

# CHILDREN'S COURT OF VICTORIA

**Protective worker:** (Name removed) "the protective worker"  
[Department of Human Services]

**Children:** AB [03/04/2000]  
MB [19/08/2002]  
CB [13/09/2003]

<b><u>JUDICIAL OFFICER:</u></b>	<b>PETER T. POWER</b>
<b><u>WHERE HELD:</u></b>	<b>MELBOURNE</b>
<b><u>DATES OF HEARING:</u></b>	<b>03-06/12/2007</b>
<b><u>DATE OF DECISION:</u></b>	<b>17/12/2007</b>
<b><u>CASE MAY BE CITED AS:</u></b>	<b>DOHS v Mr &amp; Mrs B</b>
<b><u>MED. NTRL. CITATION:</u></b>	<b>[2007] VChC 1</b>

Child protection – Applications to revoke, alternatively to vary custody to Secretary orders – Protective concerns centred on mother’s impulsive, aggressive and anti-social behaviour and father’s neurological impairment and alcohol intake – Two oldest children aged 7½ & 5¼ in out of home care with long-term foster carer who was not able to become their permanent carer – Youngest child aged 4¼ in out of home care with paternal aunt – Whether custody to Secretary orders should be revoked and replaced with guardianship to Secretary orders – Relevant test – Conditions relating to parental & sibling access – Relevance of children’s wishes – Role of Court in case-planning decisions – *Children, Youth and Families Act 2005*, ss.8, 10, 166-168, 301, 308, 310.

<b>PARTY</b>	<b>COUNSEL</b>	<b>SOLICITOR</b>
<b>Department of Human Services [Child Protection]<sup>1</sup></b>	<b>Mr J Stevens</b>	<b>Court Advocacy Unit</b>
<b>Mother</b>	<b>Ms L Athanasopoulos [03/12/2007 &amp; part 04/12/2007]<sup>2</sup></b>	<b>Victoria Legal Aid- Ms P Barrand</b>
<b>Father</b>	<b>Ms K Rose</b>	<b>Dotchin &amp; Co</b>
<b>AB</b>	<b>Mr N Terziovski</b>	<b>Gorman &amp; Hannan</b>
<b>MB &amp; CB</b>	<b>Unrepresented - Too young to give instructions</b>	

<sup>1</sup> Hereinafter ‘DOHS’ or ‘the Department’.

<sup>2</sup> The mother did not attend Court on 03/12/2007. In discussion with counsel, I pointed out the difficulty she might face in continuing to represent the mother without having up to date instructions. The case did not proceed into evidence on 03/12/2007. On the following morning counsel advised me that she had spoken to her instructor who duly advised the mother that she had to attend court. Prior to 10am on 04/12/2007 the mother phoned Ms Ros Porter of Victoria Legal Aid and advised her that she was coming to court and was “40 minutes away”. When at 11.35am her client was still not at court counsel - who had previously spoken to the Bar Ethics Committee - sought leave to withdraw and I granted that leave. In my view counsel could not have proceeded in this case in the absence of her client’s instructions. I am not aware of the mother having attended court at any time during this hearing.

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## 1. FAMILY STRUCTURE

AB [03/04/2000, 7y8m] & MB [19/08/2002, 5y4m] are the daughters of (name removed) “the mother” [25/06/1981, 26y] and (name removed) “the father” [01/02/1964, 43y]. CB [13/09/2003, 4y3m] is their son.

The mother and the father were married in 2002 and separated in 2004. They have not been divorced.<sup>3</sup> The mother and the father remain in conflict. Although they do not communicate directly, they have each made disparaging remarks to the DOHS’ protective worker about the other’s ability to parent the children effectively.<sup>4</sup>

## 2. PREVIOUS APPLICATIONS & ORDERS <sup>5</sup>

### 2.1 HISTORY 2000-2004

The family has been known to DOHS since April 2000, AB having been the subject of a protection application since her birth.<sup>6</sup> On 11/12/2000 the protection application for AB was proved and she was placed on an interim protection order for 3 months. Thereafter, on 09/03/2001, AB was placed on a custody to Secretary order. That order was extended on 29/01/2002 but was ultimately allowed to expire at term.<sup>7</sup>

### 2.2 PROTECTION APPLICATIONS DATED 28/05/2004

On 16/02/2004 the Department received a notification that AB had been physically assaulted by her mother. The details are as follows:

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<sup>3</sup> Information provided by counsel for the father at my request: see p.39 of my notes.

<sup>4</sup> See DOHS’ Addendum report dated 12/11/2007 at p.7.

<sup>5</sup> I have set out the history of applications & orders in great detail because of the uncertainty surrounding the current orders.

<sup>6</sup> For details of the pre-birth notification see DOHS’ Application report dated 15/06/2004 at p.11.

<sup>7</sup> This information is compiled from Children’s Court Clinic report of Dr (name removed) dated 08/11/2006 at p.1 and from the DOHS’ chronology provided for the Directions hearing on 23/11/2007.

“AB had a bruise on her left cheek in the shape of an adult’s fingermark. The bruise was dark purple colour. It is alleged that AB disclosed that her mother had hit her face. Furthermore AB asked not to be touched on her left arm as it hurt. The (location removed) Police Sexual Offence and Child Abuse Unit (SOCAU) was contacted to undertake a joint visit with the Protective Workers to interview AB. AB was examined and bruises were found on her face and arm. The bruise on the arm was about 6-8cm and oval in shape. It was dark in colour and blue with some redness. AB disclosed that her mother had thrown a toy at her.”<sup>8</sup>

A further notification was received that a week earlier the three children had been seen with bad sunburn and small blisters on their faces.<sup>9</sup>

On 20/02/2004 the children were placed in the care of their “paternal aunt”, (name removed), on a voluntary agreement. The paternal aunt’s 2 grandchildren were also living with her. The “maternal grandparents” (names removed) initially provided respite every weekend and then every second weekend. However, the maternal grandparents found respite very taxing and the full-time care of the children devolved more and more to the paternal aunt.<sup>10</sup>

On 28/05/2004 the Department filed and served protection applications by notice for each child on the grounds set out in the predecessors<sup>11</sup> to ss.162(1)(c) & 162(1)(e) of the *Children, Youth and Families Act 2005*.<sup>12</sup> These sections provided that a child is in need of protection if-

- (c) The child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child’s parents have not protected, or are unlikely to protect, the child from harm of that type.
- (e) The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child’s emotional or intellectual development is, or is likely to be, significantly damaged and the child’s parents have not protected, or are unlikely to protect, the child from harm of that type.

On 16/06/2004, the first mention date of these applications, a submissions contest was held and the children were placed on interim accommodation orders to reside in the care of a suitable person, the paternal aunt.<sup>13</sup>

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<sup>8</sup> DOHS’ Application report dated 15/06/2004 at p.4.

<sup>9</sup> *Op.cit.*, p.5.

<sup>10</sup> This information is compiled from DOHS’ Application report dated 15/06/2004 at pp.5-6 and from Children’s Court Clinic report of Dr (name removed) dated 08/11/2006 at pp.1-2.

<sup>11</sup> These were sections 63(c) & 63(f) of the *Children and Young Persons Act 1989*.

<sup>12</sup> Hereinafter ‘the CYFA’ or ‘the Act’.

<sup>13</sup> It is unusual for a submissions contest to be held when children have not been apprehended. I presume that the reason was because the voluntary agreement for out of home care had been on foot for 4 months.

On 07/07/2004 a pre-hearing conference was held. The mother did not attend and had provided no forwarding address. The Court found the protection applications proved on both grounds and placed the children on interim protection orders for 3 months with a number of conditions, including a condition that the children reside as directed by DOHS and conditions providing for access by the parents.

On 06/10/2004, the return date of the interim protection orders, the Court placed each child on a custody to Secretary order for a period of 6 months. A notation was placed on the Court file: "The mother wants to work towards the children being returned to her care." Each order contained 20 conditions, including the following conditions relating to access by the parents:

19. Mother may have access with the child for a minimum of twice a week including one Sunday every second week at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.
20. Father may have access with the child a minimum of twice a week at times and places as agreed between DOHS and the father. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Father must confirm access the day before access by 5pm, otherwise access will be cancelled.

On 18/01/2005 the Court granted the Department's applications to vary the custody to Secretary orders<sup>14</sup> on the basis that the person who had been supervising the mother's access on a Sunday was no longer able to do so. Condition 19 was varied as follows:

19. Mother may have supervised access with the child for a minimum of twice a week at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.

### **2.3 SECOND VARIATION & FIRST EXTENSION OF CUSTODY TO SECRETARY ORDERS**

On 15/06/2005 the Court granted the Department's applications to extend and vary the custody to Secretary orders.<sup>15</sup> The order for each child was extended for 12 months from 06/04/2005 to 05/04/2006 and varied to contain the following 23 conditions:

1. Mother must accept visits from and cooperate with DOHS.
2. Father must accept visits from and cooperate with DOHS.
3. Mother must accept support services as agreed with DOHS.
4. Father must accept support services as agreed with DOHS.

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<sup>14</sup> These applications were filed on 22/12/2004.

<sup>15</sup> These applications were filed on 04/04/2005 & 27/04/2005 respectively.

5. Mother must go to counselling as agreed with DOHS and must allow reports about attendance to be given to DOHS.
6. Father must go to counselling as agreed with DOHS and must allow reports about attendance to be given to DOHS.
7. Mother must go to a psychologist and/or psychiatrist as agreed with DOHS for assessment and treatment and must allow reports to be given to DOHS and follow any recommendations made.
8. Mother must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
9. Mother must submit to random supervised drug testing once per week or otherwise as directed by DOHS and must allow the results to be given to DOHS.
10. Father must submit to random supervised alcohol and drug testing once per week or otherwise as directed by DOHS and must allow the results to be given to DOHS.
11. Mother must participate in assessment and/or treatment for drug dependence as directed by DOHS and must allow reports to be given to DOHS.
12. Father must participate in assessment and/or treatment for drug dependence as directed by DOHS and must allow reports to be given to DOHS.
13. Mother must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
14. Father must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
15. Mother must make best endeavour to find long term housing.
16. Mother must tell DOHS within 24 hours of changing address.
17. Mother must not expose the child to physical or verbal violence.
18. Mother must not hit or hurt the child for any reason.
19. Father must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
20. Mother must not threaten or assault DOHS' staff.
21. Father must ensure (name removed) does not have any contact with the child.
22. Mother may have access with the child for a minimum of twice a week for one hour and a half or as otherwise agreed at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Mother must confirm access before 5pm the evening before access, otherwise access will be cancelled. DOHS will review access arrangements once per month in line with case planning decisions in regard to location and frequency.
23. Father may have access with the child for a minimum of twice per week. One access for 2 hours and one access for 1½ hours. Father must confirm access the day before by 5pm, otherwise access will be cancelled.

A notation on behalf of the father was placed on the court file: "He would like a shared care reunification plan. Father's 1½ hour access is to occur at his home."

## **2.4 MORE VARIATIONS & SECOND EXTENSION OF CUSTODY TO SECRETARY ORDERS**

- (a) On 08/02/2006 the Department filed an application to vary the custody to Secretary orders. The reason was described in somewhat Delphic terms: "Inability to fulfil the current access condition."

- (b) On 04/04/2006 the Department also filed a further application to extend the custody to Secretary orders.
- (c) On 11/09/2006, at the commencement of a contested hearing, the mother filed an application to revoke the custody to Secretary orders. The reason, equally Delphic, was said to be “Change in circumstances”.
- (d) On 29/11/2006 the Department filed a further application to vary the custody to Secretary orders, stating as reason: “Father has attended access alcohol affected [on 23/11/2006].”

Application (d) was granted on 20/12/2006 and condition 23 of the custody to Secretary order was varied to read as follows:

- 23. Father may have access with the child for a minimum of twice a week for 2 hours per access at times and places as agreed between the parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Access will be cancelled if the father does not confirm access the day before by 5pm or if the father attends access alcohol or substance affected.

Applications (a), (b) & (c) were the subject of a lengthy contested hearing which ran for 4 days commencing on 11/09/2006, 2 days commencing on 27/03/2007 and on 23/07/2007. On the last day the Court made orders for each child described as follows: “Application to revoke custody to Secretary order dismissed. Application to extend and vary granted for 12 months.” It appears clear from a part-recording of the proceedings on 23/07/2007 that it was application (c), the mother’s application to revoke, which was dismissed on that day. It is also clear that the granting of application (b) meant that the custody to Secretary orders were extended until 22/07/2008. What is unfortunately unclear is the consequence of the granting of application (a). There is nothing in the Court file which details the varied conditions and the latter part of the recording from 23/07/2007 is missing. It is possible to infer from the first part of the recording on that day that an access condition was to be changed to “as agreed” and the reference to “a minimum of twice a week for 1½ hours” was to be deleted. Since it was only the mother who was participating in that contest, presumably it was only the mother’s access condition which was varied and probably it was varied to:

- 22. Mother may have access with the child at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Mother must confirm access before 5pm the evening before access, otherwise access

will be cancelled. DOHS will review access arrangements once per month in line with case planning decisions in regard to location and frequency.

But it is not at all clear precisely what are the current conditions on each of the custody to Secretary orders.

### **3. CURRENT APPLICATIONS**

#### **3.1 APPLICATIONS TO REVOKE CUSTODY TO SECRETARY ORDERS**

On 29/03/2007 the Department had filed applications to revoke the custody to Secretary orders. The timing was surprising given that there was a contest which had been on foot for 6 days and it was not yet completed. The details of each application were as follows:

“The child have [*sic*] been out of the parents’ care for more than 3 years and DOHS is seeking a Guardianship Order.”

What is also surprising was that on 23/07/2007 - the final day of the contested hearing – counsel managed to persuade the presiding Magistrate that he was not part-heard in relation to these applications to revoke.<sup>16</sup>

#### **3.2 APPLICATIONS TO VARY CUSTODY TO SECRETARY ORDERS**

Because of the uncertainty surrounding the current orders I requested DOHS to file and serve applications to vary the custody to Secretary orders so that I could make clear orders in the event that I dismissed its applications to revoke. The Department did so on 04/12/2007. The details in those applications were:

“Variation of current access conditions. Mother and father may have access with the child at times and places as agreed between the parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary”.

### **4. POSITIONS OF THE PARTIES IN THIS CONTEST**

#### **4.1 THE DEPARTMENT**

The Department’s primary position is that the custody to Secretary orders for all 3 children should be revoked and replaced with guardianship to Secretary orders. Its secondary position is that the custody to Secretary orders should be varied to

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<sup>16</sup> Counsel and magistrate involved in that contest are all different from those involved in this contest.

replaced the current conditions, whatever they might be, with the following 14 conditions:

1. Mother must accept visits from and cooperate with DOHS.
2. Father must accept visits from and cooperate with DOHS.
3. Mother must accept support services as agreed with DOHS.
4. Father must accept support services as agreed with DOHS.
5. Father must submit to random supervised alcohol and drug testing as directed by DOHS and must allow reports to be given to DOHS.
6. Mother must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
7. Father must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
8. Mother must not hit or hurt the child for any reason.
9. Mother must not expose the child to physical or verbal violence.
10. Mother must not threaten or assault DOHS staff.
11. Mother must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
12. Father must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
13. Mother may have access with the child at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Mother must confirm access before 5pm the evening before access, otherwise access will be cancelled.
14. [FOR AB & MB] Father may have access with the child at times and places as agreed between DOHS and the father. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Father must confirm access before 5pm the evening before access, otherwise access will be cancelled. Access will not proceed if the father presents as alcohol or substance affected.
14. [FOR CB] Father may have access with the child for a minimum of once per week for three hours at times and places as agreed between DOHS and the father. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Father must confirm access before 5pm the evening before access, otherwise access will be cancelled. Access will not proceed if the father presents as alcohol or substance affected.

## **4.2 THE MOTHER**

The mother did not attend at or participate in the hearing.

## **4.3 THE FATHER**

The father did not seek to have the children placed with him. Counsel advised that the father was satisfied with the custody to Secretary order continuing. He opposes a variation of his access to make it “as agreed”.<sup>17</sup>

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<sup>17</sup> Opening submission of counsel for the father at p.5 of my notes.

#### 4.4 AB

The position expressed by counsel for AB was quite sophisticated. He said that his instructions related primarily to access, were quite clear and normally would be consistent with the type of access facilitated under a guardianship to Secretary order. However, his instructing solicitor did not feel that AB – who is only 7½ years old - understood the difference between a guardianship to Secretary order and a custody to Secretary order. He asked that he not be required to state a formal position in opening but be allowed to make final submissions once he had heard all of the evidence.<sup>18</sup> In the afternoon of the third day he had spoken to AB in his chambers. In response to questions about residence and access AB said that-

- She would like to see her father once each school holidays and would like a grown-up around because her father had yelled “Hurry up and get out” on her last access at a swimming pool. This sounded to counsel more like a complaint than something which distressed AB.
- She would like to see her mother twice a year in school holidays. She said “I don’t like mum when she scares me.”
- She wants to decide when she sees her parents.
- She does not want to live with mum, dad or grandma. She knew that she could not live long-term with her current carer and seemed to accept that without apparent sadness. She wants to live with CB & MB and whoever their carer would be. She does not want to live with the paternal aunt and if CB stays with her she would like to see CB every Sunday when they don’t have anything on. She would also like to see her maternal grandmother.<sup>19</sup>

AB also said to counsel that she did not care who signed consent forms for excursions and the like: “I don’t care who signs them. Dad or the carer can sign them. It doesn’t matter.”

#### Counsel’s opinion was that:

“[The father] is definitely a person [AB] sees as significant in her life but one who needs to fit in with her schooling and her life with her carers. The comment about signing forms for her reinforced...that she still considers him a parental figure to some extent.”<sup>20</sup>

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<sup>18</sup> See pp.3 & 5 of my notes.

<sup>19</sup> See p.34 of my notes.

<sup>20</sup> See p.36 of my notes.

Counsel's final submission was that, while the mother has not displayed anything to suggest that she is willing to have the level of involvement expected of a parent under a custody to Secretary order, the father has shown enough commitment to the children to maintain his guardianship role. Maintaining ties with family members is in the children's best interests and is an important consideration under ss.10(3)(b) & 10(3)(d) of the CYFA. However, DOHS should continue on the path to permanent care and when a permanent care application is ready to be made, the father's level of involvement in the child's life can be reviewed again. It is unfortunate that the permanent care plan has not progressed further given that the girls' current placement is not a permanent one.<sup>21</sup>

Counsel concluded by noting that while AB is currently upset with her father, the evidence does not disclose a need for supervision of access *per se* and that AB's feelings at the moment might best be overcome in the short term by having the next access monitored.<sup>22</sup>

## 5. WITNESSES

Four witnesses gave *viva voce* evidence. They were all professional witnesses who were called by DOHS and presented as honest and generally objective. Had the mother been participating in the contest, the Department would have called witnesses re assessments of her mental health and neuropsychological functioning.

	NAME	DESCRIPTION OF WITNESS
#1	(Name removed) "witness 1"	Ozchild case support worker for the girls for the last 3 months.
#2	(Name removed) "witness 2"	Ozchild access support worker for the girls since February 2006.
#3	(Name removed) "witness 3"	DOHS Team Leader with responsibility for this case since March 2007. <sup>23</sup>
#4	(Name removed) "witness 4"	Clinical neuropsychologist who conducted a detailed assessment of the father on 16/08/2006.

<sup>21</sup> *Op.cit.*, pp.35-36.

<sup>22</sup> *Op.cit.*, p.36.

<sup>23</sup> The allocated protective worker was overseas at the time witness 3 was called and was not subsequently called. Given witness 3's knowledge of the case and her evidence, it was a very reasonable decision not to call the protective worker.

The father did not give evidence himself and did not call any witnesses on his behalf. In the circumstances that was a reasonable decision. So far as he was concerned, there was very little factual material which was in dispute. No evidence was called on behalf of AB.

## 6. REPORTS & OTHER DOCUMENTS

I have read the following reports and other documents. Documents #1 to #8 were tendered by DOHS. Documents #9 to #12 were on the Court file.

	SHORT DESCRIPTION OF DOCUMENT	DATE OF DOCUMENT
#1	DOHS' Addendum report of the protective worker	12/11/2007
#2	DOHS' Addendum report of the protective worker	19/07/2007
#3	DOHS' Addendum report of the protective worker	20/07/2007
#4	DOHS' Application & Disposition report of the protective worker <sup>24</sup>	19/07/2007
#5	Schedule of requests by DOHS of the father to provide urine screens and results obtained by DOHS	09/05/2006 to 22/08/2007
#6	Schedule of the mother's scheduled accesses	18/01/2007 to 20/11/2007
#7	Schedule of the father's scheduled accesses	04/01/2007 to 30/11/2007
#8	Neuropsychological report on the father by witness 4	16/08/2006
#9	Children's Court Clinic report of Dr (name removed)	08/11/2006
#10	DOHS' Application report of (name removed)	15/06/2004
#11	Neuropsychological report on the mother by (name removed)	08/08/2005
#12	Statement of Dr (name removed) re examination of MB	04/12/2005

## 7. THE CHILDREN'S PLACEMENTS

### 7.1 AB & MB

Since the girls were removed from their parents' care on 19/02/2004 they have had relatively good stability of care. Until 01/03/2005 they were in the care of the paternal aunt with respite provided by the maternal grandparents. Between 01/03/2005 & 09/03/2005 they were in a short-term foster care placement. Since 09/03/2005 they have been in an Ozchild foster care placement with (name removed) & (name removed) "the carers". I agree with counsel for AB that it is unfortunate

<sup>24</sup> Documents #1 to #4 written by the protective worker were co-signed by witness 3.

that the girls' placement is not a permanent one. I also agree with him that it is not the fault of the Department.<sup>25</sup> Nor is it the fault of the carers who "feel they are too old to provide a permanent placement"<sup>26</sup>. However, the carers are not seeking to have the girls placed elsewhere immediately and for their part the girls are not wanting to return to their parents' care even though they are aware that the carers are not able to provide care indefinitely:

"The carers have said they will continue to look after the children for another 6-12 months. They are keen to see the girls settled in a permanent placement so they can have some resolution to proceedings but they are not able to take on the permanent care of the children which causes the children a considerable amount of angst. They have said to the carers quite often they want to stay and live with the carers. They are frightened about moving on which given their age is completely understandable and common with children in foster care. They are worried about what the plans are going to be. They are worried they are going to have to return to their parents' care. They have said to the carers many times that they do not want to live with their mother. During the last access with their mother which was on 04/09/2007 I believe that AB told her mother she loves her but didn't want to live with her."<sup>27</sup>

## 7.2 CB

Since CB was removed from his parents' care on 19/02/2004 he has been in a stable placement with his paternal aunt whom he calls "Nana". In the early stages respite was provided by the maternal grandparents. The paternal aunt has indicated her willingness to be a permanent carer for CB.<sup>28</sup>

# 8. PARENTS' CHARACTERISTICS

## 8.1 THE MOTHER & (NAME REMOVED) "THE MOTHER'S PARTNER"

The mother is the second oldest of six children. Her older sibling died at 5½ months of age from sudden infant death syndrome (SIDS). In infancy she was described by her parents as a "happy baby" but from an early age she displayed aggression, immaturity and poor impulse control. It is reported that aggressive, disruptive and uncontrollable behaviour persisted through primary school and the mother had difficulty in forming peer relationships and frequently fabricated stories. In early

<sup>25</sup> See final submission of counsel for AB at p.36 of my notes.

<sup>26</sup> Evidence of witness 2 in cross-examination by counsel for AB at p.14 of my notes.

<sup>27</sup> Evidence-in-chief of witness 1 at p.6 of my notes.

<sup>28</sup> See DOHS' Application & Disposition report dated 19/07/2007 at p.9.

primary years she was assessed as having borderline IQ but was considered ineligible for special school services.<sup>29</sup>

The mother was a client of DOHS Eastern Metropolitan Region between the ages of 12-18. The protective issues involved frequent absconding from home, stealing to pay for drugs and placing herself at risk by going home with unknown older males. Subsequent to being placed on a custody to Secretary order on 16/10/1995, the mother had damaged her family home and other property before leaving home.<sup>30</sup>

A neuropsychological report on the mother dated 08/08/2005 paints a bleak picture of her psychological functioning:

“The mother has a complex psychiatric history, with multiple diagnoses over time, most recent being Post Traumatic Stress Disorder and Borderline Personality Disorder in the context of borderline intelligence, poor coping strategies, and a longstanding history of polysubstance use (including marijuana, heroin, speed, LSD, ecstasy, alcohol and diazepam and temazepam abuse) that began in her teenage years...She has previously had the diagnosis of Conduct Disorder and the possibility of a mood disorder has not been ruled out.

The mother has a strong family history of psychiatric illness. Her mother had Bipolar Disorder and has been treated with Prthiaden. Four of the mother’s younger siblings have learning disabilities and have each been diagnosed with depression.”<sup>31</sup>

The various reports and the chronology in section 11.2 of this judgment are replete with examples of impulsive, aggressive and/or anti-social behaviour by the mother. One striking example dates from 23/02/2004:

“The mother visited the children at her mother’s home where it is alleged that the mother told AB that she ‘hated her’ and that it was ‘her fault’ that the children were not with her. During that visitation the mother swam naked in the family swimming pool in front of the children and then proceeded to make abusive telephone calls to the father. The mother agreed to leave the house only if her mother was to give her \$20. The children were left in the care of their uncle while the mother and her mother went to the bank to get some money. As the mother and her mother were leaving the house MB began to cry and the mother blamed her mother and attempted to hit her on the head. The mother’s mother was able to block the hit. It was alleged that later on at the bank the mother behaved in an erratic and abusive manner making threats to cut her mother’s and AB’s throat if the children went into Foster Care. The mother’s mother expressed concerns for her safety and for the children’s safety every time the mother was to have access to the children.”<sup>32</sup>

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<sup>29</sup> Neuropsychological report of (name removed) & Dr (name removed) re the mother dated 08/08/2005 at pp.1-2.

<sup>30</sup> DOHS’ Application report dated 15/06/2004 at p.12.

<sup>31</sup> Neuropsychological report of (name removed) & Dr (name removed) (Eastern Health Mental Health Program) at p.4.

<sup>32</sup> DOHS’ Application report dated 15/06/2004 at pp.5-6.

For several years the mother has been in a relationship with a (name removed) “the mother’s partner” whom she met at a nightclub in 2004. The mother’s partner’s 15 year marriage ended some time ago and he had care of his 16 year old son and was on good terms with his daughters aged 22 and 18.<sup>33</sup> There has not been any protective intervention with any of these 3 children. The mother’s partner had attended the Children’s Court Clinic on 08/11/2006 and the clinician, Dr (name removed), reported:

“According to the mother’s partner ‘I took her in and looked after her...she was one very mixed up girl...I taught her stuff. Even about her personal hygiene.’ Their relationship had its rocky passages, however, and he said, from time to time, he would get fed up and leave. Many of their disputes, it seemed, were related to the mother’s lapse into drug and alcohol abuse. They seemed to coincide with low periods of depression which triggered self-destructive behaviours of one kind or another in the mother and it would mean a complete undoing of all that the mother’s partner felt he had achieved in looking after her. It was not clear whether there were issues of domestic violence involved in their disputes. According to the mother, the most significant aspect of their relationship was his help ‘in getting access going again’.

In the last two months or so, according to the mother’s partner, following a trial of another anti-depressant, the mother lifted out of her depression. She seemed to have finally found a state of emotional equilibrium. According to her own accounts and those of her partner, she was not on any illicit drugs and was not drinking. For some reason, she said, she was ‘much happier...I feel I don’t need alcohol, I don’t like what it does to me...without it, I find I can stick up for myself much better without going off the deep end. She was still aware, however, of feelings of vulnerability and felt the need to further create the support to enable her to deal with dark passages...

Most importantly, however, she has resumed a commitment to regular access. She felt that all the damage she had directly and indirectly inflicted on herself and the children, the estrangement from the children was the most devastating. The impression was felt that this was the highest priority, the repair of the relationship. She did not see that she could realistically care for them, but she was wanting to make every use of the opportunity to get to know them and to try, by whatever means possible, to be there for them as their mother.”<sup>34</sup>

But the mother’s good intentions did not last. Since 24/07/2007 she has only attended one access with her children despite attempts by the Department to facilitate more regular contact.<sup>35</sup> Further, on 03/10/2007 the mother again asked whether her partner could attend an access visit notwithstanding an agreement she had made with the Department that he have no contact with the children due to the children expressing their dislike of him”.<sup>36</sup> The Ozchild case support worker, witness 2, reiterated the girls’ concerns and her own concern about him:

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<sup>33</sup> Children’s Court Clinic report of Dr (name removed) dated 08/11/2006 at p.9.

<sup>34</sup> *Ibid.*

<sup>35</sup> See DOHS’ Addendum report dated 12/11/2007 at p.4. The one access referred to was on 04/09/2007. Full details of the mother’s scheduled accesses since 18/01/2007 are set out in section 10.1 below.

<sup>36</sup> See DOHS’ Addendum report dated 12/11/2007 at p.5.

“The girls have said many times they don’t like the mother’s partner. We have had to ask him to leave the property because he shouldn’t be on Ozchild property. The girls are intimidated by him and don’t like him. Their behaviour on the way is ‘Will the mother’s partner be there? I don’t want to see the mother’s partner.’ This gentleman has frightened me.”<sup>37</sup>

**The protective worker reported a telephone conversation on 17/07/2007:**

“The mother and her partner stated that the children should be ‘forced to come to access’...The mother’s partner stated to [the protective worker]: ‘You and AB are destroying the mother’. The mother’s partner then said: ‘This is bullshit’ and left the room.”<sup>38</sup>

## **8.2 THE FATHER**

The father is the third oldest of four children. He has an older brother, an older sister who is CB’s carer and a younger sister.<sup>39</sup> His parents were both alcoholics.<sup>40</sup>

I requested information about the father’s relationship with his older sister. Counsel for the father advised that “whilst it is not an antagonistic relationship as in conflict, they have little relationship and he doesn’t have contact with her and in the past there has been some antagonism. Estranged is probably an appropriate word.”<sup>41</sup> Counsel for DOHS advised that the paternal aunt “hasn’t seen [the father] for a long time, at least a few years and is frustrated at the father in relation to his inability to address concerns and to stop drinking”.<sup>42</sup>

The neuropsychologist, witness 4, who assessed the father on 16/08/2006 set out the following relevant background information about him:

“The father has a number of risk factors for neuropsychological impairment. He has had several Motor Vehicle Accidents which may have involved loss of consciousness. He has a 30 year history of variable alcohol intake and he reports that his parents were both ‘alcoholics’. He has also had a history of heroin addiction and use of other illicit substances. He has made a self destructive attempt on his life and I am not sure if he was unconscious with that. He also reports a number of assaults which have involved blows to the head.

The father reports that he had a limited education completing Year 9 at a Technical School and then leaving to work with a cabinet maker. Although this was not a formal apprenticeship, he considers that he became quite skilled at this and enjoyed the work.

<sup>37</sup> Evidence-in-chief of witness 2 at p.12 of my notes.

<sup>38</sup> See DOHS’ Addendum report dated 20/07/2007 at p.2.

<sup>39</sup> Information provided by counsel for the father at my request: see p.39 of my notes.

<sup>40</sup> See Neuropsychological Report of witness 4 at p.1.

<sup>41</sup> See p.36 of my notes. “Estranged” was also the word used by witness 3 in her *viva voce* evidence: see p.21 of my notes.

<sup>42</sup> This was information provided by the paternal aunt to a protective worker (name removed) on 05/12/2007: see p.36 of my notes. Since the paternal aunt was unable to be cross-examined, I do not give significant weight to her comments about her brother’s inability to stop drinking.

However, following his suicide attempt which involved slashing his wrists, he did a lot of damage to the nerves and tendons of the right hand and hence was not able to follow his trade any more. He last worked in 1990 and has been on a disability support benefit since that time.

...Since the break-up of his relationship and his three children being fostered under a DHS order he has become increasingly motivated to regain the care and control of the children and has apparently been having more and more access time with them even though...he is without transport. He has recently completed a residential Detox program at the Box Hill Hospital and is apparently making good progress with the Buporphine program and hopes to continue to reduce the dosage of this.”<sup>43</sup>

**Witness 4 said of the father’s presentation in the extensive neuropsychological assessment – described by her as “quite hard work” for the father<sup>44</sup> – which she conducted on 16/08/2006:**

“The father was alert and cooperative and coped well with a session of nearly three hours with no difficulties. Despite his [good] motivation, it was difficult for him to maintain concentration for periods longer than about 15 minutes and he quickly became restless and somewhat agitated with longer tasks which were difficult for him. He was quite distractible mainly from internal trains of thought but also external events. Despite his acknowledged anxiety concerning the importance of the situation, there were no episodes of lability or irritability.”<sup>45</sup>

**Her comment about “the importance of the situation” was an acknowledgement that this assessment – based on referrals both by DOHS (Child Protection) and by Corrections – was an important step in the father’s attempt to regain custody of his three children. Despite this, the father did not give witness 4 the impression that he was striving to create an unduly positive impression of himself.<sup>46</sup>**

**Witness 4 summarized her assessment of the father as follows:**

“The father is showing signs of moderate reduction in immediate memory and general slowing in all aspects of information processing.

There is minimal but significant reduction in short term recall which is probably able to be compensated. No major difficulties with confusion or confabulation were noted. Short term verbal recall is considerably better than visual.

There are major limitations in most aspects of executive function with the greatest difficulties being in the areas of new learning, conceptual flexibility and organization and planning.<sup>47</sup> There are lesser problems with behavioural regulation although his poorer spontaneity and self monitoring will probably lead to some issues of incompetence as he cannot always follow through with actions, plans or systems. The executive difficulties are likely to lead to less efficient and, at times, inappropriate problem solving and decision making.

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<sup>43</sup> Neuropsychological Report of witness 4 at p.1.

<sup>44</sup> At p.31 of my notes witness 4 responded to the description by counsel for the father of the assessment as “a taxing session” with this comment.

<sup>45</sup> Neuropsychological Report of witness 4 at p.2.

<sup>46</sup> In answer to a question by me at p.30 of my notes.

<sup>47</sup> The father demonstrated this to me at a practical level by being late for Court on 2 or 3 of the 4 hearing days. On the third day he did not arrive at Court until 11.37am.

It seems that his least disabling problem is either depression or anxiety<sup>48</sup> and so it may be worth having his prescribing doctor review his current level of prescribed Valium as this may be adding to his difficulties with attention and speed of thinking.”<sup>49</sup>

**In *viva voce* evidence witness 4 said of the father:**

- In the initial interview his view of himself was “as well as most people”. I would not subsequently have agreed with him.
- He would probably need more time than most people to solve problems and more support and encouragement. That is partly because of his restricted educational/occupation background [he has been out of the workforce so long] and partly his psychological issues in relation to anxiety and low mood.
- It is harder for him to make decisions because of problems of short term memory. He is not as reliable in seeing the implications of particular choices or courses of action and not as good at thinking in abstract which is important in problem solving from a cognitive point of view. It involves a number of cognitive abilities, including capacity to analyse a task, set priorities, develop a sequence of steps, follow the steps and monitor how things are going.<sup>50</sup>

**Witness 4 believes that the father will or may benefit from the following:**

- “Ongoing support and very modified counselling to address his self-reported anxiety, pessimism and low self-esteem.
- Encouragement to undertake more comprehensive external memory management strategies which are within his capabilities and do not rely too heavily on the presence of others.
- Similar encouragement to use external systems for planning and organisation but this will need to recognize that he will probably always need more input from others for cuing, prompting and reinforcing.
- Recognition of his limited strengths for learning, changing attitude and regulating behaviour when considering avocational rehabilitation. This will also be important to recognize when considering parenting programs. Despite his obvious and genuine motivations to take exclusive care of his three children, I consider that he will need a lot of assistance, support and supervision until good childcare and child raising habits are established (and inappropriate habits are prevented!!)
- Ongoing support for accommodation and child support issues and applications for access to legal, medical, financial services as he cannot cope with any of these activities by himself even though he would probably not consider this to be the case. His insight into his executive difficulties is not realistic.
- Encouragement to maintain his abstinence from his drinking as it may be exacerbating his cognitive disabilities, and to persevere with his Heroin Withdrawal program.”<sup>51</sup>

**I found witness 4 a good professional witness, balanced, fair and kind. I accept her evidence.**

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<sup>48</sup> The father’s score on the Beck Depression Inventory was 14/63 which is above the score of 10 which is allocated to “normal unhappiness” but well below the cutoff for serious depression. His score on the Beck Anxiety Inventory was 6/63 which would not warrant his current level of prescribed Valium. See Neuropsychological Report of witness 4 at p.4 and her *viva voce* evidence at p.31 of my notes.

<sup>49</sup> Neuropsychological Report of witness 4 at p.4.

<sup>50</sup> Evidence-in-chief of witness 4 at p.29 of my notes.

<sup>51</sup> Neuropsychological Report of witness 4 at pp.4-5.

## **9. THE “BEST INTERESTS” OF THE CHILD**

Section 8(1) of the CYFA requires the Court to have regard to relevant principles in Part 1.2 in making any decision or taking any action under the CYFA.<sup>52</sup> For the purposes of this hearing, the relevant principles are set out in s.10 of the CYFA. The fundamental principle is that in s.10(1) which provides that for the purposes of the CYFA the best interests of the child must always be paramount. Section 10(2) requires the decision-maker, when determining whether a decision or action is in the best interests of a child, always to consider the need to protect the child from harm, to protect his/her rights and to promote his/her development (taking into account the child’s age and state of development). Section 10(3) provides that, in addition to ss.10(1) & 10(2), when determining what decision to make or action to take in the best interests of a child, the decision-maker must have regard to 18 listed matters where relevant. The following 14 matters in s.10(3) appear to have some relevance to the present case:

- (a) The need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.
- (b) The need to strengthen, preserve and promote positive relationships between the child and the child’s parent, family members and persons significant to the child.
- (d) The child’s view and wishes, if they can be ascertained, should be given appropriate weight.
- (e) The effects of cumulative patterns of harm on a child’s safety and development.
- (f) The desirability of continuity and stability in a child’s care.
- (g) A child is only to be removed from the care of his parent if there is an unacceptable risk of harm to the child.
- (h) If the child is to be removed from the care of the parent, consideration is to be given first to the child being placed with an appropriate family member or other person significant to the child before any other placement option is considered.
- (i) The desirability, when a child is removed from the care of the parent, to plan the reunification of the child with his parent.
- (j) The capacity of each parent or other adult relative or potential care giver to provide for the child’s needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child.
- (k) Access arrangements between the child and the child’s parents, siblings, family members and other persons significant to the child.
- (l) The child’s social, individual and cultural identity and the child’s age, maturity and sex.
- (o) The desirability of allowing the child’s education to continue without interruption or disturbance.
- (p) The possible harmful effects of delay in making the decision or taking the action.

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<sup>52</sup> Section 8(2) places the same obligation on the Secretary when making any decision, taking any action or providing any service under the CYFA to children and families.

(q) The desirability of siblings being placed together when placed in out of home care.

## **10. FREQUENCY OF AND OBSERVATIONS AT ACCESS**

### **10.1 ACCESS WITH THE MOTHER**

Until 10/07/2007 the mother had been having fairly regular weekly access with all 3 children. Since then she has had access on only one occasion, 04/09/2007, most of the other scheduled weekly accesses having been cancelled due to the mother's failure to confirm access by 5pm on the day before. A table of scheduled and actual accesses is on the following page.

# **MOTHER'S SCHEDULED ACCESS**

<b>Date</b>	<b>Attendance</b>	<b>Children Present</b>
20/11/2007	No access due to mother failing to confirm	
19/11/2007	Attempts to contact mother to discuss access are unsuccessful	
15/11/2007	Return P/C to mother. Mother requests access if children are willing to attend.	
15/11/2007	PW speaks to AB and MB. AB agrees to attend as she wishes to inform her mother she does not want to live with her. MB refuses to attend.	
13/11/2007	No access due to mother failing to confirm	
06/11/2007	No access due to mother failing to confirm	
30/10/2007	No access due to mother failing to confirm	
23/10/2007	No access due to mother failing to confirm	
16/10/2007	No access due to mother failing to confirm	
09/10/2007	No access due to mother failing to confirm	
02/10/2007	Mother failed to attend despite prior confirmation	CB transported to access
26/09/2007 – 09/10/2007	AB and MB in Q/land with carers	
25/09/2007	Mother cancelled access due to being unwell	
18/09/2007	No access due to mother failing to confirm	
11/09/2007	No access due to mother failing to confirm	
04/09/2007	Mother attended access supervised by the protective worker at Oz Child.	AB, MB and CB
28/08/2007	No access due to mother failing to confirm	
21/08/2007	No access due to mother failing to confirm	
14/08/2007	No access due to mother failing to confirm	
07/08/2007	No access due to mother failing to confirm	
31/07/2007	No access due to mother failing to confirm	
24/07/2007	Mother failed to attend despite prior confirmation	All children transported to access
17/07/2007	Mother cancelled access	
10/07/2007	Mother attended	CB only attended as AB and MB refused to attend
03/07/2007	Mother attended	AB and MB
26/06/2007	Mother cancelled access	
19/06/2007	Mother cancelled access due to working with Peter (partner)	
12/06/2007	Mother attended	AB, MB and CB
05/06/2007	Mother attended	AB, MB and CB
29/05/2007	Mother attended	AB, MB and CB
22/05/2007	Mother cancelled access	
15/05/2007	Mother attended	AB, MB and CB
08/05/2007	Mother attended (with DCS)	AB, MB and CB
01/05/2007	Mother attended	AB and MB only as CB was unwell
18/04/2007	Mother attended	AB, MB and CB
11/04/2007	Mother cancelled access	
04/04/2007	Mother attended	CB
27/03/2007	Mother attended	AB, MB and CB
21/03/2007	Mother attended	AB, MB and CB
20/03/2007	Mother attended	AB, MB and CB
14/07/2007	Mother attended	AB, MB and CB
07/03/2007	Mother cancelled access	
09/02/2007	Mother attended	MB and CB
18/01/2007	Mother attended	AB, MB and CB

**The Ozchild worker, witness 2, has supervised a total of 18 accesses between the children and their mother since February 2006. The accesses are generally on Thursday from 4pm to 5pm at the Ozchild office in Dandenong. The last access she**

supervised was on 03/07/2007 when access was extended to make-up for accesses missed due to court attendance and ran from 10am to 2.30pm at a play centre in Hallam. Witness 2 did not supervise the last access on 04/09/2007. She described the quality of the accesses she has supervised in 2007 as “50-50”:

“About 50-50, really good, really bad quality. The mother often brings food and activities. She is forward thinking. However, often the activities are not appropriate and the girls require support which she doesn’t provide. She has often upset the girls with inappropriate discussion with her partner whom the girls have said on many occasions they don’t like.”<sup>53</sup>

It is commendable that the mother has expressed her desire to work on the quality of her relationship with her children and that she has sent AB and MB birthday cards with messages of affection to this end.<sup>54</sup> However, there remain very strong reasons why access between the children and their mother has been reduced in frequency and continues to be supervised. These were set out by the protective worker in his report dated 19/07/2007:

“Access...continues to be supervised due to ongoing concerns about the mother’s propensity to physically injure the children by squeezing and tightly holding them.<sup>55</sup> There have been numerous incidents during access when the mother has bruised and distressed the children due to rough handling.

Continued supervised access has been assessed as necessary due to the mother’s demonstrated inability to adequately supervise the children and ensure their safety when access occurs off-site. The children have potentially been placed at risk of harm, necessitating the timely intervention of access supervisors, for example near busy roads and, on one occasion, a duck pond.

Further to the mother physically injuring the children, there have been other areas of ongoing concern observed in relation to the mother’s interactions with the children during access. These have included the mother having a limited insight into the children’s needs, difficulty in engaging with all three children at one time, problems setting boundaries on the children’s behaviour and an inability to see the potential for conflict or danger. Access supervisors have consistently re-directed and prompted the mother during access, for example to toilet the children before their return journey to placement. However, the Ozchild worker, witness 2, has stated that she has seen no improvement in the mother’s behaviour in the two years that she has supervised her access with the children.

The poor quality of access with the mother is having an increasingly negative impact on the children, especially AB and MB, who are now verbalizing their anxiety about attending access. AB has stated that ‘mum is scary’ and that she doesn’t want to see her mother every week. MB has stated ‘my mum isn’t very nice, she yells at me and my sister’ and that she too does not want to see her mother every week. AB and MB have frequently become anxious and visibly upset before and during access. On 15/05/2007 AB cried and stated ‘mum is scary’ and MB has stated that she ‘doesn’t like access with mum’ because mum has ‘grabbed’ her and ‘hurt’ her.

<sup>53</sup> Evidence-in-chief of witness 2 at p.12 of my notes.

<sup>54</sup> DOHS’ Addendum report dated 12/11/2007 at p.5.

<sup>55</sup> In a statement dated 04/12/2005 Dr (name removed), who had examined MB on 25/11/2005 said: “In the past and on this occasion [MB’s] mother squeezes her tightly when she hugs her. Sometimes she refuses to let go and her arms have to be prised off her daughter.”

Both AB and MB have demonstrated avoidant behaviour when having contact with their mother, and have been observed on numerous occasions to hide under tables. In addition to this, for two years AB and MB's carer has reported that both children suffer from nightmares and bed-wetting following access with their mother.

CB has been observed to have a poor bond with the mother. During access, the mother usually focuses her attention on AB and MB while CB is left to his own devices to play on his own. As a result, CB now approaches access supervisors for interaction and reassurance, and appears indifferent when greeting and separating from the mother.

During an interview with the writer on 10/07/2007 both AB and MB explicitly stated they would like less access with their mother. Despite encouragement, both AB and MB are now consistently refusing to attend access with their mother, and have stated that the only reason they would attend access is to 'see CB'. Further, AB also stated that she 'doesn't want to live with mum' and that she 'doesn't want to live with dad'.

Although the mother has cancelled access stating that 'something bad usually happens', she has nevertheless urged DOHS to 'force' the children to attend."<sup>56</sup>

It is clear from all of this evidence why access between the children and their mother should occur "as agreed between DOHS and the mother" rather than with a fixed frequency. On 21/08/2007 the mother stated to the Department that she would see the children "when they want to see me"<sup>57</sup>. It was agreed that the Department would facilitate access when the children said that they wanted to see their mother and that the Department would arrange access with all three children once monthly at a minimum. Although I will not fix a particular minimum, I would have thought once every 2 months preferable to once monthly. However, as the children are still very young, I do not consider it appropriate to their stage of development that they have an absolute veto over access, as I discussed with the team leader, witness 3:

Mr Power- "Is it not developmentally unsound to allow a young child to be the arbiter of whether or not access occurs in the absence of some clear reason underpinning the child's decision?"

Witness 3 - AB is clear. With MB it is difficult to establish a concrete reason given her age. She is actively stating she doesn't want to attend access.

Mr Power- If MB said she didn't want to go to prep, you wouldn't say that's OK?

Witness 3 - Absolutely.

Mr Power- But that's an analogy.

Witness 3 - It is difficult. I am concerned too that both AB and MB are very aware their current placement is temporary and they can't continue to reside there. For a 5 year old girl an uncertain future would impact on her sense of security and sense of belonging. It has entered my mind if the girls were in a secure and stable placement I'd be interested to see whether their relationship, especially with their father, improves. The girls are fearful of being reunified with either parent."<sup>58</sup>

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<sup>56</sup> See DOHS' Application & Disposition report dated 19/07/2007 at pp.6-7.

<sup>57</sup> DOHS' Addendum report dated 12/11/2007 at p.4.

<sup>58</sup> See pp.21-22. of my notes.

**It is not inappropriate for the children to express a view about the frequency of access but they should not be the arbiters of whether access occurs or not. In my view the access condition on each child's order should be as follows:**

**“Mother may have access with the child at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Mother must confirm access before 5pm on the day before any scheduled access, otherwise access will be cancelled. In determining times and places of access, DOHS must consider, though not necessarily be bound by, any views expressed by the child.”**

## **10.2 ACCESS WITH THE FATHER**

**Until 31/08/2007 the father had been having fairly regular weekly access with CB & MB. AB, the father & DOHS had agreed that AB would only attend access on school holidays to avoid disruption to her schooling.<sup>59</sup> The father has continued to have fairly consistent weekly access with CB and “it goes well off-site”<sup>60</sup>. The father missed access on 28/09/2007 because he was unwell with flu and he failed to confirm prior to scheduled access on 12/10/2007. A table of scheduled and actual accesses is set out on the following page.**

**MB has refused to attend scheduled accesses with her father on 10/08/2007, 07/09/2007, 14/09/2007, 19/10/2007, 02/11/2007, 09/11/2007 & 30/11/2007. This was despite encouragement from protective workers, access facilitators and her carer. When asked why she did not want to attend MB has said “I want less access with my dad” and “I just don't want to go”.<sup>61</sup> The key to MB's recent reluctance is probably to be found in a throw-away comment by AB to her counsel on 05/12/2007: “MB doesn't like going when I don't go. Now she doesn't like going without me.”<sup>62</sup> There is no evidence of any difficulty with CB attending access.**

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<sup>59</sup> DOHS' Addendum report dated 12/11/2007 at p.6.

<sup>60</sup> Evidence of witness 3 at p.21 of my notes.

<sup>61</sup> *Ibid.*

<sup>62</sup> At p.35 of my notes. The emphasis is mine.

# **FATHER'S SCHEDULED ACCESS**

<b>Date</b>	<b>Attendance</b>	<b>Children present</b>
30/11/2007	Father attended	CB *
23/11/2007	<b>No access due to Directions Hearing</b>	
16/11/2007	Father attended (access at swimming pool)	CB and MB
09/11/2007	Father attended	CB *
02/11/2007	Father attended	CB *
26/10/2007	<b>Father cancelled access (no reason given)</b>	
19/10/2007	Father attended	CB *
12/10/2007	<b>Access cancelled as father failed to confirm</b>	
05/10/2007	Father attended	CB *
<b>26/09/2007 – 09/10/2007</b>	<b>AB and MB in Q/land with carers</b>	
28/09/2007	<b>Father cancelled access for CB only (unwell due to flu)</b>	
21/09/2007	Father attended (access at swimming pool)	CB, MB and AB
14/09/2007	Father attended	CB *
07/09/2007	Father attended	CB *
31/08/2007	Father attended	CB and MB
24/08/2007	Father attended	CB and MB
17/08/2007	Father attended	CB, MB and AB
10/08/2007	Father attended	CB *
03/08/2007	<b>Access cancelled as father failed to confirm</b>	
27/07/2007	<b>Father attended but returned from access substance affected</b>	CB and MB
20/07/2007	Father attended	CB and MB
13/07/2007	Father attended	CB and MB
06/07/2007	Father attended	CB, MB and AB
29/06/2007	<b>Father cancelled access (unwell due to flu)</b>	
22/06/2007	Father attended	CB and MB
15/06/2007	Father attended	CB and MB
08/06/2007	<b>Father failed to attend (when contacted father advised that he suffered a mild heart attack)</b>	
01/06/2007	Father attended	CB and MB
25/05/2007	Father attended	CB *
18/05/2007	Father attended	CB and MB
<b>11/05/2007</b>	<b>Father cancelled access (unwell)</b>	
04/05/2007	Father attended	CB and MB
27/04/2007	Father attended	CB and MB
20/04/2007	Father attended	MB (CB did not attend as he was ill)
13/04/2007	Father attended	CB and MB
06/04/2007	<b>Access did not proceed due to Public Holiday</b>	
30/03/2007	Father attended	CB and MB
23/03/2007	Father attended	CB and MB
16/03/2007	Father attended	CB and MB
09/03/2007	Father attended	CB and MB
02/03/2007	Father attended	CB and MB
23/02/2007	Father attended	CB and MB
16/02/2007	Father attended	CB and MB
02/02/2007	Father attended	CB and MB
<b>25/01/2007</b>	<b>Father cancelled access due to criminal court proceedings</b>	
<b>19/01/2007</b>	<b>Father cancelled access due to work</b>	
11/01/2007	Father attended	CB, MB and AB
<b>04/01/2007</b>	<b>Father cancelled access due to work</b>	

\* MB refused to attend access with her father on dates marked \*

Following the father having attended for access alcohol affected on 23/11/2006, his access condition was varied and he has since been assessed at the start of access to ensure that he is not substance affected. On 31/07/2007 the father admitted to the Department that he had “stuffed up” by drinking “a can” of alcohol during his access on 27/07/2007.<sup>63</sup>

The Department has supported the father in planning access visits so that they are varied and enjoyable for the children. For instance on one recent occasion access was held at a local swimming pool and all three children were reported to have “had a ball”<sup>64</sup>.

The father has been observed to have a strong and affectionate bond with CB. The Department conceded in July 2007 that “all three children have been observed to have a good bond with the father”.<sup>65</sup> (Name removed), the carer of AB & MB, has advised the Department that the girls “love their dad” but never ask to see him.<sup>66</sup>

MB is in kindergarten this year but is to start school in January 2008. In the past few months she has been expressing reluctance to attend weekly access and now apparently does not like going without AB. For her part AB would like to see her father once each school holidays and would like a grown-up around. I agree with the submission of AB’s counsel that the evidence does not presently disclose a need for supervision *per se*. However, I do not agree with his submission that the next access of the girls with their father might be monitored.<sup>67</sup> I consider that both girls’ access ought be restricted to school holidays to avoid disruption to their schooling. However, I do not consider that one access visit per school holidays is in the girls’ best interests. At this uncertain stage in their lives the obligation in s.10(3)(b) of the Act to consider the need to strengthen, preserve and promote positive relationships

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<sup>63</sup> See DOHS’ Addendum report dated 12/11/2007 at p.6.

<sup>64</sup> *Ibid.*

<sup>65</sup> See DOHS’ Application & Disposition report dated 19/07/2007 at p.7.

<sup>66</sup> See DOHS’ Addendum report dated 12/11/2007 at p.6.

<sup>67</sup> See p.36 of my notes and see section 4.4 above.

between the girls and their father requires a greater level of access than 4 times per year. On the other hand, since I am obliged by s.10(3)(f) of the Act to consider the desirability of continuity and stability in each child's care, the level of access should not be so great as to destabilize the girls' transition into a permanent care family. Balancing these factors as best I can, I consider that the girls should have access with their father a minimum of 9 times per year. This is calculated on the basis of 2 accesses in each of the shorter holidays and 3 accesses in the summer holidays but is not restricted to that. "Minimum" does not necessarily mean "maximum". For the same reasons as with the mother's access, I strongly believe it is not appropriate to the girls' stage of development that they have an absolute veto over access.

The evidence does not support, nor does the Department seek, any change in the frequency of CB's access with his father.

Provided that the father does not present as alcohol or substance affected at the start or end of access, I consider that it is in the best interests of each of the children that his accesses with them should be unsupervised. However, if he does present as alcohol or substance affected at the start or end of access with any of the children, all future accesses are to be supervised by DOHS or its nominee unless DOHS assesses that supervision is not necessary.

The father's access condition on the girls' orders is to be as follows:

"Father may have access with the child a minimum of 9 times per year at times and places as agreed between DOHS and the father. Father must confirm access before 5pm on the day before any scheduled access, otherwise access will be cancelled. If the father presents for an access visit alcohol or substance affected, that visit will be cancelled. Access is to be unsupervised unless the father presents as alcohol or substance affected at the start or end of an access visit with any of the children, in which event all future accesses are to be supervised by DOHS or its nominee unless DOHS assesses that supervision is not necessary. In determining times and places of access, DOHS must consider, though not necessarily be bound by, any views expressed by the child."

The father's access condition on CB's order is to be as follows:

"Father may have access with the child for a minimum of once per week for three hours at times and places as agreed between DOHS and the father. Father must confirm access before 5pm the evening before access, otherwise access will be cancelled. If the father presents for an access visit alcohol or substance affected, that visit will be cancelled. Access is to be unsupervised unless the father presents as alcohol or substance affected at the start or end of an access visit with any of the children, in which event all future accesses are to be supervised by DOHS or its nominee unless DOHS assesses that supervision is not necessary."

### 10.3 ACCESS WITH SIBLINGS & MATERNAL GRANDMOTHER

The children have been observed to have warm and affectionate interactions with each other.<sup>68</sup> There is a great deal of evidence that the girls really like their brother CB. For instance, AB has told the Department she wants to live with CB & MB and if she can't live with CB she wants to see him every Sunday unless there is something else on.<sup>69</sup> Both AB & MB have suggested that the *raison d'être* for them attending access with their mother is to "see CB".<sup>70</sup>

Contact between the siblings has been maintained through informal sibling access visits organized by the carers [of AB & MB]. At sibling access which occurred on 20/08/2007 [for MB's birthday] & 08/09/2007 [for CB's birthday] it was reported that all of the children "had a great time".<sup>71</sup>

AB is also keen to have overnight access with CB and access with her maternal grandmother:

Mr Terziovski - "AB has said she would like overnight access with CB but not at CB's place. Has that been conveyed to you?"

Witness 3 - Possibly. I know AB & MB do enjoy seeing CB. It's possible that has been conveyed but I haven't seen a case note re specific overnight access. It could be followed up because the current carers have a very good relationship and organize sibling access between themselves.

Mr Terziovski - AB would like to see her maternal grandmother.

Witness 3 - I would need to follow that up because I am unsure what role the maternal grandmother has with the children."<sup>72</sup>

Section 10(3)(k) of the CYFA requires me to give consideration to access arrangements between the child and parents, siblings and family members. Given that new carers may not have the same very good relationship with the paternal aunt as the carer [of AB and MB] has, I consider it important to include a sibling access condition on each of the children's orders. There should also be a condition requiring the Department to facilitate access between each child and the maternal grandparents if the Department assesses that it is in the best interests of the child to do so.

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<sup>68</sup> See DOHS' Application & Disposition report dated 19/07/2007 at p.9.

<sup>69</sup> AB's instructions to counsel: see p.34 of my notes.

<sup>70</sup> See DOHS' Application & Disposition report dated 19/07/2007 at p.6.

<sup>71</sup> See DOHS' Addendum report dated 12/11/2007 at p.8.

<sup>72</sup> At p.28 of my notes.

## **11. THE PROTECTIVE CONCERNS <sup>73</sup>**

### **11.1 INITIAL PROTECTIVE CONCERNS**

On 16/02/2004 the Department received a notification that AB had been physically assaulted by her mother.<sup>74</sup> Further information indicated that the mother did not appear to be coping with the care of the children. The children were removed from the mother's care and have been out of parental care since.

Subsequent investigation revealed significant issues of domestic violence between the parents, the parents' poly-substance abuse and the mother's transience, intellectual disability and mental health diagnoses: Borderline Personality Disorder, Tourette's syndrome, Post Traumatic Stress Disorder, Conduct Disorder, Psychosis, Dysthymia and Poly-substance Use Disorder.<sup>75</sup> The mother has an extensive criminal history. She was a client of DOHS as an adolescent as a result of her violent behaviour, criminal damage and repeated absconding with older boys.<sup>76</sup> She also has a history of self-harming behaviour, including suicide attempts, multiple overdoses and attempting to set herself on fire. In 2005 she was case managed by Murnong Community Mental Health Service who reported that her "deficits in reasoning... directly contribute to disadvantages in social problem solving".<sup>77</sup>

The father has a long and significant history of alcohol and poly-substance abuse and the screens which the Department has received from him over the years have regularly tested positive for cannabinoids and benzodiazepines and earlier – but not since May 2006 - positive for opiates (heroin). He has mental health issues involving anxiety and depression. He also has an extensive criminal history, he is socially isolated and he has no family support.<sup>78</sup>

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<sup>73</sup> The contents of this section should be read in conjunction with the Parents' Characteristics set out in section 8 and with the Observations at Access set out in section 10.

<sup>74</sup> The details are set out in section 2.2 above.

<sup>75</sup> See DOHS' Application & Disposition report dated 19/07/2007 at p.5.

<sup>76</sup> *Op.cit.*, p.10.

<sup>77</sup> *Op.cit.*, p.5.

<sup>78</sup> *Op.cit.*, pp.6-7.

## 11.2 CHRONOLOGY 2004-2007

**This chronology was provided by the Department at the Directions Hearing on 23/11/2007 as required by Practice Direction No.3 of 2006. It contains a list of incidents or events relied upon by the Department to support its applications since 2004. Nothing in it was challenged during the contested hearing and nothing in it is obviously incorrect. In those circumstances I accept this chronology as factually correct and as an eloquent illustration of ongoing protective concerns.**

16/02/2004	Notification re: alleged physical assault on AB by mother. SOCAU involved. Mother agreed to a voluntary placement with MGP's
20/02/2004	Shared care for all 3 children between MGP's and Paternal aunt
15/03/2004	Mother alleges that the father raped her. No known charges on father thereafter.
02/04/2004	Mother overdosed on ecstasy, speed, acid and heroin. She was hospitalised and later taken to a refuge
05/04/2004	Refuge workers attend to take mother to Windana Detox Centre as pre arranged, however found home abandoned and seriously trashed
07/04/2004	Eviction notice by refuge to mother for male allowed to live on premises
27/08/2004	Gribbles pathology advise DHS that the father attended to do drug screen smelling of alcohol
06/10/2004	CSO granted
11/10/2004	The father to attend Ringwood Magistrate's Court for handling and receiving stolen property
11/11/2004	Mother hiding in father's house during father's access. Children confused to have mother hiding
24/11/2004	Mother abducted MB from father's home and also attempted assault of protective worker on same day
29/12/2004	Girls disclosed mother squeezed MB hard
04/01/2005	Mother in a refuge
05/01/2005	Mother asked to leave refuge due to her aggressive behaviour
11/01/2005	Mother in another refuge
20/01/2005	Physical assault of refuge staff member by mother and damaged premises - police involved
14/01/2005	Mother attempts to abscond twice with the children at McDonald's during access. Mother physically assaults case support worker at Hungry Jacks during access. Also mother held CB too tightly and he was crying. Mother throws metal chairs around whilst swearing and yelling. Mother attempts to open the car door whilst children being transported back to care (whilst the car was stationary at red lights) and then spits on car window and hits the window with her hand bag. Mother hits protective worker's car and attempts to hit the worker. DHS decides to have accesses only at DHS office premises due to safety issues.
20/01/2005	Mother assaults staff and damages property at St Kilda Crisis Centre. Police involved.
27/01/2005	Mother states she didn't want access

08/02/2005	Mother verbally abused DHS receptionist and physical assault of senior staff member
17/03/2005	(Name removed) (mental health worker) advised that mother would not follow through with the prescribed anti psychotic medication
22/03/2005	AB vomited having to see mother
01/04/2005	CB needed worker in room to be settled. Mother needed assistance to care
04/04/2005	Mother states she was raped by a male friend and hence was sent to refuge
08/04/2005	Mother asked to leave refuge – her aggression and mental instability placing other tenants/ mother and child at risk.
14/04/2005	Case planning meeting - mother unstable - lied about complying with medication when she wasn't
21/04/2005	Mother at Maroondah Hospital due to feeling unwell and CATT team involved subsequently
22/04/2005	Mother released from Maroondah Hospital.
26/04/2005	CATT team calls mother during access to make an appointment. Mother observed to be heavily sedated.
05/06/2005	CSO varied
15/06/2005	PHC – notation made that father would like to be included in shared care reunification plan.
14/07/2005	Neuropsychological assessment of the mother by Clinical Neuropsychologist.
19/07/2005	Meeting with mother about her breach of conditions 18 and 20. Mother signs letter/undertaking to follow up with Court conditions and that she fully understands that it is not acceptable to threaten DHS staff. The agreement further stated that if she breached these agreements access would be terminated.
26/07/2005	Mother arrived at DHS reception and was agitated. She had started throwing things around in the foyer.
01/08/2005	The Department was notified that father was seen intoxicated walking in Bayswater. He had called and cancelled access in the morning of the same day saying he was sick.
03/08/2005	Reported concerns that father was seen intoxicated and swearing at passers by in Knox City. He had not confirmed prearranged access on this day. He had missed access for the second time in one week.
12/08/2005	Mother's urine screen – Cannabis detected.
15/08/2005	Mother's urine screen – Cannabis detected.
16/08/2005	Worker discusses positive urine screens for Cannabis with mother and she says it is Peter who smokes it she must have inhaled the fumes.
19/08/2005	Mother's urine screen – Cannabis detected
22/08/2005	Mother's urine screen – Cannabis detected
24/08/2005	Mother's urine screen – Cannabis detected.
26/08/2005	Mother's urine screen – Cannabis and methadone detected
29/08/2005	Mother's urine screen – cannabis detected.
31/08/2005	Mother's urine screen – Cannabis detected.
07/09/2005	Mother's urine screen – cannabis detected.
14/09/2005	Father's D&A counsellor reports that father attended sessions alcohol affected on 22/08/05 and 06/09/05.
12/10/2005	Mother's urine screen shows positive for Ecstasy. Mother's explanation was that her drink must have been spiked at the pub.
14/10/2005	Mother appeared lethargic and drowsy during access due to new medication for anxiety.
18/10/2005	Access with mother terminated due to her squeezing MB and AB so tightly

	that they cried in pain. The worker had to physically pull mother's fingers and hands to get each child away from her. Mother tells the children "they're mean, why do you take their side" and "stop playing up for them".
15/11/2005	Mother put MB on her lap by force and MB screamed. On witnessing this incident, AB began to cry. Mother subsequently let go of MB and went for AB. When AB attempted to flee, mother grabbed AB by the arm and smacked her on the bottom.
25/11/2005	Mother bruises MB by holding on to her by force. Worker had to call security for personal and children's safety. All the children were traumatised by the incidents during this access. AB was crying and hiding under the table in fear of her mother. MB was taken for a forensic medical examination and the Doctor concluded that the injury/bruising was not consistent with being accidental. Department noted significant concerns regarding the physical, psychological and emotional wellbeing of the children with their mother even under supervised access conditions. Accesses with mother on hold until the matter is given more consideration.
01/12/2005	Father's urine screen shows positive for Benzodiazepines and Cannabis. Father explains he's on medication for depression/anxiety and for sleeping.
09/12/2005	AB discloses that access with father did not go well because he had shut himself in the room most of the time and then watched t.v. Also father "told AB off" for not supervising CB because CB pulled a blind down in father's house.
13/12/2005	Girls disclose to worker prior to access with their father that they were concerned with their father "growling" at them during access. Father requested to shorten his access by half an hour when the children were dropped off for access without giving any explanation why.
15/12/2005	Father's urine screen shows cannabis use. He explains that he uses "sometimes", however doesn't give any further explanations about the amount or frequency of use.
09/01/2006	Mother asked for phone contact with the girls. The girls agreed for such contact after asking for assurance that the worker would be in close proximity to the mother the carer to be near her.
13/01/2006	Father was not home for access and phone was switched off. Father later explains that he had lost track of days.
30/01/2006	Father did not confirm access. Writer attempted calling about 5 times on the day and on following 3 days, but no answer.
13/02/2006	Father's D&A worker states father had significant relapse in late Oct/early Nov 2005 and that father has mental health issues, specifically anxiety. D&A counselling involved mainly due to 2 separate CBO's. Writer called father and he sounded alcohol affected (slow and slurred words) – he called the writer a "fucking dumb mole" and "you don't know fucking anything, do ya?"
14/02/2006	Father's Parole Officer states she was referring father for ARBIAS assessment.
16/03/2006	Father cancels next day's access due to community work although he agreed with the access time when arranged last week.
20/03/2006	Father cancels access for Thursday due to community work – would not agree to, or allow writer to, renegotiate different times for community work.  SOCAU advises that mother was interviewed regarding MB's bruising in November. Mother had said that she had held on to MB although she was crying because it was her access time. No insight shown. No charges laid at

	this time. However, SOCAU advises that mother got interviewed by Police for shoplifting on her way to the SOCAU interview – mother on suspended sentence already. Further criminal charges pending.
21/03/2006	Mother states she doesn't want to attend Court (for Variation of CSO) because she doesn't want to maintain accesses. However, the next day she gives instructions disagrees with the Variation of CSO. Very erratic with her wishes in relation to the children.
29/03/2006	Mother extremely verbally abusive on the phone to writer – “fuck you”, “You're fucking useless”, “I fucking hate you”...Does not attend Statutory Case Review Meeting
30/03/2006	Mother asks for access with AB for her birthday. Due to being a school day, access offered after school and mother refuses it and hangs up.
31/03/2006	Mother calls and abuses the writer – called the writer and Carer “fucking dogs”
03/04/2006	Extension for CSO issued
04/04/2006	Mother not at Court for Variation of CSO
06/04/2006	Report that father was seen intoxicated just after access today
13/04/2006	Mother cancels access on the day. Says children only want to see her because they would get “something” for Easter. When writer encouraged to have access, mother hung up. No insight. Very erratic.
21/04/2006	Report that mother evicted from unit due to non-cooperation in payment of rental arrears
03/05/2006	Mother attends Court and requests accesses again. Access immediately arranged for the next day.
04/05/2006	Mother calls at 10am and confirms access, however does not attend access which was arranged for 11.45am. Mother hangs up on writer when asked for the reason.
05/05/2006	Mother calls writer 4 times saying “you fucking bitch”, “you fucking dog” and “watch your back, I'll get you for this”.  Mother refuses to give address to send drug screen scripts
19/05/2006	Mother does not attend PHC
25/05/2006	Mother has supervised access organised by OzChild
06/06/2006	Mother states she has still not found accommodation
15/06/2006	Mother cancels access on the day (organised by OzChild)
16/06/2006	Mother calls OzChild asking for access

14/07/2006	OzChild states concern that MB returned home from access with father "reeking" of smoke. MB had a cough already
08/08/2006	Mother states Legal Aid won't fund her any longer
15/08/2006	Access organised for mother with MB and CB. But on MB being sick, mother cancels access with CB as well saying she only wanted to see MB
16/08/2006	Neuropsychological assessment of the father by Clinical Neuropsychologist & Psychologist
29/09/2006	Prior to attending access AB complains of being sick during transport to access and car is stopped so AB can vomit on the side of the road.
12/10/2006	MB refuses to attend access despite attempts at encouragement to do so.
08/11/2006	Court Clinic Assessment
23/11/2006	The father attends DHS office for access with children and is observed to smell of alcohol. The father explains that he was drinking the night before and as a consequence access is supervised and he is asked to submit to a supervised drug and alcohol urine screen. The father also admits to protective worker, (name removed), that he had been charged with drinking in a public place on 20/10/2006. The father also becomes verbally aggressive with (name removed) when spoken to about submitting supervised drug and alcohol urine screens.
23/11/2006	Positive results for supervised drug and alcohol urine screen for the father: <ul style="list-style-type: none"> <li>• Sympathetic amines (metabolites of methylamphetamine)</li> <li>• Benzodiazepines</li> <li>• Cannabinoids</li> <li>• Urine Ethanol (level = 0.136 grams, approximately three times the legal limit for driving)</li> </ul> The father later advises that had used "speed" and explained that "someone" had given it to him and had drunk it).
10/11/2006	MB refuses to attend access despite attempts at encouragement to do so.
29/11/2006	Positive benzodiazepines result for supervised drug and alcohol urine screen for the father.
06/12/2006	Positive results for opiates and benzodiazepines for supervised drug and alcohol urine screens for the father,
14/12/2006	MB refuses to get ready for access and to go to access and states to access worker "I don't feel well and do not want to go".
28/12/2006	The mother attends access with children at shopping centre and is observed by case support worker to become frustrated with their boisterous behaviour and unable to manage or control it. The mother's partner has unexpected contact with mother during access, AB becomes anxious and states "He's not supposed to be here". The mother is reported to dismiss her reaction. AB and MB become distressed necessitating access ceasing. On return trip to carer's home AB states "I don't want to see her (mother) any more".
04/01/2007	The father cancels access because he said he was working.
11/01/2007	AB and MB inform protective worker, (name removed), that they do not want to attend access the next day they want to stay home.
16/01/2007	Positive cannabinoids result for supervised drug and alcohol urine screen for the father.
18/01/2007	AB and MB both state they do not want to see their mother and have access with her. AB and MB eventually attend after encouragement but on several occasions request to return to their carer. Case support worker overhears AB saying to MB "She might hurt me".
19/01/2007	The father cancels access because he said he was working.

25/01/2007	The father cancels access saying he had a Court Hearing.
08/02/2007	It is reported that the father attends Ringwood Magistrate's Court and is convicted and fined for possessing house breaking implements and possession of cannabis.
11/04/2007	The mother cancels access at short notice.
12/04/2007	DCS worker, (name removed) is allocated to the mother.
17/04/2007	DHS request the father provide supervised drug and alcohol screens twice per week.
26/04/2007	Positive cannabinoids result for supervised drug and alcohol urine screen for the father.
10/05/2007	The mother informs the children during access that "when you go to another house you won't be together". The mother's partner attends access venue to collect the mother and waves goodbye at the children despite agreement that he would stay away from access as AB and MB do not like him. The mother's partner tells the protective worker to "get fucked" during a discussion about his presence during access.
10/05/2007	The father cancels access stating he has a virus.
15/05/2007	During journey to access AB and MB inform the protective worker that "they do not want to see mum every week" AB is visibly anxious and states, "something bad always happens at access". AB leaves access on two occasions variously stating "mum's weird" and "I don't like it, mum's scary (crying)". AB and MB run away from mother during access. Access is terminated.
18/05/2007	The father returns CB soiled from access despite reassuring the protective worker that he has toileted the children.
21/05/2007	The mother cancels access stating "I've had a gutful. Something bad always happens". The mother's partner informs the protective worker that "AB has mental problems". MB tells her kindergarten teacher "the mum I went to see isn't very nice. She yells at me and my sister".
25/05/2007	MB refuses to go to access with the father.
31/05/2007	(Name removed) (DCS TL) states that (name removed) observed the mother to be "inappropriate", "egocentric", and "not picking up on the kids cues" during 15/05/2007 access. The carer [of AB & MB] advises that the mother's case is to be reallocated as (name removed) is on indefinite sick leave.
06/08/2007	The father fails to arrive for access. Later contacts the protective worker stating that he has had a heart attack.
14/06/2007	MB informs the carer she does not want to attend access with her father.
19/06/2007	The mother cancels access as she is working.
26/06/2007	The mother cancels access as she is working.
27/06/2007	The father cancels access, stating he has the flu.

03/07/2007	4 hour access with the mother and AB and MB. AB states "mum is scary" and both girls request mother to leave access. Access recommended to be terminated due to AB and MB becoming distressed and the mother not interacting with the children and "hiding in the climbing frame". The mother grabs AB and does not reassure AB after she hits her head on the climbing frame.
04/07/2007	Carer advises AB and MB have had nightmares following access with mother. MB has wet the bed. AB and MB state the only reason they go to access is to see CB.
10/07/2007	Despite encouragement AB and MB refuse to attend access with their mother.
11/07/2007	AB states to the protective worker that she 'would like less access with mum and dad', she "doesn't want to live with mum", and she "doesn't want to live with dad".
17/07/2007	The mother cancels access at short notice.
02/07/2007	Carer informs the protective worker that AB and MB have told her that they are "scared of dad losing them during access".
11/07/2007	AB and MB inform the protective worker they would like less access with father.
19/07/2007	The father cancels access stating that he "has to go to the city".
27/07/2007	The father returns from unsupervised access with MB and CB alcohol affected and leaves the children unsupervised in the reception area of DHS office while he goes in search "lost tobacco". MB and CB ask the security guard "where dad is?" Both children, when asked, reply "no" to whether they had a good time at access.
31/07/2007	The mother fails to attend access.
31/07/2007	The father admits to having "a can" during access and states that he has "stuffed up" by doing this. The father advises that he is "sick of it (counselling)" and he "has done it for three years". The father informed that his accesses are to be supervised if he continues to present as substance affected.
03/08/2007	The father fails to attend access.
07/08/2007	The mother fails to attend access.
12/08/2007	MB refuses to have access with her father.
14/08/2007	The mother fails to attend access.
14/08/2007	The mother fails to attend BIP meeting.
17/08/2007	Positive results for supervised drug and alcohol urine screen for the father: <ul style="list-style-type: none"> <li>• Cannabinoids</li> <li>• Benzodiazepines</li> </ul>
20/08/2007	Sibling access occurs.
21/08/2007	The mother fails to attend access.
21/08/2007	The mother states she would see the children "when they want to see me".
21/08/2007	The mother fails to attend BIP meeting.

04/09/2007	The protective worker supervised one hour access between the mother and all three children. The mother observed to have difficulty managing all three children. AB and MB indicated they were not looking forward to seeing mother. AB informed mother "I love you mum but I don't want to live with you". AB also stated to access supervisor "mum is still scary", and "is the hour up yet". AB and MB were observed to avoid mother and to be encouraged to interact with her.
07/09/2007	MB refuses to have access with her father.
08/09/2007	Sibling access occurs.
14/09/2007	MB refuses to have access with her father.
25/09/2007	The mother fails to attend access.
28/09/2007	The father fails to attend access.
02/10/2007	The mother fails to attend access.
03/10/2007	The mother requests that her partner attend an access with CB. The mother becomes verbally abusive and terminated phone calls when it is explained that this is contrary to previous agreement.
12/10/2007	The father fails to attend access.
18/10/2007	MB refuses to have access with her father. Children attend access with father at swimming pool, funded by DHS.
29/10/2007	Referral to Adoptions and Permanent Care Team for AB and MB.
30/10/2007	The mother fails to attend access.
02/11/2007	MB refuses to have access with her father.
09/11/2007	MB refuses to have access with her father.
15/11/2007	The father has unsupervised access with MB and CB at the swimming pool.
15/11/2007	The mother requests contact with her children, if AB and MB want to. Protective worker speaks to AB and MB. MB advises she does not want to see her mother. AB advised that she should see her mother and that she wants to see her mother to tell her that she does not want to live with her.
19/11/2007	Attempted phone calls by DHS to the mother to discuss access with her children are unsuccessful.
22/11/2007	Attempted phone call by DHS to the mother is unsuccessful.

### 11.3 ONGOING PROTECTIVE CONCERNS

**Both parents have made significant attempts to rehabilitate themselves from their substance abuse.**

**Although the mother has a significant history of poly-substance abuse and has admitted to using illicit substances while she was pregnant with AB & MB and while the children were in her care, she has said to the Department that she has addressed her substance abuse issues and she has been providing clean urine drug screens as requested by the Department.<sup>79</sup>**

<sup>79</sup> See DOHS' Application & Disposition report dated 19/07/2007 at p.5.

The father has attended drug & alcohol counselling for at least 2 years.<sup>80</sup> The one time during the contested hearing when he became agitated and left the court room precipitately was when the team leader, witness 3, gave evidence that sounded to me as if she was minimizing the father's involvement with counselling:

Mr Stevens- "The father has been provided with information about drug & alcohol services?"

Witness 3- Information has been provided but to my knowledge no services have been provided

Mr Stevens- He did engage with drug & alcohol counselling for some time?

The father [*sotto voce*]- 2 years.

Witness 3- I'm unable to confirm when that ceased as the number of the service has changed and we are trying to track it down.

Mr Power-Surely the resources of the Department are sufficient to find a new phone number of a counselling service.

Witness 3- We have tracked down the service. The protective worker has obtained a new number and has left a message so we have that information."<sup>81</sup>

I do not underrate the commitment shown by the father in attending drug & alcohol counselling with (name removed) of Anglicare for at least 2 years. Witness 4 said of (name removed): "He is known to me as a particularly wise, competent, caring man."<sup>82</sup> It is also a credit to the father that he has been able to address his long-standing heroin addiction with the assistance of a buprenorphine program. However, he has been far from compliant with the Department's requests to provide urine screens. Since 09/05/2006 he has been requested to provide screens on 71 occasions and has complied on only 20 occasions. Nearly all of these screens were positive for cannabinoids and benzodiazepines but none were positive for heroin-based opiates.<sup>83</sup> The father has presented weekly over at least the past 2 years for access with his children and has been observed to have been alcohol affected twice (23/11/2006 & 27/07/2007) but not otherwise substance affected.

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<sup>80</sup> In DOHS' Addendum report dated 12/11/2007 at p.6 the protective worker says that the father, when asked to consider drug & alcohol counselling, replied that he was "sick of it" and that "he has done it for three years". In Court the father said, *sotto voce*, that he had been to counselling for 2 years. Either way, it is a very significant period of time to attend counselling.

<sup>81</sup> At p.16 of my notes.

<sup>82</sup> In cross-examination by counsel for AB at p.33 of my notes.

<sup>83</sup> Taken from a schedule of drug screen requests and results tendered by DOHS.

Despite the parents' comparative successes in controlling their substance abuse, I am satisfied that significant protective concerns remain which militate against any of the children being returned to the care of either of their parents. These include<sup>84</sup>:

- The mother's physical harm of the children.
- Both parents' inability to ensure the children's ongoing safety.
- Both parents' exposure of the children to significant emotional abuse.
- Both parents' exposure of the children to substance abuse in the past and the likelihood of this reoccurring if either parent was to become a full-time carer.
- The impact of the mother's intellectual disability and her raft of significant psychiatric disorders on her capacity to parent adequately.<sup>85</sup>
- The impact of the father's neuropsychological deficits on his capacity to parent adequately.<sup>86</sup>
- Both parents' social isolation and limited family support.
- The fact that all 3 children have been out of the care of both parents for nearly 4 years coupled with the strongly expressed wishes of AB & MB that they not be returned to the care of either of their parents.<sup>87</sup>

## 12. THE PERMANENT CARE CASE PLAN

### 12.1 THE DEPARTMENT'S NON-REUNIFICATION PLAN

The Department now considers there is no prospect of reunification with either parent and its draft case plan is for permanent care. In his most recent report dated 12/11/2007 the protective worker says:

**"It is essential that AB, MB and CB are provided with stability and certainty about their future care arrangements in order to safeguard their best interests and prevent further disruption to their psychological and emotional development. The children have resided out of their parents' care for a total period of three years and ten months during which time they have formed secure and healthy attachments to their primary caregivers. However, AB and MB are currently in a temporary foster care placement and, in the absence of any prospect of reunification with either parent, it is imperative that suitable permanent carers are identified for them as soon as possible.**

**In order to identify a permanent care placement for AB and MB, the Child Protection Long term Team made a referral to Adoptions and Permanent Care Team on the 29/10/2007.**

<sup>84</sup> Most of the concerns in this list are taken from DOHS' Addendum report dated 12/11/2007 at p.8.

<sup>85</sup> See section 8.1 above.

<sup>86</sup> See Neuropsychological Report of witness 4 and her evidence detailed in section 8.2 above.

<sup>87</sup> See AB's instructions to counsel at section 4.4 and see sections 10.1 & 11.2 above [entries 11/07/2007 & 04/09/2007].

CB's paternal aunt and primary caregiver, has again reaffirmed that she is willing to be assessed as a permanent carer for CB."<sup>88</sup>

## **12.2 THE ROLE OF THE COURT IN CASE PLANNING DECISIONS**

Though this did not happen in the present case, it is not unknown for the Department through its counsel to submit that the Children's Court has no role at all in case planning decisions.<sup>89</sup> It is certainly true that under Part 4.3 of the CYFA the preparation and review of a case plan is the sole responsibility of the Secretary.<sup>90</sup> But in making its decisions and orders the Court has to act independently of DOHS and on the basis that the best interests of the child must always be paramount.<sup>91</sup>

In the course of determining what is in a child's best interests, the Court usually hears evidence from a number of witnesses - many of whom are professional witnesses with expertise in disciplines relating to child development, child welfare and human behaviour - in order to determine how to weigh the 3 matters in s.10(2) of the CYFA and the 18 matters in s.10(3).<sup>92</sup> For instance, to determine the appropriate orders in the present case, it is necessary for me to consider whether the Department's draft case plan for non-reunification is correct in order to decide-

- whether this plan is the best mechanism for protecting each child from harm, protecting his or her rights and promoting his or her development; and
- what weight to give to each of the potentially partly conflicting matters in paragraphs (a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (o), (p) & (q) of s.10(3).

My orders in this case would be markedly different if I considered the Department's draft case plan was not in the best interests of one or more of the children.

Both parents – and especially the father - have continued to display a genuine desire to have the children returned to their care.

However, there can be little doubt – given the extensive history of abuse of the children at the hands of their mother – that it will never be in their best interests to be reunified with her. Their father's situation is not so clear cut and the

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<sup>88</sup> At pp.7-8. The emphasis is mine.

<sup>89</sup> See for instance the judgment of Judge Coate in *NM, DOHS v BS* [Children's Court of Victoria, unreported, 21/12/2004] where this submission was raised and rejected.

<sup>90</sup> See especially ss.166-168 of the CYFA.

<sup>91</sup> Section 10(1) of the CYFA.

<sup>92</sup> The relevant matters are detailed in section 9 above.

Department has certainly not been hasty in coming to its decision that reunification with the father is not a viable option.

For his part, the father has done much of what has been requested of him by the Department. The one major exception is his poor compliance with the provision of urine screens, 20 out of 71 being on any view a poor result. If failure to provide screens was the only reason for moving to a permanent care case plan, I would not agree with it. But, unfortunately, there are significant ongoing protective concerns which, in my view, militate against reunification with their father despite his wishes and notwithstanding his best endeavours. These include his neuropsychological deficits, his social isolation and lack of family support, the wishes of AB & MB that they not live with him and the stability of care which CB has enjoyed for nearly all his life with his paternal aunt from whom the father is estranged.<sup>93</sup>

In my view the Department's permanent care case plans are in the best interests of each of the three children. I strongly agree with the submission of counsel for AB that DOHS should continue on the path to permanent care and when a permanent care application is ready to be made, the father's level of involvement in the child's life can be reviewed again.<sup>94</sup>

### **13. GUARDIANSHIP TO SEC ORDERS NOT NECESSARY**

Under s.308(b) of the CYFA the Court may only revoke a custody to Secretary order if it is satisfied that it is in the best interests of the child to do so. In that event, s.310(3)(c) empowers the Court to make a guardianship to Secretary order in lieu if it is satisfied that changed circumstances justify it in doing so.<sup>95</sup>

The issue of "changed circumstances" in s.310(3)(c) is met at a threshold level by the change in the Department's case plan to non-reunification with the father. The central question is whether guardianship to Secretary orders are in the best

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<sup>93</sup> See also section 11 above.

<sup>94</sup> See section 4.4 above and see p.35 of my notes.

<sup>95</sup> This case was run on the basis that the options in ss.310(3)(a) & 310(3)(b) were not applicable.

interests of any of the children, taking into account the matters set out in s.10 of the CYFA.<sup>96</sup>

In the past I have heard it said variously that-

- (1) a child will not be accepted into the Adoptions and Permanent Care team unless the child was on a guardianship to Secretary order; and
- (2) it was difficult to place a child unless the child is on a guardianship order.

That is not the evidence in this case.

There is certainly no legal basis for the first statement. It is clear from the CYFA that a child who is not on any protection order at all is nevertheless able to be placed on a permanent care order if the legislative pre-conditions are met.<sup>97</sup> Further, it is clear that the Court, on extending a custody to Secretary order, can direct the Secretary to take steps to ensure that at the end of the period of the order a person other than the child's parent applies to a court for a permanent care order or the equivalent thereof.<sup>98</sup>

There is no evidence to support the second statement. At its highest, I might be able to infer from answers given by witness 3 that a guardianship to Secretary order is DOHS' preferred option when seeking a permanent care placement.<sup>99</sup> A response to this was given by counsel for AB in his final submission: "If permanent carers were made aware a permanent care case plan is on foot, I don't see why having a custody to Secretary order on foot before that would make any difference."<sup>100</sup> I agree with that provided that the access conditions on the custody to Secretary order are not too disruptive for the child and the potential carer. In the girls' current circumstances - where no permanent carer has been identified, where there is no dispute that AB's access only occurs on school holidays and where MB no longer wants to attend access without AB – I do not consider that a minimum of 9 access visits per year between AB & MB and their father could be so regarded even though it will probably require multiple accesses during all school holidays.

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<sup>96</sup> The relevant matters are set out in detail in section 9 above.

<sup>97</sup> See ss.319 & 322-323 of the CYFA.

<sup>98</sup> See s.297(1)(f) of the CYFA.

<sup>99</sup> See her evidence from p.24 of my notes which has been extracted on the next page.

<sup>100</sup> At p.35 of my notes.

**In my view guardianship to Secretary orders would be in the best interests of AB, MB & CB if but only if:**

- (i) both parents were unavailable or unwilling to make guardianship decisions;**
- (ii) both parents were incapable of making such decisions; or**
- (iii) in the past both parents had made one or more significantly inappropriate guardianship decisions; or**
- (iv) the permanent care case plan could not be properly advanced unless the children were on guardianship to Secretary orders.**

**There is no evidence that the parents have both been unavailable or unwilling to make any guardianship decisions. For instance:**

**Mr Terziovski- “Have any difficulties arisen due to the parents not exercising guardianship rights over the children? Have the carers had any problems?**

**Witness 2 – No. Not at all. No.”<sup>101</sup>**

**Ms Rose- “The father is making good decisions about the children’s guardianship needs in relation to consents?**

**Witness 3- In relation to excursions, travel interstate, access yes.**

**...**

**Ms Rose- The Department’s view is that ultimately this case will have an application for a permanent care order?**

**Witness 3- Yes.**

**Ms Rose- Why when the father is available, reasonable, co-operative and access is going well, he is making good decisions for access, does DOHS need a guardianship order prior to making an application for a permanent care order?**

**Witness 3- The decision was made for guardianship in recognition of the assessment that reunification with the father is no longer a viable option.**

**Mr Power- Why is that? Why does the pathway to permanent care need a guardianship to Secretary order?**

**Witness 3- The conditions of the custody to Secretary order. A number are no longer applicable given that reunification is no longer an option. Also a recognition that AB & MB are seeking a long-term placement and an assessment that the long-term caregiver would be best placed to make long-term guardianship decisions for the children given their long term care and responsibility for the children. We would also be aware of the children’s changing needs as they develop and also in terms of providing consistent informed consent as I mentioned earlier.**

**Ms Rose- Conditions no longer needed could be deleted from the custody to Secretary order?**

**Witness 3- They could, yes.**

**Ms Rose- But the father has been making decisions well?**

**Witness 3- He has been. However, there has been some degree of inconsistency especially with the communications book which hasn’t been continued on... The father does provide consent, is usually co-operative and there are no concerns about engaging with him to seek his consent. There was difficulty on one occasion when the father presented as substance affected in November 2006...”<sup>102</sup>**

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<sup>101</sup> At p.10 of my notes.

<sup>102</sup> At pp.24-25 of my notes.

Witness 3's reference to a "communications book" relates to a book which had been used between 14/02/2006 & 12/10/2006 to enable the father and AB's & MB's carer to communicate directly with each other. Father and carer had used this book to communicate with each other in relation to the children on a number of occasions in 2006. However, it fell into disuse later in the year. The father's last entry was 15/09/2006. Thereafter the carer made 5 entries in the book but eventually stopped providing information because there had been no further entries from the father.<sup>103</sup> Witness 3 (in cross-examination) and counsel for the Department (in his final submission) appeared to elevate the father's non-continuation of the communications book into a reason for guardianship to Secretary orders being made. I believe that resumption of the use of a communications book is desirable but I do not put it higher than that. I will include a condition on AB's & MB's custody to Secretary orders that DOHS and the father use their best endeavours to ensure a communications book is reinstated and used.

There was a suggestion at the end of evidence-in-chief of the neuropsychologist witness 4 that the father's cognitive and social deficits might render him incapable of making guardianship decisions:

**Mr Stevens-** "Referring to p.5 of your report re parenting of the children, the issue of reunification is not the subject of today's contest. The children will remain in foster care until at least July 2008. The issue of this contest is guardianship. The Department is seeking guardianship to Secretary orders so that decisions about schooling, the health of the children etc can be made by DOHS or the carer. On your assessment of the father, can you comment on your views on the father's guardianship decision-making ability?"

**Witness 4** – I would say he would not be able to undertake such an activity single-handed and without a degree of support, mentoring and that type of thing. Obviously someone whom he trusts rather than otherwise.

**Mr Power-** I should make it clear that the sorts of things we are talking about are a signed authority for the child to attend a particular school, a signed authority for a child at a school to go on an excursion, a signed authority for a doctor to carry out a procedure which a doctor has recommended.

**Witness 4-** I am not seeing him as incompetent to do that. As you described them to me, there is a degree of seriousness of the implications of those. Some of the lesser ones are well within his capability, for example the school excursion, whereas with the medical procedures I wonder whether he would be able to recognize the implications, negative or positive, of such a decision. Under ideal circumstances it would be good for another person familiar with the children to be involved. To express his own preferences, values, yes he can do that but the complexity of some of the issues may mean the long-term decision may be better if he had the external support of another person."<sup>104</sup>

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<sup>103</sup> Evidence-in-chief of witness 3 at p.19 of my notes.

<sup>104</sup> At p.31 of my notes.

**There is no evidence that the father has ever shown himself incapable of making appropriate guardianship decisions in the past or that he has made inappropriate guardianship decisions in the past.<sup>105</sup> Although she is only 7 years old, AB had no concerns about her dad signing papers on her behalf.<sup>106</sup> I am not persuaded that the father will prove to be incapable of making appropriate guardianship decisions in the future notwithstanding his neuropsychological deficits.**

**Nor is there any evidence that the permanent care case plan could not be properly advanced unless the children were on guardianship to Secretary orders. On 29/10/2007 AB & MB's cases were referred to the Department's Adoptions and Permanent Care team. There is no evidence that that referral has not been accepted or that the parents' retention of guardianship rights for the time being is likely to inhibit the prompt and proper processing of the permanent care case plan.**

**In the absence of all four of the above-listed factors<sup>107</sup>, it is my strong view that the considerations in ss.10(3)(a) & 10(3)(b) of the CYFA - namely:**

- (a) The need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.**
  - (b) The need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child –**
- outweigh any of the other factors in ss.10(2) & 10(3) of the CYFA.**

**In particular I agree with counsel for AB when he says that “maintaining a relationship is the primary one: s.10(3)(b).”<sup>108</sup>**

**Whatever might prove to be the situation when permanent carers are found for AB & MB and approved for all three children, it is my strong view that to remove the father's guardianship rights is not presently in the best interests of any of the children. The applications to revoke the custody to Secretary orders are dismissed.**

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<sup>105</sup> In particular the evidence about his contribution to the communications book (detailed at pp.17-19 of my notes) suggests the contrary.

<sup>106</sup> AB's instructions to counsel detailed in section 4.4 above and at p.35 of my notes.

<sup>107</sup> These are listed in the shaded box on p.43 above.

<sup>108</sup> See p.35 of my notes. Counsel for the father made a similar final submission: see p.38 of my notes.

## **14. VARIATION OF CUSTODY TO SECRETARY ORDERS**

However, in my view it is in the best interests of the children to vary the conditions (whatever they may be) on the current custody to Secretary orders. The reasons for this are:

- to clarify the current orders;
- to remove conditions no longer necessary as a consequence of the Department's permanent care case plans and my approval thereof;
- to vary parental access conditions to relieve pressure on the girls and to reflect current reality and my view of what is in the best interests of the children;<sup>109</sup>
- to make provision for the use of a book for direct communication between the carers of AB & MB and the father;<sup>110</sup>
- to include conditions for access between the siblings; and
- to make provision for access between the children and their maternal grandparents if the Department assesses that it is in the children's best interests to have access with their grandparents.<sup>111</sup>

Counsel for the father submitted that access between the girls and their father should remain scheduled at once per week:

**"By agreement with the Department access had been scheduled at once per week. AB has elected not to go [weekly] and the father has agreed to that. The once per week arrangement has been perfectly workable and should AB and MB elect to see their father more often that minimum should be available."**<sup>112</sup>

I strongly disagree with that. Weekly access is quite incompatible with the sort of non-kith and kin permanent care plan proposed for the girls. Further, it is clear that once per week access has not been "perfectly workable" for MB since August 2007. I think it is likely that the prospect of weekly access has been putting undue

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<sup>109</sup> For the reasons stated in section 10.2, I will fix a minimum of 9 access visits per year between the girls and their father. I will not fix a specific minimum frequency of access between the children and their mother but I would have thought once every 2 months preferable to once monthly: see section 10.1 above.

<sup>110</sup> I have not included this on CB's order. Since his carer and his father are estranged, communication will continue to have to be made for the time being through the agency of the Department.

<sup>111</sup> I do not have any evidence which would enable me to determine whether it is in the children's best interests to have such access. I include this condition simply because AB has instructed her counsel that she would like to see her maternal grandmother who she apparently has not seen for at least 1 year. See section 10.3 above.

<sup>112</sup> See final submission of counsel for the father at p.39 of my notes.

pressure on MB. Both girls are too young to be burdened with the task of electing when or whether to see their parents. I agree with counsel for AB:

“A change in access would relieve a burden on the children. At the moment MB seems anxious about the weekly decision-making on her part. AB has been clear she would only like to go to access on school holidays and the father is comfortable with that. A variation in relation to AB would be beneficial and in relation to MB...she should be made aware of the need to attend access although perhaps once per week is putting a strain on her.”<sup>113</sup>

Pursuant to s.301 of the CYFA, the conditions on each order are varied as set out below. There are to be 16 conditions on the orders for AB & MB and 15 conditions on the order for CB.<sup>114</sup>

## 15. ORDERS

For the reasons detailed above I make the following orders:

- A. The Department’s applications dated 29/03/2007 to revoke the custody to Secretary orders are dismissed.
- B. The Department’s applications dated 04/12/2007 to vary the custody to Secretary orders are granted. The conditions on each of the custody to Secretary orders are varied by replacement of the current conditions with the following conditions:
  - 1. Mother must accept visits from and cooperate with DOHS.
  - 2. Father must accept visits from and cooperate with DOHS.
  - 3. Mother must accept support services as agreed with DOHS.
  - 4. Father must accept support services as agreed with DOHS.
  - 5. Father must submit to random supervised alcohol and drug testing as directed by DOHS and must allow reports to be given to DOHS.
  - 6. Mother must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
  - 7. Father must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
  - 8. Mother must not hit or hurt the child for any reason.
  - 9. Mother must not expose the child to physical or verbal violence.
  - 10. Mother must not threaten or assault DOHS staff.
  - 11. Mother & father must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
  - 12. Mother may have access with the child at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Mother must confirm access before 5pm on the day before any scheduled access, otherwise access will be cancelled. In determining times and

<sup>113</sup> At pp.35-36 of my notes.

<sup>114</sup> Conditions 1-14 are identical for each child.

places of access, DOHS must consider, though not necessarily be bound by, any views expressed by the child.

13. The child may have access with siblings at times and places as agreed between DOHS and the children's carers. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.
14. If DOHS assesses that access with the maternal grandparents is in the child's best interests, the child may have access with the maternal grandparents at times and places as agreed between DOHS and the grandparents. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.
15. [FOR CB ONLY] Father may have access with the child for a minimum of once per week for three hours at times and places as agreed between DOHS and the father. Father must confirm access before 5pm the evening before access, otherwise access will be cancelled. If the father presents for an access visit alcohol or substance affected, that visit will be cancelled. Access is to be unsupervised unless the father presents as alcohol or substance affected at the start or end of an access visit with any of the children, in which event all future accesses are to be supervised by DOHS or its nominee unless DOHS assesses that supervision is not necessary.
15. [FOR AB & MB ONLY] Father may have access with the child a minimum of 9 times per year at times and places as agreed between DOHS and the father. Father must confirm access before 5pm on the day before any scheduled access, otherwise access will be cancelled. If the father presents for an access visit alcohol or substance affected, that visit will be cancelled. Access is to be unsupervised unless the father presents as alcohol or substance affected at the start or end of an access visit with any of the children, in which event all future accesses are to be supervised by DOHS or its nominee unless DOHS assesses that supervision is not necessary. In determining times and places of access, DOHS must consider, though not necessarily be bound by, any views expressed by the child.
16. [FOR AB & MB ONLY] DOHS and the father must use their best endeavours to ensure that a book for communication between the father and the carer is reinstated and used.