

IN THE CHILDREN'S COURT OF VICTORIA

SITTING AT MELBOURNE

FAMILY DIVISION

MAGISTRATE: R HAMILTON
WHERE HELD: Melbourne
DATE OF HEARING: 4-8 & 11 December 2023; 20-22 May 2024
DATE OF DECISION: 6 June 2024
CASE MAY BE CITED AS: Secretary Department of Families, Fairness and Housing (DFFH) v E siblings
MEDIUM NEUTRAL CITATION: [2024] VChC 3

CATCHWORDS – Applications to breach Family Preservation Orders and replace them with Care by Secretary orders – Non-Reunification Case Plan – Parenting Capacity – Good Enough Parenting – Children in Separate Placements – Multiple Placement Changes – Stability and Consistency – Balancing Harms

APPEARANCES

	COUNSEL	SOLICITOR
DFFH	Ms Portelli	CPLO
Mother	Ms Foy	Avery Solicitors & Barristers
Child E3	Ms Hartnett	Victoria Legal Aid

EVIDENCE

WITNESSES

4-8 & 11 December 2023

Ms D, previously case manager, Child Protection [location deleted], DFFH

Ms P, Acting Senior Child Protection Practitioner, DFFH

Ms R, Family Preservation and Reunification Response (“FPRR”) practitioner

Ms T, [Agency] Take Two, Clinician

Ms D, [Allocated agency] Case Manager

Dr T, Children’s Court Clinician, Neuropsychological Assessment

Ms B, National Disability Insurance Scheme (“NDIS”) Support Coordinator

Mr S, NDIS

Mr W, Student Wellbeing Officer, [name deleted] Primary School

Ms M, Family Violence and Sexual Abuse Counsellor

Ms E, Disability Advocate

Ms L, Children’s Court Clinician

Mother

Resumption of Hearing 20-22 May 2024

Ms P, Acting Senior Child Protection Practitioner, DFFH

Ms T, [Agency] Take Two, Clinician

Ms H, Family Preservation and Reunification Program practitioner, [name deleted] Family Care

Dr R, Children’s Court Clinician

Mother

HER HONOUR:

Substantive Applications and Current Orders

1. The initial proceedings in December 2023 related to all four children of the mother and the father: E1 then aged 15 years, E2 then aged 12 years, E3 then aged 10 years and E4 then aged 7 years.
2. Proceedings relating to the older two children, E1 and E2, resolved with final orders by consent prior to the commencement of evidence on 4 December 2023. Accordingly, these Applications and Orders relate only to the two younger children, E3 and E4, although the Reasons for Decision encompass reference to all four children where relevant.
3. The substantive Applications are applications dated 15 June 2022 to breach Family Preservation Orders.
4. The current Interim Accommodation Orders were made on 16 June 2022, extended from time to time and varied on 11 December 2023.
5. I note that the DFFH has not filed an application for a Care by Secretary Order in relation to either child and accordingly the Applications to Breach the Family Preservation Orders are the substantive proceedings. The Interim Accommodation Orders made 16 June 2022 have in effect suspended the existing Family Preservation Orders on and from that same date.
6. Accordingly, the authorising provisions under the *Children, Youth and Families Act 2005* ("CYFA") for the making and/or revocation of a Family Preservation Order in these proceedings are set out in ss 311, 312, 316, 318(1), (2) and (3) CYFA.¹

Current Orders

7. Both E3 and E4 are on Interim Accommodation Orders to out of home care. They have been in separate placements since 4 June 2023. They are also both in separate placements from their siblings, E1 and E2. At this time all four children are in separate

¹ Division 13 Breach of Protection Orders: in particular s.311 Division applies to Family Preservation Orders and s.318 Decision of Court [on finding breach].

placements. The DFFH's proposed Orders and case plans would see the siblings remaining separated in long term placements.

Time in Out of Home Care

8. Both children have been out of parental care for a total of 1,676 days as at 20 May 2024.²

Parties' Positions

9. The DFFH seek Care by Secretary Orders in accordance with DFFH's long term out of home care case plans in relation to each child.
10. The mother seeks that both children be placed with her on Family Preservation Orders.
11. The child, E3 seeks reunification into her mother's care. E3 turned 10 years of age during the final hearing adjournment period and pursuant to s.524(9) CYFA E3 was legally represented on her instructions from that time. She was represented by Counsel for the duration of the final hearing commencing 20 May 2024.
12. The father has a significant acquired brain injury and has not participated in these proceedings at any time. Accordingly, the final hearing proceeded in his absence on both occasions.

DECISION

On the basis of the evidence:

13. I find the breaches of Family Preservation Orders filed on 15 June 2022 proven.
14. For the sake of clarity and to better reflect the family's current circumstances, I revoke pursuant to s.318(2)(c) CYFA, rather than affirm, the underlying Family Preservation Orders made on 13 October 2021.

² Ex D24, Update Report dated 16 May 2024

15. I find it is not in either child's best interests to make Care by Secretary Orders in line with the DFFH proposals and I therefore refuse the orders sought by the DFFH.
16. I find that both children remain in need of protection pursuant to s. 274 of the CYFA.
17. I find that it is in both children's best interests to place each of them into the care of their mother on Family Preservation Orders pursuant to s.318(3) CYFA for a period of 12 months from the date of this decision subject to the following conditions:
 - (1) The mother must accept visits from and cooperate with DFFH.
 - (2) The father must accept visits and cooperate with DFFH.
 - (3) The mother must accept support services as agreed with DFFH.
 - (4) The father must accept support services as agreed with DFFH.
 - (5) The mother must continue to go to family violence counselling as agreed with DFFH and must allow reports to be given to DFFH.
 - (6) The mother must continue to engage with a psychologist as agreed with DFFH and must allow reports to be given to DFFH.
 - (7) The mother must ensure the child attends medical and other treatment related appointments as required.
 - (8) The mother must submit to random supervised urine screens which are to reflect an overall gradual reduction of cannabis. This expectation does not apply in the event the mother is prescribed cannabis by an authorised medical practitioner and the cannabis is taken in accordance with that prescription.
 - (9) The father must not drink alcohol or use illegal drugs or be affected by same when with the child.
 - (10) The father may have telephone contact and face to face contact with the children as agreed between the father and the DFFH but face to face contact must not take place during the time the children are with their mother.
 - (11) The child may have contact with E1 and/or E2 for a minimum of once per fortnight supervised by the DFFH or its nominee unless DFFH assesses supervision unnecessary.
 - (12) The mother must maintain the home environment in a satisfactory condition.
 - (13) The mother must ensure the child is not brought into contact with Mr A at any time and the mother is to ensure he does not attend the children's home at any time either of the children are present.

- (14) The mother must continue to participate in the Family Preservation and Reunification Program must allow that provider to attend her home for that purpose.
- (15) The mother must ensure the child continues to attend upon Take Two, play therapy and/or other such therapeutic service as agreed between the mother and the DFFH.
- (16) The mother is not to directly expose the children to any cannabis use or to any cannabis or associated paraphernalia.
- (17) The child E3 may have respite as agreed between the mother and the DFFH.
- (18) Provided respite is available, the child, E4 is to have respite up to 3 consecutive nights per week as agreed between the mother and the DFFH. Such respite is not to interfere with the mother's and children's attendance upon the [name deleted] Café on Mondays. The respite is to be from after school Tuesday to the commencement of school Friday or 9am if a non-school day otherwise 3 consecutive days each week.

REASONS FOR DECISION

Statutory Considerations

Sections 8(1) & 10 CYFA

18. 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.³
19. 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 to provide for their needs.⁴
20. I have considered and applied the mandatory threshold test that a child is only to be removed from the care of a parent if there is an unacceptable risk of harm⁵ having regard to the dicta of Elliott J in *Department of Human Services v DR* [2013] VSC 579 at [54] that there is some 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.
21. I have considered and applied the mandatory relevant considerations pursuant to s.10 of the CYFA.⁶
22. I have considered the children's views pursuant to s10(3)(d), in particular noting the evidence that both E3 and E4 wish to return to their mother's care and that E3 instructed her legal representative to act accordingly. In considering the children's views, wishes and instructions I have had regard to *A & B v Children's Court of Victoria*⁷ in which His Honour Justice Garde affirmed the UN Committee Comment No 12 on the Rights of the Child that "[i]n fact there can be no correct application of article 3 [the child's best interests] if the components of article 12 [the child's right to be heard] are not respected."⁸ His Honour also approved the Committee's emphasis that "compliance with Article 12 is essential to the realisation of the rights in the Convention,

³ Ss.8(1), 10(1) and (2) CYFA

⁴ S.10(3) relevant factors

⁵ S.10(3)(g) CYFA

⁶ In particular, s.10(3)(a), (b), (d), (e), (f), (fa), (g), (j), (k), (n), (o)

⁷ [2012] VSC 589

⁸ *A & B* [92] Garde J citing UN Committee on the Rights of the Child *General Comment No 12: The Right of the Child to be Heard* CRC/C/GC/12 (2009) [74] emphasis added by Garde J.

which 'are not fully implemented if the child is not respected as a subject with her or his own views on the rights enshrined in the respective articles.'"⁹

23. I have considered and applied s.276 of the CYFA.
24. I have considered the s.215B provisions in the management of these proceedings, their impact on the children and also s.530 in relation to proceeding with expedition and avoiding adjournments to the maximum extent possible, commensurate with procedural fairness.

Background

25. Exhibit D4¹⁰ sets out the DFFH's brief summary of "a significant history with Child Protection". There were 8 child protection reports received since 2009, 2 of which progressed to protective intervention. The family lived in New South Wales for a period of time from 2009 and during the period between 2014 and 2016 New South Wales Child Protection received a total of 18 reports. There is no evidence detailing which, if any, of those reports progressed to investigation or judicial intervention.
26. Ms D gave evidence that over the course of child protection involvement, all four children had experienced multiple placement changes, particularly E3 and E4, the subject children in these proceedings.
27. All four children were placed into out of home care with the Maternal Grandmother on 14 February 2019 and when that broke down they were placed with their maternal aunt, these two placements totalling a period of almost 2 years before being reunified back into their mother's sole care on Family Preservation Orders ("FPO") made on 13 October 2021. They remained in their mother's care supported by frequent respite placements with Ms B (NDIS Support Coordinator) until the DFFH filed breach proceedings on 15 June 2022. All four children were then placed on numerous interim accommodation orders, eventually being separated from each other through a succession of different placements.

⁹ A & B [92]: footnote 58

¹⁰ Summary Information Form dated 15 June 2022

28. Exhibit D17¹¹ sets out a chronology of placements for E3 and E4. At the commencement of the first part of this hearing on 4 December 2023, following removal from her mother's care, E3 had experienced a total of 18 placement changes between 16 June 2022 and 17 September 2023 and E4 a total 15 placement changes, including numerous changes in respite placements.

DFFH Proposal for long term out of care – E3 and E4

29. The DFFH seeks Care by Secretary orders in accordance with its long term out of home case plans for both E3 and E4. Of significance in this case is that the DFFH have not yet identified carers committed to the long term care of either child. Exhibit D17 states E4's current carers, with whom he was placed on 27 October 2023 as an emergency placement, "have agreed to care for [E4] until a long term option is identified".
30. E3's current carers, with whom she was first placed as an emergency placement¹², then removed¹³ and then returned to as a respite placement¹⁴, then again removed¹⁵ and then again returned as a short term placement¹⁶ have "expressed interest in provided [sic] long term care for [E3]".¹⁷ Ms P's oral evidence on 20 May 2024 updated the carer's position, stating that "overnight contacts have put a strain on the placement", conceding "there is a possibility of a further placement change" for E3.
31. When I consider "the desirability of continuity and permanency in the child's care", a relevant and therefore a mandatory consideration pursuant to s.10(3)(f) CYFA, I find over the course of the DFFH intervention, particularly following the breach of Family Preservation Orders on 15 June 2022, there has been no continuity of care provided for by DFFH. Nor is there evidence of any permanency in future out of home placements for either child should the Secretary be granted parental responsibility as the DFFH proposes.
32. In light of the above, I accept the cogent evidence given by E3 and E4's Take Two clinician, Ms T, that "...changes of placement, continually moving and not knowing

¹¹ Placement chronology for E3 and E4

¹² 04/06/2023 Ex D17

¹³ 03/07/2023 Ex D17

¹⁴ 18/08/2023 Ex D17

¹⁵ 20/08/2023 Ex D17

¹⁶ 17/09/2023 Ex D17

¹⁷ Ex D17

where cause trauma... [and in relation to these children]. I can't tell whether the trauma from exposure to family violence earlier on or the trauma caused by the multiple placements is worse."¹⁸

33. "E4's difficulties have been perpetuated with multiple changes in care givers since the age of two. E4 has had limited experience of consistent and attuned caregiving which has been exacerbated by the nine placement changes towards the end of 2023."¹⁹
34. By contrast, the evidence indicates the children's mother has been a consistent, caring presence in their lives. Ms T from Take Two said, "[name deleted] is a very committed mother. Whilst she recognises that she finds aspects of parenting difficult she is warm and caring and tries hard to ensure that she meets E3's needs"²⁰ and in oral evidence in the December 2023 hearing, "she [the mother] attends all of the contacts, all of the care team meetings, all of the school meetings."²¹
35. Ms T said further, "whilst E4 hasn't been consistently cared for by his parents, his mother has been a constant relationship in his life. This is a protective factor for E4, knowing that his mother continues to love and care about him despite him not being in her care."²² I consider this is very likely so for E3 as well and of course, it is consistent with both children wishing to be reunified to their mother's care.

Evidence during the December 2023 hearing

Protective Concerns

36. The earliest of the DFFH Court Reports tendered into evidence dated 22 March 2022²³ sets out the protective concerns at that time as follows:
 - Significant home environment concerns
 - Lack of stability, consistency, routine, and support within the home for the children
 - The mother's unmanaged mental health

¹⁸ Oral evidence of Ms T

¹⁹ Ex D26, [name deleted] Take Two Report dated 23/4/2023 p.6

²⁰ Ex D19, [name deleted] Take Two Report dated 4 January 2023 p 409

²¹ Oral evidence of Ms T, December 2023

²² Ex D26 [name deleted] Take Two report dated 23/4/2023 p.6

²³ Exhibit D7

- Unmanaged behaviours of the children and the mother's capacity to respond
 - E1's unmanaged mental health
 - Lack of impact support services have had on the reunification
 - Alleged verbal abuse by the mother directed at the children
 - The mother's parental capacity to manage the children's behaviours
 - The mother's insight into appropriate sleeping arrangements for the children.
37. Ms D gave evidence that during the period when she was the allocated child protection worker between 9 September 2021 to 30 June 2022, while all 4 children were living in the home with their mother, "the protective concerns at the time were chaotic home environment, mouldy food on the floor, rubbish. I went there and there was smashed glass in the kitchen. The mother said it had been there for the past few days...the food scraps were through the entire house."
38. Ms D stated "the second concern was no routines...the NDIS, FPRR worker, the behavioural support worker and the mother said she struggled to get the children to bed at appropriate times. She said the boys didn't go to bed until 2.00am. She said the children got into the pantry overnight and in the morning she would find food and sugar all over the floor."
39. Ms D gave evidence of feedback from the FPRR worker, Ms F on 15 November 2021 that "the mother struggled with the four children...the kids destroyed the lounge room, smashed a window...there was heightened behaviour."
40. On 27 January 2022, the mother contacted Ms D advising that "the kids have wrecked the kitchen chairs, spilling food, calling me names and not listening"²⁴. Ms D said the mother told her that someone had to come out to fix the plumbing because the children had stuffed clothing down the sink.²⁵ The mother is reported to say "my mental health is suffering because I can't handle their behaviours, the two boys didn't go to bed until 2 am this morning."²⁶ Ms D agreed that the mother "was open with these difficulties"²⁷. This is confirmed in the DFFH Court Report dated 22 March 2022 where it is stated

²⁴ Ex D2 p. 8

²⁵ Ibid p 8

²⁶ Ibid p.8

²⁷ Oral evidence of Ms D

“[The mother] has openly expressed her struggles with managing the children’s behaviours and complex needs, including her own mental health.”²⁸

41. Despite the mother struggling with the children’s behaviour, particularly the behaviour exhibited by E2 and E4, Ms D “wrote the report in March 2022 and the plan was to extend the Family Preservation Order...at the time of the case plan on 22 March 2022, things were going well.”²⁹

The Children’s Behaviours and Complex Needs

42. During the time the children were in their mother’s care three of the four children, E1, E2 and E4, qualified for and received NDIS support on the basis of their disabilities. “[E3] was the only child not in receipt of disability services.”³⁰

E1

43. E1’s formal diagnosis is not easy to ascertain on the evidence presented in this hearing, save that she “has been diagnosed with an intellectual disability and she has complex behavioural support needs owing to her vulnerability. She displays high risk behaviours including absconding from the home and engaging in aggressive behaviour. She...has developed deliberate self harm behaviours.... she currently receives Occupational Therapy and Speech pathology interventions through NDIS funded services.”³¹ Further E1 “has attended [name deleted] Special Development School since Year 3,”³² and is described by her carer ³³as “preoccupied by social problems; misreading social relationships and situations due to her poor problem solving; using repetitive speech without context...displaying unusual adherences to routines...a poor understanding of personal space; and repetitive body movements with her arms...akin to students diagnosed with autism.”³⁴

²⁸ Ex D2 p.14

²⁹ Oral evidence of Ms D

³⁰ Oral evidence of Ms D

³¹ Ex C 1, p.7, Children’s Court Clinic Report dated 9/1/2023.

³² ExD3 p. 3, [name deleted] Children’s Services Confidential Medical Report.

³³ “the carer is a qualified early childhood teacher who has worked specifically with vulnerable children.”

Ex C2 p.16 Children’s Court Clinic Report dated 17/2/2023.

³⁴ Ex C2 p.16 Children’s Court Clinic Report dated 17/2/2023.

E2

44. “[E2] received a diagnosis of Intellectual Disability when he was a child..[He] received a diagnosis of Severe Language Disorder in 2020 after a speech Pathology Assessment...[E2] also holds a diagnosis of Epilepsy and experiences seizures occasionally.”³⁵ The comprehensive assessment for autism resulted in a further diagnosis of Autism Spectrum Disorder, Level 3 – Requiring very substantial support, with associated language impairment and with accompanying intellectual impairment.”³⁶

E4

45. Similar to E1, there is no direct evidence of E4’s diagnosis, nor the basis for his initial eligibility to receive NDIS funding.³⁷ Ms P’s evidence in the resumption of hearing on 20 May 2023 is that E4 is “diagnosed with Attention Deficit and Hyperactivity Disorder” for which he is prescribed medication and has recently been diagnosed with epilepsy, also for which he is prescribed medication.”³⁸
46. There was consistent evidence of E4’s behaviour deteriorating when he was with his brother E2. He was described as more heightened, more dysregulated and more difficult to contain. Ms T from Take Two gave evidence that “E4’s dysregulation could be a result of copying his brother.”³⁹ Ms D in her evidence of contact said “Usually [E4] escalates because [E2] becomes heightened.”

The mother’s parenting of all four children

47. The DFFH descriptions of all four children while in their mother’s care and during their contacts with her following their removal, appear multiple times throughout the tendered reports. There are also several descriptions contained in the Family Preservation Response Closure Report.⁴⁰

³⁵ Ex M1 Confidential Psychological Assessment Report, Ms B dated 5 November 2023 p. 3.

³⁶ Ibid p.11

³⁷ I note the oral evidence of Ms P on 20/5/2024 that “[E4] no longer qualifies for NDIS...he is reliant on further supports not funded through NDIS.” And further, “the NDIS funding stopped when [E4] turned 7.”

³⁸ Oral evidence of Ms P 20 May 2023

³⁹ Oral evidence of Ms T

⁴⁰ Ex D18, FPRR Closure Report dated 1/9/2022

48. Ms D, Case Manager for the Allocated agency described a contact on 13 November 2023 which was supervised at the Office and which, judging by the numerous similar accounts in the tendered material, was not unique. “[E2] was running around, the mother was chasing him and telling him not to go out of the building. He picked up rocks from the office and was saying ‘fuck you’ to the mother over and over. We attended to the other children who were on the basketball court. [E1] was laying face down on the court and [E3] was laying on top of her. As soon as [E3] got up, [E4] tried to lie on top of her. She pushed him off and he started kicking her and screaming. [E1] was saying ‘fuck off cunt’. I asked them to stop. [E4] walked off heightened and screaming ‘fuck off fucking cunt’ and [E3] was in the corner sobbing...the mother was supporting [E2]. The mother came to the court and was heightened and out of breath. She said ‘I did not fucking agree to this. If you’re staying I’m cancelling this now. Then [E1] said, ‘I’d rather die than have contact cancelled.’ We had to separate all the children and the mother walked off.”⁴¹
49. Ms D then described contact the previous week. “On 6 November 2023, the family were on the basketball court. [E2] ran into the office and started to masturbate. The receptionist asked him to stop and he did. The family came in shortly after. Reception was closed down because of the impact that behaviour had on the worker.”⁴²
50. Ms D said, “when one of them escalates, there is a chain reaction which requires 3 adults, sometimes 6 adults to contain them...when it was like that, it is impossible for one person to manage the situation, I couldn’t manage it which is why I required support.”⁴³
51. Ms P gave similar evidence of reports from the NDIS co-ordinator Ms B when she could no longer sustain the children’s placement with her: “Ms [B] sent a message saying she is struggling to manage all four children’s behaviours and has requested access to respite...she also said [E2] might have to leave my home soon because his behaviours are getting worse, he’s threatening and scaring my animals and I can’t have that.”⁴⁴ When asked if Ms B could manage E2’s behaviour, Ms P said, “No, Ms B

⁴¹ Oral evidence of Ms D.

⁴² Ibid

⁴³ Ibid.

⁴⁴ Oral evidence of Ms P 23 May 2023. Also contained in Ex D6 at p. 4, Short Form Update Report dated 22/7/2022

also says she can't manage E2. She doesn't lack insight, it's that E2's behaviour has been a consistent struggle throughout the intervention."⁴⁵

52. In advising the DFFH that she could not care for the children beyond 12 August 2022, "Ms [B] expressed that she cannot have all four children ongoing as their behaviours together are too challenging and felt [E2]'s behaviour negatively impact [sic] on the other children".⁴⁶
53. I refer to the evidence of the Children's Court Clinician: "It should be noted that [E1], [E2] and [E4] present with their own development needs which render them particularly vulnerable. Parenting four children would be challenging for any well-resourced family."⁴⁷ The inference accepted by the Court is that the mother as a sole parent, devoid of adequate financial resources, living with an IQ in the borderline range, would find parenting all four children with their intensely difficult behavioural manifestations challenging in the extreme.
54. Noted above, these proceedings are in relation to the two younger children only, the two older children's matters having already resolved with both children remaining in separate out of home placements pursuant to final orders granting the Secretary parental responsibility to the exclusion of all others.
55. The evidence as at 11 December 2023, upon which the Court relies to determine "unacceptable risk of harm"⁴⁸; "good enough parenting"⁴⁹; and "intervention[s] ... necessary to secure the safety and wellbeing of the child"⁵⁰ was entirely based upon the mother's capacity to parent all four children. The evidence presented, particularly by the DFFH witnesses, including tendered exhibits and the Children's Court Clinician, Ms L⁵¹, might suggest an unacceptable risk of harm to the children if all four of them were in the mother's sole care. However, that is no longer a matter for this Court to decide.

⁴⁵ S.276(1)(b) CYFA

⁴⁶ Ex D6 p. 4 DFFH Short Form Update Report dated 22/7/2022

⁴⁷ Ex C2 p.25, Children's Court Clinic Report dated 17/2/2023

⁴⁸ S.10(3)(g) CYFA

⁴⁹ Affirmed in *DoHS v Mr D & Ms B* [2008] VChC 2 at pp65-66 per Magistrate Power

⁵⁰ S.10(3)(a) CYFA

⁵¹ Children's Court Clinic Report dated 17/2/2023 authored by Ms L

56. The matter for determination in this proceeding is whether there is an unacceptable risk of harm to E3 and E4 in the care of their mother and if there is, whether that risk can be ameliorated by the imposition of conditions and/or the provision of services.

Adjournment on 11 December 2023

57. As at 11 December 2023, I am satisfied that the DFFH took all reasonable steps to provide the necessary services to afford the mother the opportunity to have all four children reunified to her care. The services are detailed throughout the DFFH's exhibited evidence and confirmed throughout the oral evidence of relevant witnesses. They include substantial services provided by the Family Preservation and Reunification Program. The DFFH also included and relied on services provided through NDIS funding as "reasonable steps taken...and services provided by the Secretary".
58. I do not accept that services provided to a participant (recipient) under a participant's NDIS plan constitute a step taken by Secretary pursuant to s.276 CYFA and indeed, the Secretary ought take care to avoid unduly influencing how recipients decide upon and dispense their funds.⁵² Further, in a case such as this one, where the NDIS participant (recipient) is a child, in the absence of any order to the contrary⁵³, it is the child's parent who decides and authorises the provision of NDIS funded services and accordingly, in the least, the facilitation of the services provided ought be attributed to the children's mother in the exercise of parental responsibility for her children's health.
59. Of significance to these reasons – and also that which necessitated an adjournment of the hearing on 11 December 2023 – is the lack of steps taken by the DFFH to provide the mother with the opportunity to parent her two younger children, E3 and E4, on their own. The mother recognised and reported this back in August 2022, the evidence of which is included in the FPRR closure Report: "[The mother] has expressed that she believes that she could take care of two children at one time but not all four."

⁵² See *DFFH v M siblings; I siblings* [2024] ChCV 1 at [36] – [48]

⁵³ The children are subject to Interim Accommodation Orders resulting from a breach a Family Preservation Order neither of which negate or limit the mother's exclusive parental responsibility for major long term decisions in relation to her children. The *Family Law Act 1975* (Cth) s. 4 defines major long term decisions as "including but not limited to: (a) the child's education (both current and future); (b) the child's religious and cultural upbringing; (c) the child's health;(d) the child's name; and (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent".

60. However, the DFFH did not take steps to afford the mother that opportunity despite it being both reasonable and necessary given the mother's express proposal to parent two rather than four of her children. Accordingly at 11 December 2023, the DFFH fell short of satisfying the Court – pursuant to s.276 CYFA – that “all reasonable steps have been taken by the Secretary to provide the services necessary to enable the child to remain in the care of the child’s parent”⁵⁴, nor did it satisfy the Court that “all reasonable steps have been taken by the Secretary to provide the services necessary in the best interests of the child.”

s.276 Restrictions on the making of protection orders

61. Consequently, as at 11 December 2023, the “s.276 Restrictions on the making of protection orders” prohibited the making of a protection order by this Court prior to those steps being taken by the Secretary, thus necessitating an adjournment to enable those steps to be taken.

Evidence as at resumption of proceedings: 20 May 2024

62. When the hearing resumed on 20 May 2024, following a period of increasing contact, the children E3 and E4 were spending 3 overnights with their mother which commenced just before the commencement of the school year in January 2024. Despite the Court specifying the optimum being three consecutive nights on Friday, Saturday and Sunday in the orders made on 11 December 2023, the DFFH's evidence was that they were not able to facilitate the necessary transport for weekend contact. Inexplicably,⁵⁵ the DFFH arranged contact to occur on Monday, Wednesday and Thursday nights.

63. The further evidence presented at the resumption of the hearing included the DFFH Update Report dated 16 May 2024⁵⁶; Take Two Assessment Report in relation to E3 dated 28 April 2024⁵⁷; Take Two Assessment Report in relation to E4 dated 23 April

⁵⁴ S.276(2)(b) CYFA

⁵⁵ The evidence of Ms P was that the DFFH was not able to facilitate transport for the contact proposed by the Court as the best arrangement for the children. It is difficult to accept this rationale. The mother collects the children from school in the week day afternoons and she drops them off at school in the mornings. I see no difference in the Mother collecting the children from school on Friday and dropping them off at school on Mondays. It was not challenged in cross-examination so I take it no further.

⁵⁶ Ex D24

⁵⁷ Ex D25

2024⁵⁸; FPRR Intervention Summary ([the mother]) presumed to be dated 5 May 2024⁵⁹; and the Children's Court Clinic Court Report by Dr R dated 1 May 2024.⁶⁰

64. Evidence of the mother's consistency of care remained similar to that in the December 2023 hearing. Ms P gave evidence that over the adjournment period, "the mother has attended all contacts...[the mother] has been able to ensure that the children attend school every day with the appropriate school uniform and items."⁶¹
65. The DFFH position seeking CBSOs for both children with long term out of home care case plans remained unchanged. The Updated Report⁶² detailed the protective concerns supporting its applications as follows;
- (1) Mother's....and father's parenting capacity, and ability to adequately care for all four children
 - (2) The children's exposure to parental illicit substance use including previous methamphetamine, and current cannabis use
 - (3) The children's experiences of a chaotic lifestyle in parental care
 - (4) The mother's ability to manage the children's heightened behaviours during contact and in the family home.
 - (5) The mother inadequately supervising the children.
 - (6) In the care of the mother, the children's basic health needs not being met.
 - (7) The mother's inability to prioritise the children's safety and wellbeing over her relationship with Mr A.
 - (8) Environmental concerns in relation to the mother's home. This being assessed to be below minimum standards when the children resided in her care.
 - (9) Mr A's family violence perpetration towards the mother, and the impacts of this on the mother and the children's safety.
 - (10) Mr A's lack of engagement with support services to address family violence concerns and illicit substance concerns.
 - (11) The father's use of inappropriate discipline on the children.
 - (12) The father's acquired brain injury, and the impacts of this on his parenting capacity and ability to provide safe and attuned care to the children.

⁵⁸ Ex D26

⁵⁹ Ex D27

⁶⁰ Ex C3. This is a report conducted by a different Clinician assessing a very different family configuration to that assessed by the author of the Court Report dated 9 February 2023 and accordingly I do not consider it an updated assessment.

⁶¹ Oral evidence of Ms P, May 2024 hearing. Confirmed in Ex D 24.

⁶² Ex D24

- (13) The father's poor mental health and his self-reported daily thoughts of suicide.
- (14) The father's inappropriate conversations with the children causing them emotional distress.

66. Save for the inclusion of "including previous methamphetamine, and current cannabis use" in point 2 and the inclusion of point 7 – the mother prioritising Mr A over her children – and point 14 – the father's inappropriate conversations with the children, the protective concerns described at 16 May 2024 are identical to those contained on page 1 of the Short Form Update Report dated 24 March 2023 in relation to all four children in the mother's care which was tendered into evidence on 6 December 2023.⁶³
67. At the date of this hearing, many of the relied upon protective concerns are no longer relevant or have been negated.⁶⁴ The continuing and/or current protective concerns detailed in the oral evidence of Ms P and in the Update Report dated 16 May 2024⁶⁵ at the commencement of the May 2024 hearing were as follows;
- Sleep Routines
 - Adherence to Safety Plan
 - E4's medication and medical appointments
 - The children's use of technology
 - The mother's cannabis use.

Sleep Routines

68. Ms P gave evidence that over the three months that the children were in the mother's care for three nights each week there remained a protective concern about the children's sleep routines. Ms P said "the mother advised that [E4] was going to school tired because he was not going to sleep until 9pm and on another occasion, he went to sleep at 10.30pm". Ms P confirmed that the transport worker had also "highlighted [E4]'s tiredness" as well as the carer, Ms M."⁶⁶

⁶³ Ex D10

⁶⁴ The DFFH case no longer relies upon Mr A engaging in support services, the father is not seeking nor is being considered as a care giver, the mother's inadequate supervision of the children, parental capacity and chaotic lifestyle relates to all four children in her care and it is agreed in evidence that the mother's historic methamphetamine is no longer a protective concern.

⁶⁵ Ex D24

⁶⁶ Oral evidence of Ms P

69. Ms P said, “[E4]’s sleeping patterns have not improved over the engagement.”⁶⁷ I refer to the evidence, discussed above, that prior to removal from their mother’s care in June 2022, both E2 and E4 were not going to bed until 2am which, on the contrary, suggests a significant improvement in E4’s sleep routine during this period in his mother’s care.
70. When evidencing the impact of E4’s tiredness at school, Ms P relayed advice she received from the school that “[E4] is heightened and not able to regulate...he has been suspended for kicking other students and causing property damage...he is now on a reduced timetable which means he is collected from school early.”
71. Ms P said further, “in relation to the escalation... the transition between houses is difficult for [E4]...at the carers he is in bed by 8.15pm... [E4] says he is sleeping in his mother’s bed as well. The mother says it’s a comfort thing and makes it easier for him to fall asleep.”⁶⁸
72. It is not uncommon for children to struggle with moving back and forth between homes, particularly when it is multiple times within a week. When added to travel to school and back to different homes and to medical appointments and back, for a child with ADHD, the changes are likely to be all the more difficult to manage.
73. I do find the mother struggles to get the children into their own beds and to sleep at an appropriate time. The mother gave evidence herself of her struggle and the ways she is countering the children’s resistance. The mother gave evidence that when E3 in particular would not sleep in her own room or when E4 has had difficulty getting to sleep, she has allowed the children to sleep in her room, at times, one sharing her bed with her and the other sleeping on an assembled bed of cushions on the floor.

Safety Plan

74. Ms P gave evidence that the mother has implemented an agreed upon safety plan which entails “the children not going to the toilet together; not getting dressed together; not showering together and not sleeping in the same room”. However Ms P stated that “the children have reported sleeping in the same bed which the mother said was only

⁶⁷ Oral evidence of Ms P

⁶⁸ Ibid

on one occasion.”⁶⁹ Ms P said “we have multiple discussions around the risk of sexualised behaviours and the children still sleeping in the same bed is a concern.”⁷⁰

75. Further to para 73 above, the mother gave evidence that on the occasion when both children slept in the same bed, it was in her bed with one of them either side of her and the purpose was to get them off to sleep more easily. The mother also advised DFFH that “[E4] has slept in her bed a few times but the majority of time sleeps on [sic] his own bed. [The mother] stated that E4 hasn’t articulated the reason for sleeping in her bed but she believes its for extra comfort.”⁷¹
76. In response to safety plan concerns, the Updated Report dated 16 May 2024⁷² states “child protection recommended [the mother] sharing with the care team to ensure the family are well supported by all professionals involved in [sic] which [the mother] agreed.”⁷³
77. I consider the reported incident’s of E4’s sexualised behaviour to be a protective concern. However I find the mother’s implementation of the safety plan, taking into account the occasions when either or both of her children have slept in her room, is such that the risk does not amount to an unacceptable risk of harm to either child. I note in making this finding that there are no reported incidents of sexualised behaviour while the children have been having increased contact with their mother in the family home, save for reported comments of E3 discussed below. The most recent reported incident occurred in the respite carer’s home in December 2023 and is described as follows; “...[E4] asked had asked the carers for the 8 year old boy to have a sleep over in his room for the night. The carers allowed the sleep over, and the young person reported that [E4]’s penis being in his mouth “for a little while”.⁷⁴ I note [E4] is engaged with Take Two and I have made a condition necessitating his continuing engagement with that service.
78. I refer to the Department Update Report dated 16 May 2024⁷⁵ which states the following: “Child Protection asked [E3] if there was anything in her that she would change and she stated ‘[E4] getting away from me’.” E3 reported that “[E4] hugs a lot”

⁶⁹ Oral evidence of Ms P

⁷⁰ Ibid.

⁷¹ Ex D24

⁷² Ex D24

⁷³ Ex D24

⁷⁴ Ex D24

⁷⁵ Ex D24.

and this occurs every morning and afternoon and at home. E3 reported that she tells E4 to “get off” in which [sic] he doesn’t but then she “shouts at him to get off” and he does.⁷⁶ Given E4’s and E2’s significant patterns of sexualised behaviour detailed throughout the child protection evidence, including E4’s most recent reported incident in December 2023, E4’s repeated “hugging” E3 against her expressed will must be seen in the context of E4’s sexualised behaviour. It is absolutely clear from her reported comments that E3 does not consent to the manner in which E4 physically encompasses her, that he persists to do so in circumstances where it is obviously against her will and E3 has had to essentially fight him off by yelling at him to stop. This is reported to be a daily experience in E3’s life. E3 has a human right to authority and agency over her own body. Both the mother and the Take Two clinician must address E4’s behaviour in the context of sexualised behaviour and take proactive steps aimed at eliminating his persistent breaches of E3’s personal boundary.

79. In addition to the above therapeutic intervention, I have made an order that E4 spend 3 consecutive nights in respite each week. It is clear from the evidence that E4 and particularly the combination of E4 and E2 have overshadowed to a point of interference with E3 and E1’s relationship with their mother and the sanctity of their personal space. The regular and consecutive respite for E4 provides E3 with the opportunity to have substantial time on a one to one basis with her mother and substantial time during the school week to reside in her home without the disruption and attention seeking behaviour symptomatic of E4’s ADHD.

Medical Appointments and medication

80. A further protective concern raised by child protection is the mother “forgetting to give [E4] his medication” and “not attending appointments”. Ms P gave evidence, which is also detailed in the DFFH Update Report⁷⁷ as “On 30 January 2024, [the mother] supported [E4] to attend his paediatrician appointment. However it is noted that due to this appointment on this day, [the mother] forgot to administer [E4] his lunchtime medication....on 14 May 2024, [E3] missed a paediatrician appointment at [location deleted].”⁷⁸ Ms P also gave oral evidence that the mother “was meant to attend [E4]’s paediatrician appointment but the carer took him instead.”⁷⁹

⁷⁶ Ex D24

⁷⁷ Ex D24.

⁷⁸ Ex D 24 confirmed in Mr P’s oral evidence. May Hearing 2024.

⁷⁹ Ms P’s oral evidence May hearing 2024.

81. The mother gave uncontested evidence of a complicated medication handover system between the mother, the school and the carer due to E4's medication not being an authorised medication for more than one prescription being filled at the one time. This has meant that the one amount of medication has to be handed back and forth between the households and with the mother providing a portion to be held at the school for administration during the school day. The mother gave evidence disputing the protective concern that she had "forgotten to give [E4] his medication" stating that "the school had sufficient medication for [E4] to be administered his medication at the school."
82. The mother also gave evidence that on one occasion, she had forgotten E4's paediatric appointment but as soon as she was notified, she made immediate arrangements for him to be transported to the appointment which she joined via telephone. The mother's evidence was that she was present via the telephone for the entire consultation and that E4's treating practitioner had, as is proper, conducted the consultation as between himself and E4's mother.
83. While I do not consider these protective concerns raise an unacceptable risk, and indeed, on their own I do not consider them elevated to the category of protective concern, I note that the mother lives with a somewhat compromised cognitive capacity and part of the supports provided to the mother which the continuing statutory involvement ensure is to maximise the mother's parental capacity. The mother gave evidence that she had accepted and implemented the FPR suggestion of a large white board covering all appointments and obligations on a monthly basis. I consider the continuation of the FRP support in the mother's home, stipulated in this order, is sufficient to mitigate concerns in this regard.

The children's use of technology

84. Ms P gave evidence that "the biggest one [protective concern] is around technology...the children are often on the mother's phone.. [E3] has been on the mother's phone a lot when I have been there."⁸⁰
85. I consider children's use and/or overuse of technology is an issue of common concern to most parents and more broadly, a common community concern which, in the

⁸⁰ Oral evidence of Ms P May Hearing 2024

absence of a sinister and/or demonstrably harmful element⁸¹, I find falls short of constituting a protective concern.

86. Of course, the mother must oversee the content accessed online by both children. It is her responsibility as their parent to ensure, by all measures possible, that they are not accessing the types of sinister material I have included examples of in this decision.

The mother's cannabis use

87. The mother's level of cannabis use remains an ongoing protective concern, although evidence in the May 2024 hearing indicated at least an uncontested period of reduced consumption.

88. The mother is engaged with a number of services:

- the Family Preservation and Reunification Response Program who attend her home;
- the Take Two Program with whom the mother and children meet regularly;
- the mother has continued her engagement with her psychologist, Mr G;
- the mother has commenced equine therapy; and
- there is evidence that the mother successfully achieved her goals set with Ms M, Family Violence and Sexual Abuse Counsellor.

This is in addition to evidence given that the mother was present for all scheduled contact, school engagements, care team meetings and had ensured the children attended school every day with all they required for the day.

89. I accept Child Protection's concerns that the level of cannabis the mother uses over the demonstrable period of usage is likely to impair or at least inhibit the mother's potential parenting and/or cognitive capacity. I also note the evidence of Children's Court Clinician Dr R that "I imagine the degrees of use [that is, the mother's use of cannabis] impact on functions, I suspect it has impact."⁸²

⁸¹ By this, I mean for example, children accessing pornography and other inappropriate sexual and/or violent content; inadvertent exposure to online sexual predators, using technology to bully, harass or menace, accessing sites which illicit money, using mobile phones and/or other such devices in circumstances which risk harm such as crossing roads, prolonged periods to the extent that health and wellbeing deteriorates or is at risk of deterioration.

⁸² Oral evidence of Dr R, May 2024 Hearing.

90. However, there is no evidence that the mother's engagement with support services, meetings, appointments and obligations described above, or her capacity to provide good enough care to these two children is compromised by her cannabis use to a demonstrable degree.
91. Nonetheless, cannabis is an illicit substance. The support services in place for the mother are all, in one way or another, directed to enhancing the mother's parenting capacity such that her parenting of E3 and E4 is and remains good enough to ensure their safety and well being. The orders I have made in relation to the mother's gradual reduction and ultimate cessation of cannabis use are another necessary intervention to ensure and quite possibly enhance the mother's continuing parenting capacity and are imposed upon the mother for that reason.

The mother's relationship with Mr A

92. The protective concerns around the mother's relationship with Mr A is referred to throughout the DFFH reports over the period of this involvement. The mother has had a significant and ongoing relationship with Mr A, although for the most part they have not resided together, with the mother visiting him on weekends, and he has not been involved to any degree in parenting the children. Ms D gave evidence in the first part of the hearing that she "didn't know about him through my time until he became homeless and the mother invited him to live with her on 19 April 2022."⁸³
93. Ms D gave evidence that over the period prior to Mr A living in the home, "things were going well...and I wrote the Court Report in March 2022, the plan was to extend the FPO."⁸⁴ Within eight weeks of Mr A's moving into the family home, the protective concerns increased such that on 16 June 2022 all four children were removed from their mother's care.⁸⁵ The timing leaves no doubt that the most significant protective concern precipitating removal was Mr A's presence and behaviour in the children's lives.

⁸³ Detailed in the Summary Information Form ("Form B") dated 15 June 2022 Ex D 4.

⁸⁴ Oral evidence of Ms D December 2024 Hearing

⁸⁵ All four children were placed on interim accommodation orders to out of home care placements resulting from a "submissions contest" and not by way of evidence or findings of fact. Justice Gillard describes submissions contests as "a procedure...adopted by the Children's Court whereby the application is determined on assertions and submissions made by parties present at the hearing...an interim measure to ensure that the child is not exposed to any physical or mental danger...usually made on untested material and sometimes as a matter of urgency." *Purcell v R.M. & Ors* [2004] VSC 14 [19] and [25]

94. Included in Exhibit D 4 headed “Matters leading to Breach Family Preservation Order”, child protection “received a report that Mr [A] had begun residing in the home with the children and [the mother]. It was further reported that [the mother] disclosed family violence perpetrated by Mr [A], such as Mr [A] often becoming jealous and regularly calling her a whore and a ‘slut’”.⁸⁶
95. The Form B states further: “On 25 May 2022, Child Protection received a report that [E1] had presented with bruises to her body and made disclosures that the bruising on her arms and legs are the result of Mr [A] hitting her...[The mother] displayed a significant lack of insight into her role as the care giver of the children by continuously placing blame on the children for their behaviours. [The mother] minimised [E1]’s disclosures and concerns, repeatedly bringing the conversation back to how the children behaved towards the adults in the home and prioritisation [sic] of her relationship with Mr [A]. [The mother] repeatedly made comments ‘I have to kick my boyfriend out onto the street’ and ‘they were play fighting...[E1] was asked if she would feel safe at home with Mr [A] alone, [E1] vigorously shook her head side to side indicating ‘no’”.⁸⁷
96. The unchallenged confidential Medical Report tendered into evidence dated May 26 2022 authored by Dr M, a paediatric consultant at [name deleted] following a comprehensive examination of [E1]’s injuries opined that: “The shape, size and distribution of the bruises documented in this report is highly suspicious for repetitive inflicted injury (non-accidental) from a blunt force. The distribution of three linear association on the left forearm, with spacing of unaffected skin and tissue between them, is suspicious for bruising that might be sustained by the tight grip of a hand with slightly spaced digits.”⁸⁸
97. The mother was issued a direction to prevent Mr A from residing in or having contact with the children. Ms D’s evidence was that the mother “dismissed the concerns and the children reported Mr [A] remaining in the home.”⁸⁹ The mother dismissing the concerns and permitting Mr A to continue to reside in the family home was the precipitating event for the breach of family preservation order filed by the DFFH on

⁸⁶ Ex D 4 p 15. Ms D’s assessment was on 22 March 2022

⁸⁷ Ex D 4 p.15

⁸⁸ Ex D3 p21

⁸⁹ Oral evidence of Ms D December 2024 Hearing.

15 June 2022 and the subsequent removal of the children from their mother's care pursuant to court order dated 16 June 2022.

98. The protective concerns around Mr A, the injuries to E1 and the mother's response at that time are serious protective concerns. While accepting that, at the time of this hearing, it was clear that Mr A was not living with the mother and had had no further involvement with the children. Mr A provided the DFFH with a Statutory Declaration signed and dated 5 December 2023, which was subsequently provided to the Court declaring that ... "my sole priority is that a reunion occur between [the mother] and her children. This is more important than a relationship between [the mother] and I. I do not live with [the mother] and will have no involvement with the children."⁹⁰ The veracity of Mr A's declaration that he does not live with the mother and will have no involvement with the children was not challenged nor did the DFFH require Mr A for cross-examination in this regard.
99. I find that any risk of harm Mr A poses to the children or any risk of harm posed by the mother's relationship with Mr A can be ameliorated by the inclusion of conditions. The mother must ensure that the children or either of them do not have contact of any kind with Mr A and she must ensure that Mr A does not visit the family home at any time the children or either of them are at home. I have included conditions to that effect.

The FPRR Program and Take Two

100. Ms P confirmed the evidence of the FPRR practitioner, Ms H that "due to the short period of time, there have been limited home visits and FPRR have not had sufficient observations or conversations with [the mother] to establish a comprehensive assessment of risk factors and strengths present with the family. FPRR require more time to build rapport, engagement and make substantial progress towards goals."⁹¹ Ms H gave oral evidence confirming that and also advising that play therapy for E3 and an occupational therapist for E4 had very recently commenced. Ms H also confirmed that "the mother has a lot of appointments on and its difficult to juggle and remember what

⁹⁰ Statutory Declaration declared at [location deleted] on 5/12/2023 by Mr A.

⁹¹ Ex D24 attributed to Ms H.

day for what appointment, we put the white board in place towards the start of that intervention.”⁹²

101. I note Ms H’s observation that “the children appeared very happy with their mother, they hugged her and told her about their days.”
102. Similar to the FPRRP, Take Two clinician, Ms T gave evidence that she required more time working with the family, stating: “It’s been difficult to find time to see them all together because the access schedule does not align with my work schedule. The [name deleted] Café where they have a community dinner is every Monday and Monday is the only time I can meet with them due to my work schedule...it was important for her [the mother] to attend and the children want to go so there was a pressure to go to the [café].”⁹³ Ms T gave evidence of attending the Café where she spent time with the mother, E3 and E4. It was clear from Ms T’s description of the Café, including the meal preparation and cooking shared among the adults, including the mother, the various areas catering to children of different ages and interests. Ms T described the interactions between the children as “a positive experience for all of them”.
103. While Ms T said three sessions was not enough to form an opinion about the mother’s capacity to meet the children’s emotional needs, she did observe that “the mother was able to meet the children’s emotional needs when they were regulated. She was able to speak with them and respond to [E4]’s requests in their shared activity. [E4] had his emotional needs met in that context...If he was unregulated, it was more difficult for the mother to know how to direct [E4] in that mode of needing to use his body, to use that in a safer way.”⁹⁴
104. While the interventions were incomplete, neither witness gave evidence which would amount to there being an unacceptable risk of harm to the children or either of them in their mother’s care at this time and at this juncture I consider any risk can be ameliorated by the continuation of both support services. I have made those orders accordingly.

⁹² Oral evidence of Ms H May 2024 hearing.

⁹³ Oral Evidence of Ms T May 2024 hearing.

⁹⁴ Oral evidence of Ms T May 2024 hearing.

The Balancing of Harms

105. The CYFA threshold test for removing these children from their mother’s care is found in s.10(3)(g) which mandates “a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child”⁹⁵.
106. In determining whether an unacceptable risk exists to E3 and E4 in their mother’s care, I am also mindful of the potential harm, and in many cases, the actual harm suffered by children who are removed from their parents’ care. In *MMM v Secretary to the Department of Families Fairness and Housing*⁹⁶ Justice Gorton described this balance in the following terms:
- “In deciding whether there is an ‘unacceptable risk of harm’, the Court is required to assess, in broad terms, the likelihood of the harm being suffered in the future, together with the nature and extent of the potential damage to the child if the harm were to eventuate. See, generally, *Department of Human Services v DR* [2013] VSC 579, [61] (Elliott J). That must be weighed against the benefits of maintaining the family unit and the children’s bond with their parents.”
107. Former Magistrate Mr Peter Power states: “Another way of analysing the balancing process is whether the risk to the child of suffering future harm is greater than the risk to the child of suffering emotional harm from being removed from parental care... There is now an abundance of literature over four decades that describes the potential negative impact on a child of such separation [from a parent].”⁹⁷ In *DOHS v Ms H & Mr I* [Children’s Court of Victoria-Power M, 17/12/2014] the issue was whether four children aged 3-9 – the oldest of whom were twins – should be returned to their mother’s care or case-planned for permanent out-of-family care. The Court also cited and relied on the following material on “separation distress” provided to the Court by clinical psychologists Dr F & Dr C: “Clinical experience shows that children experience distress – sometimes severe enough to lead to a diagnosis of anxiety – for a number of reasons. Separation is one of these...”⁹⁸
108. In balancing harms, not only is there potential for emotional harm in removal from a parent, I am also mindful of the potential for harm to children who are placed into State

⁹⁵ S.10(3)(g) CYFA

⁹⁶ [2023] VSC 354 at [17]

⁹⁷ Power, P, Children’s Court Research Materials at pages 5.59 & 5.62-5.63.

⁹⁸ *Ibid* at 5.63.

care. In the forward to the Commission for Children and Young People's Inquiry into the lived experience of children and young people in the Victorian out-of-home care system, Principal Commissioner, Ms Liana Buchanan states:

“Through this inquiry, the Commission had the privilege of speaking to over 200 children and young people with an experience of care. It was encouraging to hear that some flourished in safe, stable and loving placements, with supportive and skilled carers and workers. However, far too many of the children and young people told us they felt lost in an overstretched and chaotic care system. Many experienced the stress and upheaval of constantly shifting placements. Many cycled through so many case workers, they gave up on the idea of having someone who knew their story and could support them. Others, particularly those in residential care, described feeling unsafe and alone in bleak and run down accommodation. Some children and young people commented on the irony of a system that removed them from their family to keep them safe, yet continued to harm them.

The Commission reviewed the files of 32 of these children and young people and found that 81 per cent presented with complex trauma and challenging behaviours. Of the group who exhibited challenging behaviours:

- more than one third had been assessed with an intellectual disability
- one quarter had exhibited sexualised behaviours
- half had run away from placement repeatedly.

Most of these children and young people had experienced high levels of placement instability when they first entered care (more than six moves in their first year).⁹⁹

109. I am not saying E3 and/or E4 will necessarily experience the harms many children in out of home placements have experienced and I am certainly not saying either of them have been subject to quality of care concerns while in out of home care. However, as referred to above, E3 has had 18 placement changes and E4 15 placement changes since removal from their mother's care and, at this time, neither child has an identified carer committed to their long term care. I consider further changes in placements to be somewhat inevitable. Also significant in this case is that all four siblings are in different

⁹⁹ *In our own words*, Commission for Children and Young People, Victorian Government Printer November 2019 at pp.3 and 25.

placements separated from each other and the DFFH proposal sees no changes to that separation of siblings.

110. Children's Court Clinician, Dr R observes: "Given the implementation of supports to facilitate reunification, this alternative,[that is, long term out of home care placements for both children] is likely to cause increased distress for all parties..."¹⁰⁰

111. In *DoHS v Mr D & Ms B*¹⁰¹ witness 3 – a Children's Court Clinician – had given evidence that–

"There is a concept in psychology called '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."

112. While elements of Dr R's evidence in relation to whether the children's mother could provide 'good enough parenting' appeared contradictory, ultimately in Dr R's oral evidence – on considering the above evidence from *DoHS v Mr D & Ms B* – Dr R concluded that "yes [the mother was a good enough parent] with supports in place."¹⁰²

Conclusion

113. After consideration of all available evidence in this case, I am not satisfied there is an unacceptable risk of harm to the two children in their mother's care which cannot be ameliorated to an acceptable level by the provision of services and under the statutory supervision of DFFH. I have made specific orders on this basis.

¹⁰⁰ Ex C3 Children's Court Clinic Court Report dated 1 May 2024 p.30

¹⁰¹ [2008] VChC 2 at pp65-66. See also Power, P, Children's Court Research Materials at pages 5.64-5.65.

¹⁰² Oral evidence of Dr R, May 2024 Hearing,

114. I am further satisfied that with support services in place and taking into account the mother's demonstrable commitment and motivation to parent her children to the best of her ability and her willingness to accept and engage in necessary supports, I find the mother is a good enough parent to parent her two children E3 and E4.

115. On the basis of the evidence and for these reasons, I make the orders placing the children into their mother's care which are included in this Decision.

Magistrate R Hamilton