

IN THE CHILDREN'S COURT OF VICTORIA  
FAMILY DIVISION

MAGISTRATE: R HAMILTON  
WHERE HELD: Melbourne  
DATE OF HEARING: 11-15, 18-22 September 2023 and  
13-16 November 2023  
DATE OF DECISION: 17 November 2023  
CASE MAY BE CITED AS: Secretary Department of Families, Fairness and  
Housing ("DFFH") v ZX [2023] VChC 3

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CATCHWORDS – Protection Application grounds (c), (e) *Children, Youth and Families Act 2005* ("CYFA") – s.276A(2)(a) – Expert Evidence/Opinion Evidence as to the Characterisation of Family Violence – Application of s.76 *Evidence Act 2008* - Shared Care on a Family Preservation Order – s.524(11) Statement as to the Child's instructions given or Wishes Expressed – Whether Child's Academic Performance Impacted by Trauma

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| APPEARANCES                              | COUNSEL     |
|--|-------------|
| For DFFH                                 | Ms Liano    |
| For Mother                               | Ms Brenton  |
| For Father                               | Mr Draper   |
| For the Independent<br>Children's Lawyer | Ms Woodfall |

## **EVIDENCE**

### **WITNESSES**

- Witness 1: Advanced Child Protection Practitioner, DFFH
- Witness 2: Team Manager Child Protection, DFFH
- Witness 3: Child Protection Practitioner, DFFH
- Witness 4: Psychologist, Take Two
- Witness 5: Senior Child Protection Practitioner, Child Protection, DFFH
- Witness 6: Child Protection Practitioner, DFFH
- Witness 7: Clinical Psychologist, Children's Court Clinic
- Witness 8: Family Preservation Practitioner
- Witness 9: Psychologist
- Witness 10: Alcohol Counselling Clinician
- Witness 11: Assistant Vice Principal of ZX's current Primary School
- Witness 12: Psychiatrist
- Witness 13: Registered Nurse, Father's Mental Health Case Manager
- Witness 14: Drug and Alcohol Counsellor
- Witness 15: Mother's Forensic Psychiatrist
- Witness 16: Mother's General Medical Practitioner

### **DOCUMENTS**

A list of 66 Exhibits tendered into evidence was annexed to the Reasons for Decision provided to the parties but is not included in these published Reasons.

## **HER HONOUR:**

1. This proceeding concerns ZX ('the child') born [date deleted] who is currently 9 years of age. ZX is the only child of his mother, Ms Z ('the mother') and his father, Mr X ('the father').
2. The applications before the Court are as follows:
  - (a) Protection Application alleging grounds (c) and (e)<sup>1</sup> signed on behalf of the DFFH, dated 20 July 2022 and first listed on at the Children's Court of Victoria sitting at Melbourne on 21 July 2022; and
  - (b) Application to Breach an Interim Accommodation Order ('IAO') filed 11 September 2023.

### **3. Parties' Positions**

- (a) At the commencement of the proceedings the DFFH sought a Family Reunification Order with reunification of the child to the father's care. By the conclusion of evidence and at the time of this decision, the DFFH sought a Family Preservation Order to the Father with the remaining issues in dispute being as follows:
  - whether the time the child spends with his mother is monitored, described in evidence as someone dropping the child off to the mother at the commencement of time and collecting him from the mother at the conclusion of time; it also included the mother being able to collect the child from school;
  - the commencement of overnight time with the mother only if assessed as suitable by the DFFH; and
  - whether the parents and the child can spend time together prior to the father completing a Mens' Behavioural Change Program.
- (b) The Father seeks a Family Preservation Order on a shared care basis with the Mother, with the Father residing with the Paternal Grandparents.
- (c) The Mother seeks a Family Preservation Order on a shared care basis with the father with the mother remaining in her existing home.

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<sup>1</sup> s.162(1)(c) CYFA: 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. s.162(1)(e) CYFA: 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.

- (d) Pending the testing of evidence, the Independent Children's Lawyer ('ICL') sought a Family Reunification Order with reunification to one or both of the parents.

### **Current Order**

4. The current order is an Interim Accommodation Order made on 24 January 2023 placing the child with the Paternal Grandparents with conditions, among others, that the father may live with the child and grandparents and that the mother may have supervised contact with the child for a minimum of two times per week at times and places as agreed.

### **Time in Out of Home Care**

5. ZX was removed from his mother's care on 21 July 2022. He was 8 years of age and had been in his mother's sole care from birth until that time. After some days in an Anglicare foster placement, ZX was placed on an interim accommodation order to his Paternal Grandparents with his father living with him in the home. He has remained in that home with his father and grandparents. On 13 December 2022 the Interim Accommodation Order was made to the Father. On 24 January 2023 DFFH issued IAO breach proceedings and the Court placed the child on an IAO to the Paternal Grandparents with the Father living in the home with the child. There was a further application to breach that order dated 11 September 2023 which remained on foot during these proceedings.

### **6. Current Case Plan**

Family Reunification.

## **DECISION**

7. On the evidence, in relation to the mother I find the statutory threshold of unacceptable risk of harm to the child in her mother's care is not satisfied because the risk is ameliorated by the DFFH oversight and the conditions imposed by this order which in turn are only those necessary to ensure the safety and wellbeing of the child.

### **Orders made on the basis of the evidence**

8. The protection application dated 20 July 2022 is found proven on ground (e). Ground (c) is struck out.
9. All and any other applications, including the Application to Breach the Interim Accommodation Order filed 11 September 2023 are struck out.

10. The Court makes a Family Preservation Order for a period of 8 months placing the child ZX into the care of his Mother and Father subject to the following conditions;
1. The Father must accept visits and cooperate with the DFFH.
  2. The Mother must accept visits and cooperate with the DFFH.
  3. The Father must accept support services as agreed with the DFFH.
  4. The Mother must accept support services as agreed with the DFFH.
  5. The Mother and/or Father must not threaten or abuse child protection practitioners.
  6. The Mother and the Father must not denigrate child protection practitioners in the presence of or within the hearing of the child.
  7. Commencing from Friday 17 November 2023, the child will live with the Mother for a minimum of 3 nights per week as follows,
    - (a) from Wednesday 22 November 2023 from the conclusion of school or 5.00pm if a non-school day until 11.00am on Saturday 25 November 2023, and every second Wednesday to Saturday thereafter; and
    - (b) from Friday 1 December 2023 from the conclusion of school or 5.00pm if a non-school day until the commencement of school on Monday or 5.00pm if a non-school day and each alternate Friday to Monday thereafter;
    - (c) in addition to the above; for a period of 7 consecutive nights in each of the school term holidays commencing on the last day of school; and for a total period of 3 weeks in the long summer holidays at times as agreed between the Mother and the Father with the DFFH to be kept informed.
    - (d) on special occasions including the child's birthday, the Mother's birthday, Christmas and Easter, at times as agreed between the Mother and the Father;
    - (e) by telephone, Face time or other electronic means at reasonable times;
    - (f) such other further times as agreed between the Mother and the Father with the DFFH to be kept informed.
  8. The child will live with the Father at all other times.
  9. When the child is living with the Father, the child must live with the Father in his home with the Paternal Grandparents unless and until the Father finds alternative accommodation assessed as suitable by the DFFH.
  10. The Mother and/or the Father must ensure the child is not exposed to any family violence.
  11. The Father must not consume or be affected by alcohol during any of the following occasions:
    - (a) Transporting the child to or from any location;
    - (b) Attending appointments and or activities related to the child's education, health and/or wellbeing including meetings with child protection practitioners.

- (c) Subject to these orders, during any time, however brief, the Father, Mother and the child are together
12. The Father must not consume alcohol to excess while the child is in his care.
  13. The Father must not live with the child when the child is in the Mother's care but may spend time with and communicate with the Mother and/or the child provided he does not commit family violence while doing so.
  14. For the purpose of changeovers which do not occur at the school, the Father or either Paternal Grandparent will transport the child to the Mother's home at the commencement of time and collect the child from the Mother's home at the conclusion of time.
  15. The Father must continue to engage with [named] psychiatric and mental health team and follow recommendations as to treatment, including any recommendation to transfer medical oversight to the Father's general medical practitioner in consultation with the Father.
  16. The Father must continue to engage with Alcohol and Drug treatment, currently provided by [named] Dual Diagnosis Service as recommended by the Service in consultation with the Father.
  17. The Father must attend upon and complete a Mens Behaviour Change Program when available and provide a certificate of completion to the DFFH and to the Court if requested.
  18. The Mother must continue to attend upon [witness 14] or such other practitioner, for alcohol and drug and/or other recommended counselling as recommended in consultation between the counsellor and the Mother.
  19. The Mother must accept parenting supports, namely, transport assistance and housekeeping services if and as facilitated by the DFFH.
  20. The Mother must attend upon [witness 15] for a review appointment and attend any further appointments if so recommended by [witness 15] in consultation with the Mother.
  21. The child may have respite as agreed between the parties.
  22. The child is to remain enrolled at [his current] Primary School and the Mother and Father are to engage with and cooperate with the school in relation to the child's socio-educational needs.

## REASONS FOR DECISION

11. Given the DFFH sought an order placing ZX with his father, I have addressed my reasons for decision primarily as they relate to the child and the mother, save for addressing the DFFH protective concerns about ZX's being exposed to family violence perpetrated by his father towards his mother should they spend time together as a family.

### Statutory Considerations

#### s.10 CYFA

12. In making these orders, I have regarded the best interests of the child as the paramount consideration. I have considered the need to protect him from harm, to protect his rights and to promote his development.<sup>2</sup>

13. Further to the above, I have considered in particular the minimum interventions necessary to ensure the child's safety; the desirability of continuity and permanency in the child's care taking note of: the effects of cumulative patterns of harm on his safety and development; the capacity of the mother and/or father to provide for his needs<sup>3</sup> and I have considered, in particular, the child's views and wishes as reasonably ascertained<sup>4</sup> and I have given them such weight as is appropriate in the circumstances.

14. I have also considered and applied the mandatory threshold test that the child is only to be removed from the care of a parent if there is an unacceptable risk of harm<sup>5</sup>, having regard to the dicta of Elliott J in *Department of Human Services v DR* [2013] VSC 579 at [54]: "There is considerable force to the contention that s.10(3)(g) contains a mandatory requirement of unacceptable risk without which there is no proper basis to remove a child from the care of his or her parents".

### The child's instructions and wishes

15. In compliance with one of the two mandated obligations the CYFA imposes on legal practitioners appointed as an Independent Children's Representative, the ICL, Ms Melanie Younis, filed a s. 524(11)(b) statement dated 22 September 2023 comprehensively setting

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<sup>2</sup> Ss.10(1) and (2) CYFA.

<sup>3</sup> S.10(3) relevant factors.

<sup>4</sup> S.10(3)(d) CYFA.

<sup>5</sup> S.10(3)(g) CYFA.

out “the instructions given or wishes expressed by the child”<sup>6</sup> over the course of Ms Younis’s appointment. The s.524(11)(b) Statement was annexed to the Reasons for Decision provided to the parties but is not included in these published Reasons.

16. ZX spoke with Ms Younis on eight separate occasions between and including 25 July 2022 and 10 September 2023 and again prior to the recommencement of the Final Hearing in November 2023. While ZX’s instructions and wishes varied from time to time, I understand his generally consistent position was to continue living with his father and to spend time with his mother, which increased at the commencement of this hearing to include some visits in her home and some sleepovers.
17. Witness 1 confirmed in her evidence that on 16 August 2023 ZX had said: “It’s a bit sad if the judge said I had to stay here [that is with his grandparents]. I’d like to stay with mum on the weekends.”<sup>7</sup> By the time of the recommencement of the Final Hearing in November 2023 ZX’s instructions, views and wishes had progressed to living with his mother with his father providing significant in-home support.
18. It was clear from the evidence that ZX was both acutely aware of, and impacted by exposure to his parents’ fighting and to his mother’s demonstrative anger in the presence of child protection workers.<sup>8</sup> Ahead of child protection supervising contact on 4 May 2023, ZX is reported saying to the worker “It would probably go really bad...[due to the presence of the worker] and that it won’t be your fault, mum just wants to fight, and she doesn’t get it...she doesn’t get the case.”<sup>9</sup>
19. ZX had much to say about his experience of child protection’s involvement with his family from “being removed from his mother by a stranger” and following a further 7 months of intervention, ZX sobbing uncontrollably while telling his grandmother that “no one knows what I’m going through with mum, dad and child protection”<sup>10</sup>.

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<sup>6</sup> Pursuant to s. 524(11) a legal practitioner representing. In the Family Division, a child aged under 10 years or a child aged 10 years or more whom the Court determines under subsection (1B) is not mature enough to give instructions **must** – (a) act in accordance with what he or she believes to be in the best interests of the child; and (b) to the extent that is practicable to do so, communicate to the Court the instructions given or wishes expressed by the child.

<sup>7</sup> This was confirmed in cross-examination on behalf of the Independent Children’s Lawyer.

<sup>8</sup> Evidence of witness 1 that if “ZXs contact with his mother did not go well, it was usually because of the mother’s difficulties with the department” and “ZX was exposed to those times when the mother was escalated...he would either retreat or he would try to calm his mother himself, try to de-escalate her.”

<sup>9</sup> Ex D 20 Short Form Update Report dated 16/6/2023 at p.93 of the court book.

<sup>10</sup> Ex D12 Family Preservation and Reunification Response Minutes dated 28 February 2023 at p.3.



20. In regards to ZX's experience of removal from his mother's care, I refer to *DoHS v Mr D & Ms B*<sup>11</sup> and the pertinent comments of the Children's Court Clinician on 'good enough parenting':

*"There is a concept in psychology call 'good enough parenting'. It's what one is aiming for. It doesn't have to be perfect or at the high end....It is an important concept. It may be a long way from what you would say is ideal but it is adequate...Children do survive under less than ideal circumstances.*

*...what we know is the very, very negative impact on children as they look back on their early lives and one of the most negative things that can happen to them is removal from their parents...there would have to be a serious risk to the child and I would hope...we have exhausted every effort to do everything these parents might require to make the environment adequate or 'good enough' for the children."*

### **Child Protection Concerns**

21. The oral evidence of witness 1 detailed the protective concerns at the time of the child's removal from his mother in July 2022 as "concerns raised by [his previous] Primary School, inadequate lunches, ill-fitting clothes, environmental concerns and the child's exposure to family violence between the parents."

22. Exhibit D27 sets out the child protection concerns which witness 6 in her evidence classified as historic and/or current as follows:

- the child's exposure to verbal and physical abuse from his mother (current)
- the child's exposure to the mother presenting as verbally aggressive to services such as school staff and child protection (current)
- the child's previous exposure to conflict between his mother and father (current)
- the child's exposure to environmental neglect (historic)
- the child's exposure to the mother and father's conflictual relationship (current)
- the child's exposure to the father's history of perpetrating family violence towards his mother (current)
- the parentification of the child (current)
- the child's academic performance and development (witness 6's evidence is that the child's performance is impacted by trauma, current)

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<sup>11</sup> [2008] VChC 2 at pp 65-66 per Magistrate Power

- the child’s experience of neglect in his mother’s care (historic)
- the child’s poor hygiene and presentation (historic)
- the mother’s substance use – cannabis and prescription medication (uncertain)
- the mother’s non engagement and volatile engagement with child protection and other professionals (current)
- the mother’s limited insight into protective concerns (current)
- the child’s inconsistent attendance at school (historic)
- the mother’s involvement with child protection in Victoria (current), New South Wales (historic) and South Australia (historic).<sup>12</sup>

23. Clearly, some of these concerns are overlapping and might be considered as re-statements of the same concern. Accordingly, I condense the current protective concerns presented in this hearing as they relate to the remaining issues in dispute – namely whether the mother’s contact needs to be monitored; whether ZX can have overnight contact with his mother and whether the parents and ZX can spend time together – as follows:

- (a) the child’s exposure to family violence;
- (b) the father as a perpetrator of family violence;
- (c) the mother’s insight into protective concerns;
- (d) the Mother’s mental health and substance use.

### **Family Violence**

24. As discussed above, the DFFH position at the conclusion of evidence was that ZX ought be placed on an order in his father’s care. The outstanding issue in relation to the father was whether he was suitable to facilitate, monitor or otherwise spend time with the mother and ZX together.

25. The DFFH’s evidence, both within the tendered reports and in the oral evidence provided by the child protection practitioners was that the risk of exposing ZX to family violence between his parents was a current, ongoing and unaddressed protective concern.

26. It was uncontested that there had been incidents of family violence between the parents, the mother having reported a number of highly concerning incidents herself as detailed in the Children’s Court Clinic Assessment dated 1 June 2023, including “[Mr X] being

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<sup>12</sup> Ex D27 at page 97 of the court book. The terms “current”, “uncertain” and “historic” are added to reflect the oral evidence of witness 6.

controlling and manipulative...a pattern whereby he's got me trapped physically and he's standing over me yelling and screaming abuse at me...he beat the shit out of me on ...Road in peak hour traffic in front of everyone...when he loses it, he just goes crazy. He's thrown me across the room in front of [ZX]."<sup>13</sup> The example given by the mother in the Clinic Assessment had taken place on 16 August 2013.<sup>14</sup> Noted also are the admissions the father made detailed in Ex C1.<sup>15</sup>

27. Witness 3 confirmed the evidence previously given by Witness 1 that the most recent L17 involving the parents in the child's presence was on 22 March 2023 when there was a verbal argument and name calling by the father. This was followed by a further incident around Easter 2023 at the Paternal Grandparents' home where, again, the father had a verbal argument with the mother prompting the paternal grandmother to remove the child to another room to limit his exposure to the conflict.

28. It was put to witness 6 in cross examination for the father that the family violence incidents between 2005 and 2015, including the incidents detailed by the mother referred to above had occurred in the context of the father's unmanaged mental health and drug use and that this had markedly improved. In response witness 6 said: "It's difficult to say what contribution that they had at the time, on the other hand it is concerning there have been more L17s when his mental health is managed and drug use reduced." However, witness 16 conceded that "I don't have any L17s after March 2023 that would corroborate physical violence." I note that while this statement may raise an inference that there had been psychological and/or verbal violence, no evidence was given about any such incidents and accordingly, I do not draw the inference.

29. The father has a diagnosis of schizo-affective disorder and his Mental Health case worker, witness 13, gave evidence that the father has come a long way and has made positive progress in terms of his mental health and the effective management of that. Child protection practitioner witness 3 accepted in her evidence that the "father's mental health is well managed by the depot injections, he has been and continues to be engaged with community health for a long time as a voluntary patient." He had self-referred to the Eastern consortium of Alcohol and Drug services and this engagement had formed the basis for a reunification plan for ZX into his father's care.

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<sup>13</sup> Ex C1 at para 140.

<sup>14</sup> It is reported in an L17 of that same date.

<sup>15</sup> Ex C1 at paras 135 to 137.

30. Witness 1 accepted in giving her evidence that, at least around 20 July 2023<sup>16</sup> the father had been providing substantial support to the mother and in doing so had been spending overnights at her home, leaving after ZX had gone to sleep and returning in order to take him to school in the morning<sup>17</sup>. Witness 1 accepted the proposition that the parents were “co-parenting to some degree”.
31. Witness 3 gave evidence that the DFFH assessed the risk of family violence between the parents as an ongoing protective concern and that “If the father wants to facilitate contact, the Father needs to address family violence”.
32. Witness 3 explained in her oral evidence that “ongoing” meant “it had not been addressed by the father” and that “not addressed” meant “the father has not done a Mens Behaviour Change Program despite being asked to complete one by the DFFH.”<sup>18</sup>
33. The most recent L17 dated 22/3/2023 was followed by reports of a verbal argument between the parents during Easter 2023 while ZX was present.
34. In her evidence about the Department’s concerns about the family violence, witness 3 gave evidence that she saw family violence through a feminist lens: “Mr X has a position of power over the mother and therefore the mother’s response can be thought of as family violence because of the coercive control over her” and further “I consider the mother to be in a vulnerable position due to her stroke and the father used that vulnerability to exert control and coercion over her.” There were no specific examples given of incidents which demonstrate control and coercion other than witness 3 positioning the mother inviting the father to her home as her doing so as a result of the father’s coercive control rather than a decision made of the mother’s own free will. This is a position disputed by the mother.
35. I find witness 3’s view of family violence through a feminist lens – in the absence of direct application to ascertainable incidents observed by witness 3 and/ or corroborated by credible, independent observation – to be an opinion as to the likely occurrence of family violence if certain criteria or circumstances are present.

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<sup>16</sup> Case note confirmed by witness 1 in oral evidence.

<sup>17</sup> Detailed in ExD12.

<sup>18</sup> It was not a court ordered condition and the father’s evidence was that he had completed an online anger management course although no evidence of this was produced in this hearing.

36. In other words, it is the type of evidence the court would expect of an expert witness called to provide evidence “about the dynamics and characterisation of family violence”, as is expressly provided for under the *Family Violence Protection Act 2008* in relation to proceedings under that Act.

37. Section 73 of the *FVP Act* provides “an expert witness may include evidence of “the general nature and dynamics of relationships affected by family violence...social , cultural or economic factors that impact on persons who are or have been in a relationship affected by family violence...” and importantly “expert witness means a witness with relevant qualification, training or expertise in family violence.”<sup>19</sup>

38. Counsel for the DFFH did not present witness 3’s evidence in this context nor did counsel make reference to or attempt to satisfy the recognised foundation enabling a Court to consider expert evidence. In this regard, I refer to *Baulch v Lyndoch Warrnambool & Anor (Ruling No. 3)* [2008] VSC 420 at [10]-[14] where Forrest J summarized the relevant principles as follows:

- (a) a party wishing to call an expert witness must clearly identify the field of specialized knowledge in respect of which it is said the witness can proffer an opinion;
- (b) a party must then identify the expertise of the witness in that field; it must be demonstrated that by reason of specialized training, study or experience the witness is truly an expert in that area;
- (c) the opinion expressed by the witness must be either wholly or substantially based on that specialist knowledge and not on the everyday knowledge of the common person;
- (d) the opinion must be based on clearly identified facts; and
- (e) the onus rests on the party calling the witness to satisfy the above criteria.<sup>20</sup>

39. Of course, in the Family Division the Court “may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”<sup>21</sup>. However, in the Supreme Court of the A.C.T. Higgins J explained the proper operation of such a provision as follows:

“[I]t should be recognised that such provisions do not render the rules of evidence irrelevant...

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<sup>19</sup> S.73 (1), (2), (3) *FVP Act 2008*.

<sup>20</sup> In part Justice Forrest referred to and relied upon *Makita Australia Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] per Heydon JA.

<sup>21</sup> s.215(1)(d) of the CYFA.

The proper approach to the application of the rules of evidence in the face of such a provision was considered by Lockhart J in *Pearce v Button* (1985) 65 ALR 83 at 97; 8 FCR 408 at 422. ‘...a judge should be slow to invoke it [a power to dispense with compliance with rules of evidence] where there is a real dispute about matters which go to the heart of the case.’<sup>22</sup>

40. This approach was confirmed by Bell J in *DOHS v Sanding* [2011] where His Honour said: “Certainly the rules of evidence may be valuable and should not be lightly discarded, particularly where there is a serious dispute over a matter which may be of importance to the outcome of the proceeding.”<sup>23</sup>
41. The DFFH position on the father’s family violence towards the mother in the presence of the child is one of the two central protective issues which are in dispute and which, on the DFFH case, has prevented and should continue to prevent the father spending time with the mother and child as a family, even to the extent that he ought not be permitted to facilitate contact between the child and the mother by providing transport, let alone providing co-parenting support in the mother’s home while ZX is in her care.
42. I find it is a real dispute which goes to the heart of the case and is of importance to the outcome of the proceedings. Accordingly, I disregard witness 3’s evidence where it diverges into what I consider to be opinion evidence excluded by s.76 of the *Evidence Act 2008*.<sup>24</sup>
43. The mother has suffered a series of strokes and the medical evidence, and I might say common sense, indicates she has had periods of being slower to complete tasks, reduced physical prowess and it really goes without saying that she needs and, I am sure, appreciates the support the father provides around the home and his apparent availability and willingness to provide same.
44. On the basis of the evidence, provided largely by the DFFH, I find the father has spent time with the mother on multiple occasions, including spending extended periods of time with the mother in her home and I presume he is providing her with any required supports and would continue to do so if ZX were placed into her care. In the absence of any further

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<sup>22</sup> *A & B v Director of Family Services* (1996) 20 Fam LR 549 at 553-4.

<sup>23</sup> [2011] VSC 42; (2011) 36 VR 221 at [64].

<sup>24</sup> s. 76: The opinion rule- Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

reported incidents of family violence since April 2023 and in the context of the father spending significant amounts of time with the mother, I do not find family violence perpetrated by the father towards the mother to be a current protective concern and I find the risk of future family violence perpetrated by the father is mitigated by an order mandating him to complete a Mens Behaviour Change Program and to provide a certification of completion over the course of the order I have made.

### **DFFH consideration of reunification of the child with the mother**

45. The child ZX is described invariably as likeable, well mannered, “amazingly social and friendly...he happily works with anyone in the classroom...[he] has displayed a real care and compassion for others. Even when he doesn’t know them.”<sup>25</sup> Overall, “ZX is a well balanced boy”.<sup>26</sup>

46. Prior to his removal from his mother’s care in July 2022, ZX had lived the whole of his life in her sole care. It almost goes without saying that his well-balanced, caring and compassionate nature is in substantial part, due to how he has been raised in his mother’s care.

47. Witness 2 for the DFFH said in evidence, “I met ZX quite a few times, weekly. He was open and delightful. And further “I did observe him with his mother on more than one occasion...clearly a very strong bond.” “ZX has good memories of his mother and they had good times in the past. I supervised some contact and they were largely good. If it wasn’t, it was usually because of the mother’s difficulties with the Department...most of the time contact between ZX and his mother was quite positive”.

48. In relation to reunification of ZX to his mother, witness 2 said, “there were discussions about transitioning to overnights with the mother’s progression plan but at the end of my involvement ZX’s views were a bit up and down and so we thought it too soon. It was more to do with ZX’s views than protective concerns.”

49. In addition to the above, witness 2 said there had been no consideration given to reunification of ZX to his mother because: “It was difficult to work with the mother, she had little insight in the family violence, there was no real engagement whereas the father

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<sup>25</sup> Ex F2 DFFH Case note 9/8/2022.

<sup>26</sup> Ex F2 DFFH case note 9/8/2022.

was making real efforts, he was engaged with the school, ZX was happy with his father, the school was reporting ZX was doing better at school compared to when he was with his mother.”

50. In explaining why contact with the mother hadn't progressed, in somewhat of a contrast to his evidence above, witness 2 said: “Contact didn't progress...conversations around progression were aggressive, verbal aggression by the mother...there was never a consistent period of 2 weeks when there were consistent contacts and no concerns.”

51. As mentioned, by the time the final hearing recommenced, ZX's contact with his mother had progressed and no doubt related to that, his instructions/wishes and views had changed to wanting to return to live with his mother. I note ZX's very poignant comments to the independent children's lawyer back in August 2022 when he asked “Why does the Department say mum is a bad mum? She's not at all. Why don't they help her to clean the home?”<sup>27</sup>

### **The mother's mental and physical health**

52. The DFFH have raised concerns throughout the tendered and oral evidence about the mother's “extensive drug history” and her mental health being “possibly a Borderline Personality Disorder.”<sup>28</sup>

53. Further to this, witness 6 said in her evidence “the mother's emotional regulation is up and down. We'd like to see her engage with mental health and possibly a diagnosis to assist with her regulation. The main concern is the mother's inability to regulate herself.”<sup>29</sup>

54. The mother has engaged on a regular and substantial basis with an AOD counselling and treatment service; a forensic psychiatrist and a general medical practitioner, firstly Dr CS and then witness 16, both physicians at a Health Care Clinic.

55. The mother's AOD Counsellor [witness 14], her Forensic Psychiatrist [witness 15] and her General Medical Practitioner [witness 16] gave cogent evidence confirming the mother's

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<sup>27</sup> This was put to and confirmed by witness 1 in cross-examination on behalf of the ICL based on the s. 524(11) Statement filed 22 September 2023 on behalf of the Independent Children's Lawyer, Ms Melanie Younis at para 4.f.

<sup>28</sup> Oral evidence of witness 6.

<sup>29</sup> As above.



effective engagement in treatment, her medical and/or psychological health and in support of her general capacity to parent.

### **Psychiatric evaluation**

56. The mother's Forensic Psychiatrist [witness 15] gave evidence that he commenced seeing the mother in February 2023 following a referral from her then general medical practitioner, Dr CS, for opinion and management. Witness 15 was aware of child protection's involvement and that ZX had been removed from her care and also that it was one of the areas they focused on during their engagement. Witness 15 said mother engaged in 5 face-to-face sessions of between 30 to 40 minutes duration on a monthly basis so that he could obtain "a serial impression over at least a six month period". Witness 15 confirmed he was able to form a forensic opinion as to the mother's mental health over that period which was that she is "free from any diagnosable mental health condition" and that "she has been the entire time I have seen her". He advised the mother was underweight when he first saw her in February 2023 and that she was anxious, describing "separation from her son as the main stressor in her life". Witness 15 confirmed that over the course of their engagement, the mother's "physical health improved" and "her overall self-care improved".

57. From information contained in the referral, witness 15 was aware of the mother's medical history, that she had suffered multiple strokes and that she was prescribed various cardiovascular medications for her strokes, including aspirin. In relation to her strokes, witness 15 said "the mother had some minor difficulty with speech, but she could walk, she didn't have any marked speech problem. She is capable of engaging in day-to-day activity. There is no evidence that the mother's stroke would impact her parenting capacity."

58. In response to the DFFH concerns about the mother's hostility, aggression and heightened presentations, witness 15 gave evidence that "despite the difficulties of what's been happening [referring to the child protection involvement and the removal of her child] she appeared reasonable in her processes. I have never seen her emotionally dysregulated. She was also reasonable in her response to the length of time the child protection intervention was taking."

59. Witness 15 confirmed that in their most recent session on 25 July 2023, "there were still no substance issues and there were no thoughts or feelings of harm to herself...she had

contact with her child every day and was enjoying that and I noted that she had the capacity to look after a child, both physically and mentally.”

60. Witness 15 recommended a follow up appointment and I have made an order to that effect.

### **Medical evaluation**

61. Witness 16 gave evidence that the mother was a long-term patient of the practice, having seen Dr CS from 2017 prior to commencing seeing witness 16 from May 2023 after Dr CS’s departure and sees her at least once per month and sometimes more frequently. Witness 16 treats the mother “mainly in relation to her multiple strokes”, which began in February 2022<sup>30</sup> and “works in consultation with her neurologist”. Witness 16 said in her evidence that the strokes “impact [the mother’s] quality of life, movement, speech, self-care, cooking and basic tasks. She does them all, but the strokes affect how quickly she can do them.”

62. In relation to the impact of the mother’s medications, particular those prescribed for pain management, witness 16 said “Stroke victims get a lot of pain. The medication is not substantial given the mother’s diagnosis, it’s not extreme. She is not impacted by the medication in her daily tasks. I’ve never seen her drowsy. She is stable on the medications and she is reducing the pain medication.

63. Witness 16 was also aware that “the DFFH are involved in relation to whether she’s capable of looking after her son” and gave her opinion that “with support she is capable of looking after her son like anyone else with a disability. I don’t see why she wouldn’t be able to.” When asked what supports she meant, witness 16 said “more supports around the house, they are not specific to parenting. I think anyone with her medical history would need help around the house...maybe transport”.

64. When asked about whether the mother had ever presented as heightened or aggressive, witness 16 said “every time I see the mother she is very coherent, very logical and aware of her difficulties. The mother is very keen to do as much as she can, whatever she can, to obtain treatments and improve her health. She is distressed about her strokes but never

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<sup>30</sup> It is unclear on the evidence whether the actual strokes began in February 2022 or whether that was when they were detected through CT scans. The evidence of witness 16 was that CT scans revealed a number of previous strokes and it is unclear whether they were such that the mother may not have been aware of them at the time they occurred.

inappropriate.” And further “she often says her movement and speech make people say she is affected by drugs. She loves her child and wants him back.”

### **Alcohol and Drug Counselling**

65. Witness 14, social worker and counsellor, gave evidence that the mother self-referred to their alcohol and drug counselling services in August 2023 and that to date the mother had engaged in 6 to 7 sessions plus 3 assessment sessions, each session being around 45 to 60 minutes. Further to those, there were an additional 3 sessions, 28/9/2023; 10/10/2023 and 31/10/2023 with another session booked for 31/11/2023 with. Witness 14 said that “the mother had previously engaged with the service in June 2021 for about 6 months and then re-engaged in June 2023.” Witness 14 confirmed: “I can assist Ms Z for as long as she needs”.

66. Similarly to witness 15 and witness 16, witness 14 confirmed in her evidence that “[the mother] never became heightened or incapable of regulating her emotions. None of the other practitioners she had worked with had ever seen her unable to regulate her emotions or becoming heightened...the mother’s engagement is genuine... she is always proactive. I have never had to chase her and she comes across as authentic...she has been very receptive and there’s been no problems with engagement. I went back over the previous clinicians’ notes and they also had never seen any aggression or dysregulation.”

67. Witness 14, describing her approach as “strength based”, confirmed she provided general counselling as well as substance counselling: “I work on issues which might trigger her, how to remain calm, focused, breathe.”

68. Witness 14 confirmed she is a mandatory reporter and that she “makes that very clear”. She confirmed she had never seen the mother substance affected and, indeed, the mother had reduced her cannabis use significantly from 1g per day to 2gs per week.

69. On the basis of this professional evidence, I also find it is probable that the mother’s heightened, dysregulated states, described and detailed by child protection practitioners resulted from the child protection intervention, the removal of her child, exacerbated by the ongoing Departmental supervision of her contact with ZX. This in no way excuses the mother’s abusive behaviour towards child protection workers undertaking their statutory duties, including their duty to protect the child from harm but it does, however, make it more likely than not that the mother’s inability to remain calm, regulated and child focused

is restricted to that particular set of circumstances and not indicative of her behaviour generally.

70. I find the mother's positive, regular and substantial engagement with witness 15, witness 16 and witness 14 to be an ameliorating factor in terms of potential risk to ZX in her care. They are all mandatory reporters and witness 16 and witness 14 in particular engage with the mother at such regularity that I consider it an ongoing form of, not only effective support and treatment, but monitoring.

### **The child's educational progress impacted by trauma**

71. Witness 1's evidence in relation to ZX's schooling while in his mother's care was that "his attendance was erratic, like 3 days out of 5" and that "the old school [name deleted] reported that there were concerns about dirty clothes, clothes too small, some days he would have food, sometimes he wouldn't." The principal of ZX's new school, [name deleted] sent an email dated 9/8/2022 to his previous class teacher stating "ZX is settling in extremely well... extremely sensitive... takes offence at strategies... short periods of attention...gets over the top at instructions."<sup>31</sup>

72. I note the oral evidence of witness 1 in answering the proposition that ZX's parents must have done something right given he was frequently described as delightful and well balanced, "there have been concerns about what he has been exposed to...he was happy but the longer I knew him (ZX) there were other things brought to our attention from the school. Behavioural issues, attention issues, struggling to follow instructions...but I can't say that was from the parenting."

73. While, it was largely uncontested that ZX had been exposed to family violence between his parents including his own report that his "parents argued and he needed to yell 'stop'"<sup>32</sup> and that he had been exposed to his mother's escalations during contact supervised by child protection workers, there was no substantive evidence that this traumatised ZX, other than the reasonable hypothesis that children's exposure to family violence and aggression in parents does cause harm to children. Indeed, witness 4, a psychologist who worked with ZX through "a trauma-informed lens" when asked "what is ZX's trauma"<sup>33</sup> in cross examination, replied "it's hard for me to determine. The main trauma from ZX's perspective

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<sup>31</sup> Ex F2 p 1276 of the court book.

<sup>32</sup> Oral evidence of witness 4 reporting what ZX had said to her.

<sup>33</sup> Cross examination by Mr Draper on behalf of ZX's father.

was removal from his mother's care, his levels of anxiety about child protection involvement".

74. In forming her opinions, witness 4's evidence was that Catherine from [name of agency deleted] had told her the traumas were "John's schizo-affective disorder, his mother's PTSD, birth trauma and removal of ZX from her care." She said she had "no reports from the Department but that reports from [name of agency deleted] suggested family violence and alcohol and drug history for both parents as well as mental health problems."

75. It was clear from witness 4's evidence that her opinion and/ or assessment of ZX's trauma and the trauma lens through which she viewed ZX was not a result of her own inquiries, interviews and/or assessments. In other words, witness 4's opinion was not based on her own skills, specialist training or knowledge but rather akin to Chief Justice Gleeson's characterization of the expert evidence in *HG v R* (1999) 197 CLR 414, it was based on "a combination of speculation, inference, personal and second-hand views"<sup>34</sup>.

76. In turn, and in the absence of any expert evidence, I find there is no appreciable evidence at all linking trauma to ZX's academic performance.

77. Witness 11, assistant vice-principal of ZX's current Primary School, gave evidence in relation to ZX's progress during his time at the school which commenced midterm of year 2 in early 2022. In the beginning, witness 11 said "he struggled to settle in...there were no physical signs of neglect, it was just the lunch box. It had mould in it like it had come out of a bin." Witness 11 said "his past school reports said he had absences and was behind in his academic performance. They had had conflict with the mother and warned about that. They also said DFFH was involved."

78. Witness 11 said that on 21 July 2022, the DFFH came to the school to collect ZX and they said they were not taking him home to his mother. Witness 11 said "ZX was very averse to going. He said 'I don't want to go with you people, I want to go home' but the Department took him from the school."

79. Over the time ZX has been at [his current] school, particularly during the time with his father and grandparents, witness 11 said "he has made a lot of progress...he receives supports including social stencil; martial arts therapy; regular check-in with a teacher; tutor

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<sup>34</sup> At [41], relied upon by Heydon JA in *Makita and Sprowles* [2001] NSWCA 305 at [85].

learning initiative focusing on literacy.” He said “ZX is a very happy and enthusiastic participant in all of the activities”. The school also had student support meetings which are triggered by the DFFH placing children into Out of Home Care.<sup>35</sup>

80. Witness 11 gave evidence that “ZX’s writing, reading and maths are behind...he’s not developmentally at his peer level.” In cross-examination for the mother, witness 11 agreed that “Ms Z made the previous school aware of ZX’s attention difficulties...and that she wants ZX to have an ADHD assessment.” And further witness 11 said “I agree with that...I’d like him to have a cognitive assessment because I am concerned about why he is not progressing academically.”

81. Witness 11 confirmed ZX’s attendance at school is good, he’s going well on social learning, he’s been to some parties, made some friends. And similarly to the evidence of others, witness 11 said ZX “has a genuinely good heart, he is an absolute delight to teach and has a great sense of humour.”

82. Of note also was witness 11’s evidence that “2 weeks prior to this hearing, both parents had attended a school assembly in which ZX spoke.”

83. Witness 11 described the school as utilising a “particular model of education” which was “trauma-informed” and was a “whole school approach”. In addition to the supports around ZX discussed above, ZX had the benefit of a therapy dog and the educational needs analysis report completed in 2023.<sup>36</sup>

84. I am satisfied that the school provides a significant level of support to and around ZX and that its staff being mandatory reporters, a significant degree of monitoring. Overall, I find the school is a significant protective factor in ameliorating risk to ZXs in his mother’s care.

85. Accordingly, I have made an order that ZX enrolment in his current Primary School is to continue.

## **Conclusion**

86. It is for the reasons above that I make the Orders detailed in paragraphs [8] to [10].

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<sup>35</sup> Although it should be noted that from the time ZX was removed from his mother’s care, he resided with his father in the paternal grandparents’ home.

<sup>36</sup> Ex D40.