

IN THE CHILDREN'S COURT OF VICTORIA

FAMILY DIVISION

MAGISTRATE: R HAMILTON  
WHERE HELD: Melbourne  
DATE OF HEARING: 5-8, 12 March 2024  
DATE OF DECISION: 12 March 2024  
CASE MAY BE CITED AS: Secretary Department of Families Fairness and Housing  
("DFFH") v M siblings; I siblings [2024] ChCV 1

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CATCHWORDS – Applications for Care by Secretary Orders – Non-Reunification Case Plan – Children Removed From Parents From Birth – Father a Registered Sex Offender – Court Record of Conviction Proof Of Offences – s. 276(2)(b) *Children, Youth and Families Act 2005* ("CYFA") not satisfied – Best Interests of the Children – Unacceptable Risk of Harm – The DFFH using the mother's NDIS funding in its provision of services to the mother

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APPEARANCES

<u>PARTY</u>	<u>COUNSEL</u>	<u>SOLICITOR</u>
DFFH	Ms Theresa Porritt	CPLO
ICL	Ms Lyndon Woodfall	Dale and Younis
Mother	Self-Represented	
Father	Did not participate	

## **EVIDENCE**

### **WITNESSES**

Witness 1: Child Protection Practitioner, DFFH

Witness 2: Acting Team Manager Child Protection

Witness 3: Child Protection Practitioner, DFFH

Witness 4: [name deleted] Centre's Co-ordinator

Witness 5: Case Planner, Team Manager DFFH

Witness 6: Psychologist

Witness 7: General Practitioner

Witness 8: Psychologist, [name of organisation deleted]

Witness 9: Aboriginal Co-ordinator, [name deleted] Health

Witness 10: Social Worker, [name deleted] Hospital

Witness 11: NDIS Co-ordinator

The Mother

### **DOCUMENTS**

An Exhibit list of 51 documents tendered into evidence as annexed to the Reasons For Decision provided to the parties but is not included in these published Reasons.

## **HER HONOUR:**

1. This proceeding concerns three children, AM born [date deleted] now aged 2 yrs, BI and CI born [date deleted] now aged 1 yr.
2. All three children are the children of mother, Ms I (“the mother”) and father, Mr M (“the father”).
3. At the time of this hearing, the children’s parents live together.
4. The mother identifies as Aboriginal and a Cultural support plan has been endorsed for AM, although there remains a lack of confirmation of the mother’s Aboriginal lineage or her acceptance as an Aboriginal or Torres Strait Islander by an Aboriginal or Torres Strait Island community.<sup>1</sup>
5. All three children were removed from their parents’ care at the time of their respective births and have remained in out of home care to date. Consequently, the parents have never had any of the children in their care. The children are placed together in a VACCA endorsed foster care placement.
6. The DFFH did not present the children’s current foster placement as a long-term placement option. Indeed, as recently as November/December 2023, the DFFH moved all three children to a family placement in [location deleted] with a view to them remaining in that placement. The child protection witnesses also gave evidence of quality of care concerns in the current foster placement. The concerns detailed in tendered documents and confirmed in oral evidence included the foster carer failing to take the children, particularly AM, to scheduled medical appointments and contact supervisors reporting that the children often came from the carer’s home unwashed, wearing grubby clothes and presenting with symptoms of ill health described as “runny noses”. There has been no formal quality of care investigation to date.

## **Parties’ Positions**

7. The DFFH seek Care by Secretary Orders in relation to all three children.
8. The Mother seeks the return of the children to her care through a process of them spending increasing periods of time in her care.

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<sup>1</sup> S.3(1) CYFA - Definition of an “Aboriginal person”.

9. The Father attended on the first day of the hearing only. He did not appear at Court on any of the further 4 days of the hearing nor did he communicate with the Court by any means.

### **Substantive Applications and Current Orders**

10. Care by Secretary Order Applications filed 27 June 2023 (AM, BI and CI)
11. Protection Applications filed 2 February 2023 (BI and CI)
12. AM is subject to a Family Reunification Order made 17 May 2022 and BI and CI are subject to Interim Accommodation Orders first made 2 February 2023.

### **DECISION**

#### **On the basis of the evidence:**

13. I find all three children would be at an unacceptable risk of harm if placed into the mother's care at this time.
14. I find that over the course of the Family Reunification Order, the DFFH has taken all reasonable steps in order to provide the services to enable AM to reside with his mother and that it is in his best interests to make a Care by Secretary Order.<sup>2</sup>
15. I find that it is in AM's best interests to have contact with his mother on a minimum of one occasion each week for a minimum of 2 hours and that his twin siblings not attend that contact.
16. In relation to BI and CI, I am not satisfied the DFFH has taken all reasonable steps necessary to enable them to be placed into their mother's care<sup>3</sup> and therefore the application for a CBSO is refused. In its stead I find it is in these children's best interests to make a Family Reunification Order until 1 February 2025 with the conditions detailed in the Order made and provided to the parties on 12 March 2024.

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<sup>2</sup> S.276(2) CYFA.

<sup>3</sup> S.276(2) CYFA.

## REASONS FOR DECISION

### Statutory Considerations

#### Section 10 CYFA

17. In making these decisions, I have regarded the best interests of the children as the paramount consideration. I have considered the need to protect them from harm, to protect their rights and to promote their development.<sup>4</sup>
18. Further to the above, I have considered in particular the minimum interventions necessary to ensure the children's safety; the desirability of continuity and permanency in the children's care; the effects of cumulative patterns of harm on their safety and development and the capacity of the mother and/or father to provide for their needs.<sup>5</sup>
19. I have considered and applied the mandatory threshold test that a child is only to be removed from the care of parent if there is an unacceptable risk of harm<sup>6</sup>, having regard to *Department of Human Services v DR* [2013] VSC 579 at [54] where Elliott J noted there was 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.
20. I have considered and applied s.276(2) of the CYFA.
21. I have considered the s.215B provisions in the management of these proceedings and their impact on the children. I have also considered s.530 in relation to proceeding with expedition and avoiding adjournments to the maximum extent possible, commensurate with procedural fairness.

### Child Protection Concerns

22. The DFFH protective concerns are detailed throughout the DFFH Court Reports tendered into evidence as follows:
- (a) The mother's lack of antenatal care
  - (b) The father's conviction for child sexual offences, his denial of the offences and lack of remorse

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<sup>4</sup> Ss.10(1) and (2) CYFA.

<sup>5</sup> Ss.10(3) relevant factors.

<sup>6</sup> S.10(3)(g) CYFA.

- (c) The mother's lack of insight into the father's convictions
- (d) The mother's mental health concerns
- (e) Family violence perpetrated by the father against the mother
- (f) The mother's parenting capacity, including the impact her intellectual disability has on her capacity
- (g) The mother's lack of engagement with family violence services, NDIS co-ordinator and psychological support and inconsistent communication with DFFH.<sup>7</sup>

### **Mother's insight into the father's offending**

23. At the conclusion of the DFFH evidentiary case, the mother gave somewhat contradictory evidence about her plans for the children. At first, the mother gave evidence that in the 3 bedroom home she shares with the father, the plan is for AM to have a bedroom of his own, the twins will share a bedroom and she and the father will be in the remaining bedroom.<sup>8</sup>
24. Despite having described that plan, the mother gave subsequent evidence that her current living circumstances were unsafe and therefore it was not a suitable environment for the children to live in. She gave evidence that the children's father, in addition to the sexual offence against a child for which he has been convicted, had child pornography material on his mobile phone. The mother said she "very recently discovered child pornography on the father's mobile phone"<sup>9</sup>.
25. In relation to the father's convictions, the mother gave evidence refuting her lack of insight into the seriousness of the offences, stating that "it was more the lack of knowledge of the charges...I think one of the workers told me. I had a lack of knowledge about what actually happened. I did recognise the potential risk to my children and other children and that is my current concern, the charges and his pornography with 15 year old girls, it's written here that its underaged girls. It's made me more aware of what a risk he is. What I've seen on his phone. I saw this stuff about a month ago. I confronted him and he did not take it well."<sup>10</sup>

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<sup>7</sup> Ex D4 but these concerns are repeated throughout multiple DFFH Exhibits.

<sup>8</sup> I note, this bedroom configuration was put to the mother by counsel in cross-examination and the mother adopted counsel's suggested arrangement rather than proposing it on her own initiative.

<sup>9</sup> Oral evidence of the mother.

<sup>10</sup> Oral evidence of the mother.

26. The mother said her intention was to move out of the home she currently shares with the children's father and establish her own home, possibly with a friend who currently lives in [location deleted].
27. On the basis of the mother's evidence, I find that she does have insight into the risk the father poses to children. It was clear in her evidence that her intention to leave the father and establish her own home was based on insight into risk and the need to protect her children from exposure to harm.

### **Lack of antenatal care**

28. The DFFH protective concerns about the mother's lack of antenatal care during both of her pregnancies was confirmed by the [name deleted] Hospital medical records, selected parts of which were read into evidence by the witness called by the DFFH, Witness 10, senior social worker at the [name deleted] Hospital.<sup>11</sup>
29. Witness 10's evidence included the mother refusing medical interventions and admissions considered necessary for both AM and for the twins respectively. For example, the medical records indicate that on 4 August 2021, while 34 weeks pregnant with AM, the medical staff considered it necessary to induce the mother's labour. The mother removed the monitors and discharged herself against advice. She returned on 6 August 2021 and again the plan was to admit her for an induced labour. The mother again refused to remain in hospital in accordance with medical advice, necessitating a presumably less than optimum plan for her to return home with the insertion of a balloon. This was 2 days prior to AM's birth.
30. In relation to the mother's pregnancy with the twins, after multiple attempts by the Koori midwife to contact the mother after receiving the GP referral on 23 November 2022, the mother returned the call on 25 November 2022. The mother advised she could hardly walk and didn't know whether it was back pain or pregnancy.<sup>12</sup> She was advised to call an ambulance. The records indicate the mother did present for assessment but that she was agitated, looked distracted and wanted to leave. She didn't want any assessments or monitoring. She appeared to lack insight into the effects of not being assessed. The hospital staff opined one of the babies was possibly in a breach position

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<sup>11</sup> Witness 10 gave evidence that she had not personally worked with the M family and that she was simply accessing and reading from the hospital records.

<sup>12</sup> The mother confirmed evidence that she suffers from severe scoliosis which can result in significant pain and mobility issues.

necessitating an ultrasound. The mother refused to remain, signed a self-discharge against medical advice form and left the hospital.

31. On 30 November 2022 the [name deleted] Hospital midwife emailed this witness indicating there had been an urgent referral from the mother's general practitioner, there had been no antenatal care, that the mother had come into the hospital on 26 November but had quickly absconded after a call from her partner which included threats. Witness 10 recollected receiving the email and generally recalled the concerns the hospital had in relation to the father's violence. Exhibit D5 contains the following description: "On 30<sup>th</sup> of November 2022 [name deleted] hospital social worker advised that [the mother]'s gestation is unknown due to not having any ultrasound scans and that during a recent phone call between [the mother] and the midwife, [the mother] appeared agitated and was threatening the midwife. [The father] was also noted to be abusive over the phone and threatened to 'punch up' anyone that came near him, advising that at AM's birth he had a knife in his pocket. [The mother] declined to have any further tests despite being advised of the implication."<sup>13</sup>

32. While antenatal care as with medical care in general is voluntary, the mother's lack of antenatal care, particularly in relation to the twins, her disregard for medical advice during the critical 8-week pre-birth period and her active avoidance of necessary admissions, assessments and admissions raises significant protective concerns in relation to the mother's capacity to provide care for newborn and early stage babies.

33. On the basis of the evidence, I find the DFFH protection application in relation to the twins proven on the basis that they would likely have suffered harm in the care of the parents and the parents would not have had the capacity to protect them from that harm.

### **The mother's mental health, intellectual disability and parenting capacity**

34. Witness 1 gave evidence that the mother's mental health "remained unaddressed" and that "she had been sectioned under the Mental Health Act on two occasions in 2020 with suicidal ideation and depression" and further that "just prior to [AM]'s birth, the

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<sup>13</sup> Ex D5, Summary Information Form dated 2 February 2022 at pp. 132 and 133 of the Court Book.

mother presented at [name deleted] Hospital and was referred to a mental health service for suicidal ideation and low mood.”<sup>14</sup>

35. Witness 1 gave evidence that the DFFH “made many attempts to link the mother in with a psychologist. Witness 11 was the mother’s NDIS co-ordinator and he made three separate referrals for mental health. I continue to encourage the mother to link in with mental health services.”<sup>15</sup>

36. In evidence detailed below, it is apparent that the DFFH reliance on the mother’s NDIS co-ordinator, Witness 11, to put supports in place to assist the mother was misplaced.

### **The Mother’s NDIS co-ordination**

37. Witness 11, the mother’s NDIS package co-ordinator, gave evidence contradicting the DFFH evidence. When asked if he had tried to link the mother with a psychologist, Witness 11’s evidence was “No, I haven’t tried that, there has not been a referral to a psychologist.” Witness 11 further stated that “funding for a psychologist is not in the mother’s plan, however, funding for a psychologist could be used from the occupational therapy funds, this can be changed by discussion between the mother and myself.”<sup>16</sup>

38. Witness 11 gave evidence that at the request of the DFFH, he was “partially involved”<sup>17</sup> in arranging a cognitive assessment of the mother to be paid for from the mother’s NDIS package. There was no evidence provided by Witness 11 about any conversation he had with the mother about this use of her NDIS package nor, in particular, why it was considered to be of benefit of the mother. Indeed, the mother’s need for a cognitive assessment is contraindicated, given she had already qualified for the NDIS based on a cognitive assessment completed in 2012.<sup>18</sup> When challenged on his meetings, telephone calls and discussions with the mother in relation to her package and its use, Witness 11 presented as intentionally evasive and misleading.

39. The very few documents Witness 11 provided in response to the DFFH subpoena to produce all records, which Witness 11 described as “the complete records and

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<sup>14</sup> Oral evidence of Witness 1.

<sup>15</sup> Oral evidence of Witness 1.

<sup>16</sup> Oral evidence of Witness 11.

<sup>17</sup> Oral evidence of Witness 11.

<sup>18</sup> It was uncontested that the mother qualified for the NDIS on the basis of having an intellectual disability described as mild.

documents” he had in relation to the mother’s NDIS package/plan and of his role as co-ordinator, did not contain any records of telephone calls, conversations or meetings with child protection. Witness 11’s evidence was that “there are no notes, I haven’t written down any notes, I have had calls and email exchanges but I have not made any notes. There is one email with [Witness 1] dated 6 April 2022 about an update on referral for a psychologist.”

40. Witness 11 has been the mother’s NDIS co-ordinator for the past four years and it was quite apparent from his own evidence that he had done very little, if anything, to assist the mother with her NDIS plan. Nor was he able to give evidence, in any form, of any conversation he had with the mother to explain and obtain her consent for her funds to be used in response to a DFFH request for a cognitive assessment which it intended to rely upon in these court proceedings. I find Witness 11’s evidence and apparent conduct to be a wanton disregard of his obligations to the mother under the *National Disability Insurance Scheme Act 2013* (Cth) (“*NDIS Act*”)<sup>19</sup>, and that Witness 11 completely disregarded his record-keeping obligations.
41. By virtue of her intellectual disability, like many others in receipt of a NDIS package, the mother is particularly vulnerable to mismanagement of her much needed resources. It was clear from the mother’s evidence that she had very little information about her plan and that she had not been given sufficient information, if any at all, by Witness 11 about why and for what the DFFH was requesting her package to fund a cognitive assessment.
42. It was also apparent in the evidence of Witness 6 that at the time of undertaking the cognitive assessment<sup>20</sup>, she was not advised of child protection involvement nor that the DFFH intended to rely upon the assessment in support of its permanency objective in these court proceedings.
43. In the circumstances, I find that there was no possibility the mother gave informed consent either to the use of her NDIS funds for these purposes nor to undertaking the cognitive assessment given the psychologist was not provided with the context in which it was sought nor at whose request it was sought, thus preventing her from informing the mother of matters fundamental to her consent.

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<sup>19</sup> In particular ss.4, 5, 17A, 31, 34, 42, 43 of the *NDIS Act 2013*.

<sup>20</sup> Ex D25 Witness 6, Psychological Report of the mother dated 12 April 2023.

44. In making this finding, I am in no way critical of Witness 6. Her evidence and assessment were characterised by utmost professionalism and were very helpful in understanding how best to enhance the mother's capacities such that she could maximise her skills and potentials.
45. The *NDIS Act 2013* is drafted in a manner which is expressly and consistently beneficial to people with a disability. Under section 34 for example, which applies to "reasonable and necessary supports", the CEO must be satisfied that "the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals"<sup>21</sup>, that "it will assist the participant to undertake activities so as to facilitate the participant's social and economical participation"<sup>22</sup>...and most importantly, "the support will be, or is likely to be effective and beneficial for the participant"<sup>23</sup>.
46. As discussed below, given the Centre's program staff clearly did not access or rely upon the assessment recommendations on how to best work with the mother in any way at all, and there being no evidence from any child protection witnesses to indicate they had regarded any of the recommendations to improve the way that they worked with the mother on her parenting skills, there is simply nothing at all to suggest the assessment was in any way "effective or beneficial" for the mother.
47. I also note that the intended support must be "appropriately funded through the National Disability Insurance Scheme and is not more appropriately funded through other systems of service delivery...offered by a person, agency or system of service delivery..."<sup>24</sup>. In this regard I note that one of the central obligatory functions of the Secretary of the DFFH under the *Children, Youth and Families Act 2005* is "the provision of funding and resources for community-based child and family services and other services for families."<sup>25</sup>

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<sup>21</sup> S.34(1)(a) *NDIS Act*.

<sup>22</sup> S.34(1)(b) *NDIS Act*.

<sup>23</sup> S.34(1)(d) *NDIS Act*.

<sup>24</sup> S.34(1)(f) *NDIS Act*.

<sup>25</sup> S.21 CYFA. This is not the only section which refers to the Secretary providing services particularly aimed at supporting children to remain in the care of their parents and to supporting families generally. Indeed, it is made clear from s.1 of the CYFA that "the main purpose[s] of this Act are – (a) to provide for community services to support children and families".

48. This case serves as a warning to the DFFH in making direct requests to NDIS coordinators to allocate their participant's funding for assessments which it ought both facilitate and fund itself, particularly when the assessment sought is intended by the DFFH for use ostensibly against the participant in legal proceedings as was the case here. If it does so, apart from any ethical or legal ramifications in the DFFH using the NDIS other than for its stipulated purposes pursuant to the *NDIS Act*, the DFFH cannot be said to have discharged its obligations under the *Children, Youth and Families Act* to provide the necessary services to enable the child to remain in the care of the child's parent.<sup>26</sup>

**[Name deleted] Centre ('the Centre')**

49. The mother attended the Centre's 10 day residential program with her three children on 13 June 2023. Witness 4 gave evidence that "the mother was inconsistent in her ability to care for her children and required prompting and support from clinicians to meet their needs...she was observed to have difficulties in recognising and responding to the children's cues, responding and soothing to their signals of distress...requiring prompting in changing their nappies and offering bottles and food."<sup>27</sup>

50. Witness 4 also gave evidence that "ordinarily the program is 10 days however, the mother required such extensive support that it was too much of a demand on staff...we were unable to meet the goals, staff were so often required to step in to provide the care, there was little time to develop the mother's skill...we decided to terminate the program early... the mother queried our assessment of her capacity. She didn't agree with that. The conclusion after 3 days of the program was that "[the Centre] hold significant concerns regarding [the mother]'s current parenting capacity for [AM, CI and BI]."<sup>28</sup>

51. While the Centre's observations of the mother and all three children were somewhat similar to the DFFH contact observations, also of the mother and all three children, it became apparent through Witness 4's evidence that despite having knowledge of the mother's intellectual disability and despite being informed of the report and recommendations contained in the cognitive assessment on how best to tailor the Centre's program to maximise the mother's opportunity to learn, the Centre's staff

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<sup>26</sup> S.276(2)(b) CYFA.

<sup>27</sup> Oral evidence of Witness 4.

<sup>28</sup> Ex D24 at p. 410 of the Court Book.

disregarded the recommendations in their entirety. Witness 4 gave evidence that they usually do modify the program for parents with an intellectual disability by implementing different learning modes and modelling, however they had not done this for the mother.

52. Witness 4 conceded that not only had they not implemented any modifications to assist the mother but they were particularly understaffed during the period the mother and children were in the residential program and that this understaffing contributed substantially to the decision to terminate the program early.

53. I find the lack of modifications to the Centre's program to optimise the mother's opportunity to parent together with the understaffing and its impact on the staff's ability to work effectively with this family and the resultant cessation of the program on day 3 means that the report provided cannot be given significant weight as a parenting assessment and I treat it accordingly.

### **Protective Parenting Capacity Assessment**

54. Witness 8, psychologist with [name deleted], gave evidence in relation to his assessment report of the mother's protective parenting capacity dated 14 June 2023.<sup>29</sup> Witness 8 concluded that "[the mother] demonstrates inadequate cognitive, emotional and behavioural protective capacity."<sup>30</sup>

55. The Referral to Witness 8 was to assess the mother's capacity to supervise contact between the father and the children given that the father is a registered sex offender and assessed, also by Witness 8, as incapable of parenting without the presence of a protective adult.<sup>31</sup>

56. On the basis of sexual risk, Witness 8 assesses that the father "cannot be permitted to engage in sole parental care of a child/children".<sup>32</sup>

57. In relation to the mother's parenting capacity assessment, given the mother's evidence in chief that she believes the father is a risk to the safety and wellbeing of the children (discussed above) and that she intends to move out of that home, end the relationship

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<sup>29</sup> Ex D 30.

<sup>30</sup> Ex D 30 at p. 472 of the Court Book.

<sup>31</sup> Ex D 29 Forensic Psychosexual and Violence Risk Assessment dated 14 June 2023. Para 182 at p. 445 of the Court Book.

<sup>32</sup> Ex D 29 para 181 at p. 444 of the Court Book.

with the father and then seek the return of the children to her care independent of the father, the protective parenting capacity based on her insight into the father's offending and her capacity to protect the children from the risk he poses, loses some relevance if the mother's proposal comes to fruition.

## **The Father – Sex Offence Convictions**

### **Court Record is Proof of the Father's Offending**

58. The DFFH evidence in this case is that the father continues to deny he committed the indecent assault for which he is convicted.

59. I refer to the Court of Appeal's recent judgement in *Osborne v Butler* [2024] VSCA 6 which makes clear the provisions of s.92(2) of the *Evidence Act 2008*:

*"...the effect of s.92(2) is that evidence of a prior conviction within s.92(2) is admissible to prove the existence of a fact that was in issue in the criminal proceeding...it concerns evidence that a person has been convicted of an offence...it is the conviction itself which may be admitted, and treated as evidence of the existence of facts in issue in the criminal proceeding, namely the elements of the offence charged."*<sup>33</sup>

60. Section 178 of the *Evidence Act 2008* provides the evidence may be given by "certificate signed by a judge, a magistrate or registrar or other proper officer of the applicable court –

- (a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question; and
- (b) stating the time and place of the conviction, acquittal, sentence, order or proceeding; and
- (c) stating the title of the applicable court."<sup>34</sup>

61. The Notice of Order Made in Case Number F11218794 evidences that on 23 May 2016 following a Plea of Not Guilty, Magistrate Ehrlich found the accused, the father, committed an Indecent Act with a Child Under 16. Magistrate Ehrlich convicted the father and sentenced him to a Community Corrections Order for a period of 24 months with assessment and treatment for drug abuse and an offending behaviour program.

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<sup>33</sup> *Osborne v Burler* [2024] VSCA 6 at [31] and [34] per Emerton P, McLeish JA and Taylor JA.

<sup>34</sup> S.178(2) *Evidence Act 2008* cited at [20] per Emerton P, McLeish JA and Taylor JA.

The father was sentenced in relation to a registrable offence pursuant to the *Sex Offenders Registration Act 2004* and ordered to report to Victoria Police for a period of 15 years.<sup>35</sup>

62. While there appears to be no restrictions on the father having contact with children, ss.14 and 17 of the *Sex Offenders Registration Act 2004* impose a statutory obligation on the father to report the name, age, residential address and telephone number of each and any child with whom he has contact. That is, not only the child or children he has contact with at the time of his initial reporting, but every time that changes.<sup>36</sup>

63. Accordingly, the father committed the offence of indecent assault on a child under the age of 16, for which he is convicted and for which his status as a registered sex offender remains in effect.

### **Forensic Psychosexual and Violence Risk Assessment**

64. At the request of the Department, the father underwent a forensic psychosexual and violence risk assessment dated 14 June 2023 by Witness 8.<sup>37</sup>

65. Witness 8 confirmed his assessments during his oral evidence as follows:

- (a) “[The father] is assessed as low risk of perpetrating a sexual offence to his children and a moderate risk of perpetrating sexual offences against teen females. Unsupervised access to females aged between 14 and 17 remains an elevated risk scenario for [the father].”<sup>38</sup>
- (b) “[The father]’s violence appears to be predominantly characterised by coercive control and verbal abuse...his limited communication skills may result in him using instrumental violence, such as threats to get what he wants and potentially control his partners within relationship.”<sup>39</sup>
- (c) “A scenario where [the father] is violent is more likely to involve him being overly controlling or verbally abusive, including using threats of violence.”<sup>40</sup>

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<sup>35</sup> Ex C1.

<sup>36</sup> Ss.14,17 *Sex Offenders Registration Act 2004*.

<sup>37</sup> Ex D 29.

<sup>38</sup> Ex D 29 at para 372 p. 443 of the Court Book.

<sup>39</sup> Ex D 29 at para 175 p. 443 of the Court Book.

<sup>40</sup> Ex D 29 at para 176 p. 443 of the Court Book.

(d) [The father] cannot be permitted to engage in sole parental care of a child/children.”<sup>41</sup>

66. The father did not participate in these proceedings. Whether or not he would seek to parent the children on own or with an alternate protective adult is not an issue for determination. I am satisfied on the basis of the unchallenged evidence that the father presents an unacceptable risk of harm to the children if they were placed into his care and a risk to their safety and wellbeing if he were to have unsupervised contact with them.

### **Restrictions on the making of protection orders – s.276(2) CYFA**

67. Section 276(2) CYFA provides that the Court must not make a protection order that has the effect of removing a child from the care of the child’s parent unless:

- (a) the Court considers and rejects it as being contrary to the child’s best interests; and
- (b) the Court is satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary to enable to child to remain in the care of the child’s parent; and
- (c) the Court considers that the making of the order is in the best interests of the child.

68. Reasonable steps must relate to the circumstances of each case, each parent and each child’s particular needs. In this case, the evidence is that the DFFH relied upon the NDIS, in particular the mother’s NDIS co-ordinator Witness 11, to implement at least one of the necessary steps required to satisfy s. 276(2) and the evidence indicates Witness 11 did not take that step, namely, there was nothing done to arrange psychological treatment which the DFFH say was necessary to address its protective concerns about the mother’s mental health.

69. In addition to the above, in light of the mother’s intellectual disability and the availability of recommendations about how best to maximise her parental capacity, I consider the lack of implementation or even regard to those recommendations by both the Centre and child protection staff amounts to failing to take an essential and reasonable step.

70. Lastly, given the engrossing demands of infant twins together with AM’s difficult behavioural aspects, a reasonable step would and should have been to facilitate the

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<sup>41</sup> Ex D 29 at para 181 p. 444 of the Court Book.

mother spending time with the children separately or in the least, trialling separate contact between the mother and AM to that between the mother and the twins.

71. While I am satisfied that the Care by Secretary Order is in AM's best interests, I am not satisfied that all reasonable steps have been taken to promote the possibility of the twins being placed into their mother's care and there being almost twelve months remaining to effect a reunification process on a Family Reunification Order, I find it is in the twins' best interests to make that order.

72. It is for the reasons detailed above that I make the orders detailed in paragraphs [13]-[16] of this decision.

**Magistrate Hamilton**