CHILDREN'S COURT OF VICTORIA

Applicant: **(Name removed) "NM"**
[Department of Human Services]

Child: **(Name removed) "BS"**

JUDICIAL OFFICER:	**JUDGE COATE**
WHERE HELD:	**MELBOURNE**
DATES OF HEARING:	**23-25 June, 27-28 July, 27-30 September, 17-18 & 23 November 2004**
DATE OF DECISION:	**21 December 2004**
CASE MAY BE CITED AS:	**NM, DOHS and BS**
MED. NTRL. CITATION	**[2004] VChC 1**

REASONS FOR DECISON

Child protection – Applications to extend and revoke guardianship to Secretary order – From birth child had been living in a home characterised by chaos, violence between the parents and their excessive use of alcohol – At about age 15 months child was removed from parents' care after father had observed injuries on child's face consistent with him having been assaulted while in mother's care – Whether 4 year old child should remain in the care of foster carers with whom he had lived for 15 months or be returned to the care of his mother – Sequence in which the two applications should be heard – Roles of Children's Court & Victorian Civil and Administrative Tribunal – Whether the review provisions in the legislation have any effect upon the powers and responsibilities of the Children's Court in the determination of applications it has jurisdiction to hear – Whether reunification with mother or permanent care in best interests of the child – Safety and wellbeing of the child – Attachment – "Changed circumstances" –*Children and Young Persons Act 1989*, ss.107, 109, 122 [cf. *Children, Youth and Families Act 2005*, ss.295, 305, 307,333]

PARTY	COUNSEL
Department of Human Services [Child Protection]	**Mr Birrell**
Mother (name removed)	**Mr Littlejohn**
BS	**Unrepresented – too young to give instructions**
Father (name removed)	**In person for some of the proceedings – Unrepresented**

DECISION

HER HONOUR:

General background and history

BS was born on December 13, 2000. He is the subject of the two applications in these proceedings. He is currently on a guardianship order which was made on May 27, 2003 with the consent of his mother and father.

He is living with (names removed) "Mr & Mrs J" on that order and has been living with them since 2 August 2003. He has now been there for the past 16 months. The Department of Human Services ("DHS") are working to a case plan which would have BS remain permanently with Mr & Mrs J. BS's mother is (name removed) ("the mother") and his father is (name removed) ("the father"). The mother's current partner is (name removed) ("Mr K"). The mother and Mr K have a child of their relationship, (name removed) ("A") who was born on 12 January 2002. A is not the subject of these proceedings. She is the half sister of BS. BS's paternal grandmother is (name removed) ("the paternal grandmother").

The mother and father commenced a relationship in early 2000. Within weeks of the commencement of that relationship the mother became pregnant with BS. There is much in the vast array of material tendered into evidence about this relationship and its violent and unstable nature. At the time at which BS was born the mother was 19 years old and had been rejected by her family apparently upon learning of her pregnancy to the father of whom they disapproved. By the time BS was only about five weeks old DHS had received their first notification[1] about his safety. That notification contained concerns about BS's exposure to violence between his parents and their alcohol misuse.

There was a further notification on February 10, 2001 after police were called to BS's home. The police arrested BS's father and removed him from the home in handcuffs. By February 13, 2001 BS was the subject of a protection application based

[1] 22 January 2001

on concerns about his exposure to violence and the risk of both emotional and physical harm posed to him by his parents' violence and his parents' alcohol abuse.

The vast array of evidence in this case establishes that from almost the commencement of his life at home with his parents BS was living in a home which was characterised by chaos and the violence of his parents and their excessive use of alcohol. There was ample evidence of the father's excessive use of alcohol and aggressive and violent and erratic behavior. The evidence as to the mother's abuse of alcohol is less clear although there is evidence from various sources that she was regularly being observed affected by alcohol.[2]

The evidence of the father's behavior was that he was irresponsible, unreliable, erratic and an immature man who cared for little other than alcohol, marijuana and a social life with his friends. He was physically violent to the mother and on her evidence constantly in search of money for drugs and alcohol. The evidence revealed that the father was unemployed and he and the mother fought constantly over money.

The weight of evidence leads one to conclude that the mother was enmeshed in the father's lifestyle and apparently unable to disentangle from his violent and erratic behavior towards her and in the presence of BS. The mother appeared either unwilling or unable to leave him. The mother can now voice appropriate criticism of the father's conduct but remained in the relationship with him until he left her to pursue another relationship.

The home BS was brought to after his birth was described by the paternal grandmother as dirty and unkempt.[3] She described BS in this condition too whilst living in these circumstances. The mother denied any allegation that either her home or BS were dirty and unkempt[4].

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[2] Police reports of attendances at the house contained in DHS reports of 22 January 2001 and 10 February 2002; evidence from the paternal grandmother.

[3] Viva voce evidence of the paternal grandmother.

[4] Throughout the course of the evidence, wherever there was a conflict between the evidence of the paternal grandmother and the mother, I preferred the evidence of the paternal grandmother finding her to be fair and objective and measured compared to the mother who was often maintaining a position in sworn evidence which was either clearly inaccurate or at the very least less than frank.

During those early months of BS's life he was moved between his mother and paternal grandmother and foster carers on various orders as a result of the mother and father's relationship turmoil and difficulties caring for BS and their general instability.

On the material provided to the court and tendered into evidence it is difficult to be exact, but as best one can piece it together it would appear that by the time BS was 12 weeks old he was placed on an interim accommodation order into his paternal grandmother's care. This interim accommodation order was made after a protection application was initiated for BS on the grounds contained in s.63(c) and (e) of the Children and Young Persons Act 1989 (Vic) ("CYPA").

From there he spent about the next six weeks in foster care. The protection application was found proved and BS was placed on a Custody to Secretary order by 6 April 2001 with the consent of his mother and father. He was placed back into his mother and father's care on this Custody to Secretary order. The relationship between the mother and father remained tenuous through the next few months and finally ended in November 2001.

The mother, with BS in her care, moved first to the paternal grandmother's home and then later into a Salvation Army accommodation facility in the (location removed) area. She stayed there for some weeks at the end of 2001 and through to the beginning of 2002.

She commenced a relationship with Mr K in or about January 2002 and apparently moved in with him shortly thereafter. Within a few weeks of the commencement of that relationship the mother was pregnant with her second child (name removed) "A".

On March 16, 2002 BS who was about 15 months old was taken by his mother to deliver him to his father for pre-arranged access. BS's father observed BS's face which appeared to have injuries consistent with having been assaulted. He contacted the paternal grandmother who collected BS and after some consultations with professionals, took BS to a consultant forensic pediatrician at the (name removed) Hospital. The pediatrician examined BS and concluded that he had injuries consistent with non-accidental causes. Thereafter police became involved as well as DHS.

As BS was on a Custody to Secretary order at that time, DHS placed him back into the care of his paternal grandmother. He remained there for 7 months until October 2002. By this time, the paternal grandmother found she was unable to continue caring for BS full time and working two jobs. She was also in difficult financial and personal circumstances. From October 2002, BS was in various foster care placements up until August 2003 at which time he was placed with the Mr & Mrs J where he remains.

A few months after BS was removed, the mother consented to a 12 month extension of the Custody to Secretary order as at May 2002. She made no attempt to have BS returned to her care at that time.

From about October 2002 to about March 2003 despite the various attempts made by DHS to have the mother attend meetings, attend court and more importantly participate in access arrangements with BS, the mother effectively withdrew from BS. For somewhere between about five to six months of this period, the mother had no contact with BS. On 22 May 2003 she signed her consent to a guardianship order being made which had the effect of placing BS on a guardianship order from 27 May 2003 to 28 April 2004. It is this guardianship order which DHS seek to extend and the mother seeks to revoke.

There was much contention about the mother's consent to that original guardianship order which is discussed at length at pages 27 to 31 below. It is against this background that the applications before the court are brought.

The applications

There are two applications before the court. The first application is the mother's application initiated on November 11, 2003 to revoke the guardianship order upon which BS was placed on 27 May 2003. The second application is the application by DHS to extend that guardianship order for twelve months. DHS initiated the application to extend guardianship on March 23, 2004.

<u>The position of the parties</u>

DHS: DHS are opposed to the mother's application to revoke guardianship and indeed seek to extend the current guardianship order with a permanent care case plan for BS. In summary it is the position of DHS that the extension of the current guardianship order is in BS's best interests for the following reasons:

(1) The mother is not able to ensure BS's safety and well being given that she and Mr K have refused to acknowledge the true nature and extent of the physical assaults on BS whilst he was in their care.

(2) The mother’s relationship with BS has been inconsistent in that she disengaged with BS during the second half of 2002 and was not attending for access visits or meetings about him or indeed even making any enquiries of him or showing any interest in him. When she did commence to see him again it was not with a view to having him back in her care.

(3) BS is still recovering from his traumatic infancy and consequently is sometimes difficult to manage. Whilst DHS agrees that the mother and Mr K are adequately parenting A at present, its case is that it does not automatically follow that they will manage with BS. The mother's capacity to manage BS in circumstances where there would be two children in her household is untested and unpredictable at present and Mr K’s attitude remains a cause for concern as to BS’s safety and well-being.

(4) It is the case for DHS that the mother had a change of heart about having BS in her care after consenting to the guardianship order being made based on her current belief that she cannot have any more children in the wake of A’s birth. DHS assert that this is the basis upon which the mother wants BS back in her care, to make a family, rather than a true motivation for BS's best interests.

(5) BS's unsettled placement history and positive attachment to the prospective permanent carers means his interests are best served in remaining with them and not

disrupting the healthy attachment that is now forming to move him to the mother and Mr K. This is especially so in circumstances where there is a real prospect that the move to his mother and Mr K will break down and cause potentially irreparable damage to BS.

The mother:

BS's mother is seeking to have BS returned to her care. It is the mother's case that her circumstances have changed since the making of the guardianship order in 2003 and it is in BS's best interests to be placed with her and his half sister and Mr K. It is the mother's position that after BS was removed from her care DHS made no effort to assist or support her to have BS returned to her care. Further it is the position of the mother that she consented to the guardianship order at a time when she was vulnerable and without legal advice.

It was the mother's case that she was inexperienced as a mother when she had BS and her life was in some chaos as a result of BS's father's erratic, violent and drunken behavior. Consequently motherhood was not easy. She did not concede any part of the DHS case which alleged that BS was living in an environment which was dirty and unkempt. Further, she did not concede any suggestion that BS was not kept in good condition with the exception of once or twice allowing him to get mild sunburn.

The mother's case was after BS's father ended the relationship, she commenced a relationship with Mr K who is the father of her second child A. She commenced this relationship in or about January 2002 and was pregnant with A within several weeks. BS was living with her at that time. It was the mother's case that Mr K was wonderful with BS and deeply attached to him.

When BS was removed as a result of the injuries to him in March 2002 it was her case that the injuries occurred as a result of "inappropriate first aid". Her case was that DHS never accepted this and thereafter either tricked, deceived or ignored her and made no attempt to reunify BS with her despite all of her efforts.

It was the mother's case that she was unable to attend accesses with BS for some time due to her pregnancy and the threat of miscarriage which hovered over that

pregnancy. Her case was that she was never given a chance to reunify with BS despite her best efforts. She is now in a stable relationship in stable accommodation and has proved herself as a mother with A. It is her position that BS should be with her and his sister.

The father:

BS's father, was unrepresented and attended court for some of the initial days of this hearing but was not present for a substantial part of it. He was invited to represent himself at the bar table or remain in the body of the court. He chose to remain in the body of the court for some of the proceedings but otherwise was not present. He was invited to state his wishes for BS to the court on the first day he attended the hearing. He indicated that he supported the case put by DHS and that he wanted BS to stay where he was with Mr & Mrs J. Although the paternal grandmother was not a party she has clearly played a very significant part in BS's life and she expressed this wish for BS too, that is, that he remain with Mr & Mrs J.

Preliminary rulings

At the commencement of the hearing of these applications two preliminary points were raised upon which rulings were sought. One was the sequence in which the applications should proceed and the other one was a more substantial issue that went to the jurisdiction of the court in applications to extend guardianship. I ruled on both issues and confirmed that I would set out reasons for those rulings in the final written decision. Those two rulings are as follows:

(1) Sequence of applications : The two applications before the court are the application to revoke guardianship initiated by BS's mother on November 11, 2003. It is brought pursuant to s.109 of the CYPA.

On March 23, 2004 DHS initiated an application for a 12 month extension of the guardianship order of May 27, 2003. This application was brought pursuant to s.107 of the CYPA. DHS seeks an extension of that order to April 27, 2005.

The mother's application was the first in time and the mother's application requires her to

prove “changed circumstances” within the meaning of s.109 of the CYPA.

Arguably one could assert that the mother would be required to make her application first and establish her changed circumstances. There was some discussion at the outset about the practicality of the court dealing first with the mother's application to revoke guardianship. That application requires the mother to establish changed circumstances to enable her application to proceed. If the mother is able to establish those changed circumstances, the court must decide whether or not to revoke the guardianship order, based on being satisfied as to what is in BS's best interests.

The DHS application to extend guardianship requires the court to give due consideration to the detailed criteria set out in s.107(4) which clearly go to the heart of matters that would lead the court to a conclusion about BS's best interests.

I took the view that it would be far less cumbersome to have DHS lead the proceedings and give a more coherent flow to address the statutory criteria in s.107(4) leading to less disruption, artificiality and potential repetition.

The alternative would have been to direct the mother's application to go first and allow DHS to respond to that application before proceeding to hear the DHS application. Even for the purposes of trying to establish changed circumstances, without the DHS case, I would be endeavouring to make an assessment about changed circumstances in a partial vacuum without hearing evidence in support of the DHS application which would invariably go to these issues.

Further, to hear the mother's application first and arguably have to make a decision about BS's best interests, in s.109(3)(b), before hearing the DHS application to extend guardianship with its requirements to consider those detailed statutory criteria makes a nonsense of any such suggestion.

There were no submissions as to any disadvantage to any party in conducting the proceedings in this sequence. Consequently, I directed DHS to proceed with its application to extend guardianship followed by the mother's application to revoke guardianship. As a matter of logic, even to endeavour to frame the appropriate tests from the statutory criteria from s.107 and s.109, commonsense dictates this sequence.

That is, once all of the criteria of s.107(4) are considered in the application to extend, including any other relevant fact or circumstance, what is in BS's best interests is

arrived at, thus addressing the revocation test for s.109.

Of course, this ruling does not abrogate the mother's statutory responsibility to establish new facts and circumstances before a consideration of her application to revoke guardianship.

(2) Jurisdictional Issue

The second preliminary point which arose was an issue raised by DHS about the permissible parameters of evidence as to current carers of a child on a guardianship order. It was submitted by counsel for DHS that the placement of a child on a guardianship order was an administrative decision by the Secretary to DHS and therefore subject to review only by the Victorian Civil and Administrative Tribunal (VCAT).

It was submitted that the jurisdiction of VCAT to review administrative decisions was exclusive and thus the Children's Court of Victoria could not hear any evidence about the carers or apparently the DHS decision to place the child with those carers as this was an administrative decision.

Counsel for the mother submitted that the DHS case plan that the child remain with his current carers on an extended guardianship order, with a view to a permanent place with them requires the court to examine their stability and capacity to provide for the needs of the child. It was his submission that these issues were both relevant and admissible.

It would appear that the issue arose for DHS as a result of a Court Clinic report in which the clinician performed an assessment of the current carers which was not favourable to the DHS case. The admissibility of this report and jurisdiction of the court to receive it was strenuously argued by counsel for DHS at the outset.

It was made clear that DHS had a policy position that permanent carers were not to attend court to give evidence and be subjected to cross examination. It was also made clear in very strong terms that for a court to do so would put in peril the permanent care program in Victoria as permanent carers would not want to expose themselves to

such assessments and potential questioning in the courtroom.

It was also submitted that any proposed permanent carer has already gone through a rigorous process of selection and the inference from that is that the court's examination would be burdensome and superfluous.

Finally it was submitted that permanent carers are advised that they will not have to attend court and any advice to the contrary may cause the placement to break down at great detriment to BS.

I turn to the law.

S.122 of the *Children and Young Persons Act* as to its relevant parts provides as follows:

S.122. Review by Victorian Civil and Administrative Tribunal

(1) A child or a child's parent may apply to the Victorian Civil and Administrative Tribunal for review of -

(a) a decision contained in a case plan prepared in respect of the child under section 120 or any other decision made by the Secretary concerning the child;

(3)Before a person is entitled to apply to the Victorian Civil and Administrative Tribunal for the review of a decision referred to in ss.1, the person must have exhausted all available avenues for the review of the decision under section 121.

Thus s.122 of the CYPA enables a child's parent, having exhausted internal review processes to apply for review of a decision contained in a case plan prepared in respect of a child or any other decision made by the Secretary concerning the child.

There is no provision made in the CYPA that such an application to VCAT has any effect on proceedings in the Children's Court, in particular that such an application ousts or suspends or overrides the jurisdiction of the Children's Court of Victoria.

S.122 of the CYPA confers jurisdiction on VCAT for the review of administrative decisions of DHS if a party chooses to use that forum for such a review.

The review jurisdiction of the Tribunal is contained in S.48 of the Victorian Civil and Administrative Tribunal Act Vic). S.52 of the Victorian Civil and Administrative Tribunal Act purports to limit the jurisdiction of the Supreme Court and Magistrates'

Courts in relation to the exercise of powers under planning legislation in certain circumstances. No like provision has been made with respect to the jurisdiction of the Children's Court in its Family Division.

That VCAT has jurisdiction to review a decision of the Secretary of DHS, is no basis to assert that has any impact whatsoever on the Children's Court of Victoria's power and obligations to exercise its complete statutory jurisdiction under the Children and Young Persons Act.

There is no basis to assert that the capacity to review an administrative decision by the Secretary ousts the jurisdiction or curtails the jurisdiction in the Children's Court in the exercise of its statutory functions. The logical conclusion of such an assertion is that the court would be bound by every case planning decision of DHS.

In the event that DHS brings an application to extend the order of the court as in this application for extension, the court is required by the CYPA in mandatory terms to consider both the likelihood of reunification of the child with the parent and the benefits of the child remaining in the custody and guardianship of the Secretary with consideration of reunification to take priority.

The application to extend the order is not a review of the decision made by the Secretary to place the child in any particular circumstances but rather the exercise by the court of its statutory responsibility to consider the criteria set out in s.107 and indeed in this case in s.109. Both applications compel the court to assess the welfare and interests of the child in the detail set out in all of the statutory criteria.

In this case, an assessment of the potential and actual benefits to the child of a placement which the Secretary proposes is to become permanent is a relevant consideration in the assessments required in satisfaction of both s.107 and s.109. The decisions of the Secretary neither restrict the court's obligations to consider evidence which is relevant nor relieve the court of its obligations to do so.

In this case, a professional assessment has been undertaken and is available to the court to assist the court in assessing the actual and potential benefit to the child of that placement. It is crucial, particularly in circumstances where DHS have made it clear that they do not intend to call Mr & Mrs J to give evidence, that all available evidence with respect to them be before the court in these proceedings to allow the court to

fulfil its statutory function.

One final comment on this issue which is not strictly relevant to this ruling but arose in the course of discussions. It relates to the advice given to the court by Counsel that permanent carers are advised they will not have to attend court. If this is correct advice to the court, it is clearly incorrect advice to permanent carers.

A court is required pursuant to s.112 of the CYPA in considering the appropriateness of an order for permanent care to be satisfied that the permanent carers are suitable to have custody and guardianship of the child having regard to any prescribed matters. Those matters include the personality, emotional maturity, general stability of character of the proposed carers and the capacity to provide a secure and beneficial emotional environment for the child. This inquiry is the responsibility of the court. It is not sufficient that the court accept the assurance of the Secretary that the carers are assessed by the Secretary or its nominee as appropriate. It is an issue for determination of the court in the circumstances of each application on evidence properly admissible in the proceedings.

Whilst it is not difficult to understand why there may be good reasons in some cases why DHS may not seek to call the proposed permanent carers to give evidence, there are many cases where not to do so may cause there to be such a gap in the evidence that a court cannot satisfy itself that the placement is suitable and benefits the child.

Like all inflexible positions, they do not adapt well to proper exercises of discretion or indeed the complexities of human behaviour. Decision making by bureaucracy rather than on a case by case basis is a dangerous way to proceed and it may well be time to rethink such an approach if this is an accurate description of current decision making. If it is not an accurate description, it remains of concern that this representation was made to the court.

In conclusion, there is no basis to find that the provisions of the Children and Young Persons Act which provide an avenue for an aggrieved party to seek a review of an administrative decision have any effect upon the powers and responsibilities of the

court to investigate and determine the applications it has jurisdiction to hear.

It is for these reasons I rule that the assessment of Mr & Mrs J performed by the Court Clinic was both relevant and admissible as was other documentary evidence and observations and assessments of them with BS. BS's current placement, the quality of his care and his progress and development are clearly matters which the court must consider in both of these applications. To fail to examine BS's current placement would, in my view be an appellable error of law.

Concerns were put to the court about detailed information about Mr & Mrs J that contained material about personal medical histories that was unnecessarily intrusive.

I accepted this and was able to deal with it by removing such information and references to it in the course of the hearing.

The DHS application to extend guardianship commenced after this ruling.

The hearing of both of these applications extended over 13 days and a number of months. Unfortunately, the original estimate of three days hearing time for this case was obviously inaccurate. It led to the matter being adjourned on several occasions over lengthy periods to complete it. During its 13 hearing days, 16 witnesses gave evidence and 64 documents including tapes and photographs were tendered into evidence.

A list of the exhibits and witnesses is set out in the two appendices to this decision.[5]

All that evidence has been considered in the context of its relevance to the tests at law which are set out below to reach a decision. It was without argument that the standard of proof applied to the evidence was the civil standard of balance of probabilities.

DHS application to extend guardianship

This application to extend guardianship is made pursuant to s.107(1) of the CYPA.

Section 107(1) provides as follows:

[5] See pp 69-70 for Appendices 1 and 2

S.107(1) If the Court specifies in the guardianship to Secretary order a period not exceeding 12 months for the order to remain in force, then, at any time while the order is in force, the Secretary may apply to the Court for an extension of the period of the order for a period not exceeding 12 months".

S.107(4) of the CYPA sets out the matters that the court must consider in any application to extend guardianship under s.107.

Section 107(4) CYPA provides as follows:

On an application under sub-section (1) the Court –

(aa) must give due consideration to the following matters in the following order –

(i) the likelihood of the reunification of the child with his or her parent;

(ii) the benefits for the child of remaining in the custody and guardianship of the Secretary; and

(ab) must take into account –

(i) the safety and wellbeing of the child; and

(ii) the nature of the relationship of the child with his or her parent, including the nature of the access between the child and the parent during the period of the order; and

(iii) the capacity of the parent to fulfil the responsibilities and duties of parenthood, including the capacity to provide adequately for the emotional, intellectual, educational and other needs of the child; and

(iv) any action taken by the parent to give effect to the goals set out in the case plan; and

(v) the effects on the child of continued separation from the parent; and

(vi) any other fact or circumstance that, in the opinion of the court, should be taken into account in considering the welfare and interests of the child; and

(a) must extend the order for a period not exceeding 12 months if it is satisfied that -

(i) the Secretary, the child and the child's parent have agreed to the extension; and

(ii) the extending of the order is in the best interests of the child; and

(b) in any other case, may extend the order for a period not exceeding 12 months if it is satisfied that it is in the best interests of the child to do so.

There was no issue that this application was properly initiated within time. Section 107(4) sets out those matters to which the court must give due consideration and also sets out the order in which they must be considered. Therefore, it is appropriate to use the structure of s.107 to shape the necessary findings required by s.107(1)and(4).

S. 107(4)(aa)(i) The court must give due consideration to the likelihood of the reunification of the child with his or her parents

The question of BS's reunification with his mother is at the heart of these applications and underpins what both applications are about. BS's father is not pursuing reunification with him. There was a great deal of focus and cross examination of witnesses as part of the mother's case about her having been effectively tricked or pressured into signing a consent to BS being placed on the original guardianship order of 27 May 2003.

A review of all of the evidence on this issue however establishes on the balance of probabilities that the mother was at best ambivalent at that time about her capacity to have BS in her care and did consent to BS being placed on a guardianship order as she felt unable to care for him at that time. It is best summed up by the evidence of (name removed) "Ms P"[6] who said that in her role she visited the mother on 8 May 2003. She stated in evidence that the mother expressed uncertainty about signing the forms but also expressed concern about how she would handle BS with the new baby as BS could be a "handful".

Ms P visited the mother again on 30 May, 2003 and observed a level of sadness about the mother as she was aware that the order had been made. Ms P said the mother was also relieved that she did not have to try to care for BS. Her evidence was that the mother was very cooperative and also expressed sadness that Mr K would not let her discuss anything about BS.

During this time, the mother was living a very socially isolated life with Mr K, living in a caravan with their daughter who was at that time about six months old. The

[6] Ms P, Adoption and Permanent care case worker for DHS in viva voce evidence

relationship between herself and Mr K was tenuous.[7] Indeed, she had indicated to (name removed) "Ms C" on 5 May, 2003 that she was likely to leave the relationship soon. The mother did not deny this in cross examination. She only qualified that by saying that the relationship had improved after that time.

On 23 May 2003 the mother again told Ms C that "**she'd had about enough and she'd separate soon**". She also told Ms C that she was consenting to the order "**but would like to get him back**".[8]

Indeed, in evidence the mother first agreed that she could not bring a three year old into a small caravan and wanted to wait until she could get better accommodation although she later said in evidence when asked about signing the guardianship consent document… "**I doubt I would have said I'm agreeing to it**". Minutes later in evidence she agreed that she did need time to sort herself out at that time. Thus, ironically demonstrating the ambivalence the evidence suggests she felt at that time.

Indeed, Mr K in evidence did not take issue with the proposition that the mother had consented to the guardianship order being made for BS. It was his evidence that she thought she could consent to guardianship for 12 months and then get BS back.

I am satisfied on the evidence that the mother received strong advice from more than one source[9] to obtain legal advice before agreeing to the guardianship order. I am also satisfied that the mother did have explained to her the meaning of the guardianship order before signing it. I am also satisfied that the mother had ample opportunity to obtain legal advice from her solicitor but did not do so probably because she had made up her mind she was not able to have BS in her care. It is also necessary to see this decision in its full context. The mother had already consented the year before (in May 2002) to BS being on a custody to Secretary order for a further 12 months out of her care and by the second half of that order had not made any contact with BS for 6 months. This was the backdrop for her consent to a guardianship order for him.

It was also a large part of the mother's case that she had been shut out of BS's life and not supported to have him reunified with her. The evidence supports a conclusion that

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[7] Viva voce evidence of Ms C
[8] Viva voce evidence of Ms C and case notes in Exhibit 56
[9] SD, JC and MP

on the balance of probabilities the mother was struggling during at least the first 12 months after BS was removed from her care, if not longer, with a crisis of choices.

On the evidence she well understood that she had to choose between BS and Mr K. She expressed as much to (name removed) “Ms G” in April 2002[10]. It would seem that her way of reconciling this was to reconstruct the history of what had been happening inside the household in January, February and March 2002 and in particular the events of 16 March 2002.

This rewriting of history and inability to confront the reality of what was happening to BS and his lack of safety and wellbeing in the household was at the heart of the reasons given by DHS as to why it was not appropriate to pursue reunification with the mother. The mother remains unable to see why this is so.

The mother's explanations for not attending DHS meetings and not seeing BS for six months at the end of 2002 and beginning of 2003 was a combination of the frustration she experienced seeing the father being pursued as an appropriate parent and her medical condition with her pregnancy with A.

It is understandable that it would be extremely frustrating to attend meetings and see the father being pursued by DHS as an appropriate custodial parent given his inability to act like one during the course of their relationship. However, it is troubling that the mother was not moved to even call to make a separate time to discuss her son BS with DHS staff without the father present.

As to the mother’s explanation about her threatened miscarriage with A keeping her from having contact with BS, I find that explanation not plausible in the circumstances.

The mother called no medical evidence to support her position. She was not hospitalised. She wrote no letters, made no phone calls and could not explain why she took no action to maintain any form of contact with BS.

That life has improved in the way it has for the mother and Mr K and A over the last

[10] Exhibit 57

two and a half years is very positive. Sadly, however, it does not change BS's experience of his life and his development. Nor does it assist for the mother to seek to reconstruct a history in which no responsibility was upon her to pursue contact with her son, or confront the reality of what was happening to him in her home or accept that she agreed to that guardianship order in May of 2003.

In my view the assessment of Ms G of the mother's tendency to avoidance and denial, permeated her evidence and indeed the way in which she put her case. It left no confidence that BS would be supported in the way in which he needs to be in the mother's household.

S.107(4)(aa)(ii) The benefits for the child of remaining in the custody and guardianship of the Secretary

Due consideration to this question is implicit in much of the context of the matters set out below. However I interpret this provision to mean that it is incumbent upon any court considering an extension of guardianship to look at the current circumstances of the child, the current placement, the proposals for the child for the period of the extension and the benefits to the child of the current arrangements and proposals.

BS is living with Mr & Mrs J and has been for the past 14 months. It is proposed by DHS to apply to have BS on a permanent care order in the care of Mr & Mrs J. Mr & Mrs J have been selected as suitable carers through the permanent care program. (Name removed) "Ms BS", a social worker from (name removed) (location removed) whose agency is contracted by DHS to undertake adoption and permanent care, gave evidence as to the rigours of the assessment the permanent carers are put through. The court was not given the benefit of having evidence from either Mr or Mrs J. As stated above, the court was advised by Counsel for DHS that he was instructed not to have the permanent carers attend and give evidence at court, based on his instructions to abide by DHS policy.

In this particular case, there was sufficient evidence to make findings about the benefit to BS of remaining on his current order. In summary, I relied on the following:

The evidence of the paternal grandmother who described herself as "broken hearted" when she came to the realisation she could not continue to care for BS. She had effectively been the most consistent carer for BS at that time. The paternal grandmother has maintained access with BS since he was placed away from her. Since BS has been with Mr & Mrs J she sees him every three months for two and a half hours and has had Mr & Mrs J in her home. She described Mr & Mrs J as "fantastic people". She gave very powerful and persuasive evidence of watching the bond between Mr & Mrs J and BS grow. She stated in evidence:

"It's a beautiful bond growing. BS loves them now".

When asked if she saw any difficulties she said:

"**I see a very happy little boy. He's also a spoiled little boy. He's safe and loved and well cared for".**

No real attack was made upon the paternal grandmother's evidence during cross examination. She stated that she did not doubt the mother's love for BS. She stated that she thought permanent care was "**the best thing that had happened to BS**". She described him on access as:

"**Being loved and adored . . .like a king. I don't mean he's not disciplined, I've never seen the carers have to discipline him . . . at night time I lay my head on my pillow and I know he's safe".**

I found the evidence of the paternal grandmother very moving and compelling. Her love and care for BS were palpable and her wish for a life in which he was safe, happy and loved was clearly her priority. It was evident that she was sad she was unable to spend more time with him. It is to be hoped that the current inflexible access regime can be relaxed in the future to allow for a more normal and natural interaction between BS and his paternal grandmother.

(Name removed) "Ms H", the adoption and permanent care case worker employed by (name removed) in (location removed) to work with BS and his carers and birth family to support the placement gave evidence. Her evidence was that she commenced working with BS and Mr & Mrs J in the weeks leading up to BS moving into the their household full time in August 2003.

Her evidence was that she has had regular fortnightly visits to BS since December 2003, phone contact with the family and has attended all the supervised contacts. She stays up to about two hours at a time during those fortnightly visits. In her opinion, the family is functioning well and adjusting through a predictably difficult period. During her visits, BS and Mrs J are always there and Mr J is mostly there for at least part of the visit because of his work commitments.

She stated that since BS's move to Mr & Mrs J's his behaviour had changed. He had become more emotionally adjusted and beginning to attach to the carers. Her assessment was he had very good verbal skills for his age. Ms H did not paint a perfect or romantic picture of the placement and noted that limit setting was still being worked on.

At the time at which Ms H gave evidence, her last visit upon BS at home had been September 16, 2004. She noted the atmosphere had been relaxed and she stayed about one and a quarter hours with Mr & Mrs J and BS all present. When asked questions about BS's attachment, Ms H noted that BS during that last visit climbed onto Mrs J's knee and once there said "I love you Mum". She kissed him and said "I love you too".

Ms H noted BS's behaviour could be difficult and demanding at times. Ms H's overall opinion after many hours of contact was that BS was doing very well in Mr & Mrs J's household and was well settled.

I also rely on the evidence of (name removed) "Ms R"[11] as to BS's developing secure attachment to Mr & Mrs J and her evidence as to the obvious benefits of that for him. The evidence of Ms H and Ms BS and the material contained in the relevant reports is that Mr & Mrs J have dedicated themselves to caring for BS and he has benefited and continues to benefit from it.

S. 107(4)(ab)(i) The safety and wellbeing of the child

The majority of the most relevant evidence in this case fell into this mandatory criteria. I have divided consideration of the evidence under these criteria of *safety and well-being* into three categories as follows:

[11] Clinical psychologist who performed an attachment assessment which is contained in Exhibit 58.

(a) the injuries to BS documented on 16 March, 2002 and the ongoing risk to him in his mother's care;

(b) the capacity of the mother and Mr K and Mr & Mrs J to understand and respond to BS's needs; and

(c) BS's needs and his attachments and risk to him of disruption from his current placement.

(a) The injuries to BS: In March 2002 BS was living in a flat with his mother on a custody to Secretary order having moved there in early January 2002 from Salvation Army accommodation. There are varying accounts in the evidence by the mother and Mr K as to whether or not Mr K was living there too. However, I am satisfied that Mr K was at least spending most of his time at the flat where BS was from January to March 2002.

During this period from January to March 2002 BS's paternal grandmother started to notice marks and bruises upon BS. The paternal grandmother noticed a bruise near BS's eye and a large scratch on him on one occasion during this period. Her evidence was that she started to keep a diary documenting all of the marks she was noticing on BS as she started to think BS was being hurt. She gave evidence from diary notes of noticing on 25 January, 2002 that BS was sunburnt, on 30 January, 2002 he was sunburnt and on 3 February, 2002 he had a bruise on his cheek.

Her evidence was that by February 2002 the mother did not want her to see BS any more. As a consequence the matter was returned to court to confirm a fixed access regime each Saturday from 9.00am until 5.30pm. Up until that point access had been occurring without the need for court orders fixing times.

The paternal grandmother gave evidence that on the 2nd of March, 2002 BS had small bruises all over him. She noted that each time she saw him during this period he had bruises.

On 9 March, 2002 the mother rang the paternal grandmother to say she could not see BS on the coming Saturday as she was going to Melbourne for a funeral. The mother in her evidence admitted that this had not been true but was a device to avoid the paternal grandmother seeing BS because he had marks on him. The mother when asked in

evidence about the paternal grandmother's observations of BS during that period could only say that they were observations based on the paternal grandmother's desire to have BS to herself and not motivated by his best interests. This comment is not supported by any of the other evidence and indeed quite contrary to it. It is even contrary to some of the mother's own evidence about the levels of assistance the paternal grandmother gave to her and the father.

It was with this background that on 16 March, 2002 the paternal grandmother was alerted to BS's condition by her son when he went to collect BS for a Saturday access on that day. Upon seeing BS, she immediately arranged for BS to be examined at (name removed) Hospital by a consultant paediatrician.

Dr E ("the consultant paediatrician"), documented BS's injuries and stated on 16 March, 2002[12] he found four clear areas of injury to BS as follows:

(1) On his right cheek there were four linear bruises fitting the imprint of an adult hand, typical of a slapping injury. He rejected the proposition that the bruising could have been caused by a grasping action such as that described by Mr K.

(2) On his lower back he found bruising which resembled a human bite mark. He rejected the proposition that this injury could have been caused by an animal such as a dog.

(3) On the left cheek there were three linear bruises which also had the pattern of the imprint of an adult hand.

(4) On his right buttock there was a bruise which was consistent with a blow with a narrow object, a pinching action or falling into an object such as a toy whilst not wearing a nappy.

The consultant paediatrician concluded these injuries were indicative of physical abuse.

Senior Constable TB of (location removed) Sexual Offences and Child Abuse Unit charged the mother and Mr K with recklessly causing injury and unlawful assault. The mother ultimately pleaded guilty to unlawful assault and was placed on a good behaviour bond. Mr K ultimately pleaded guilty to recklessly cause injury and unlawful assault and was sentenced to 5 months imprisonment to be served by way of

[12] Exhibit 24

intensive correction order.[13]

The explanations given by the mother and Mr K as to what happened to BS to produce those injuries which were documented on 16 March, 2002 has changed significantly from that time until the present. In my view the changing explanations and rationalisations are significant and relevant to BS's safety were he to be placed in the mother's home.

The mother gave an account to the court in her sworn evidence as to how the injuries to each of BS's cheeks occurred. She stated that she had inadvertently slapped him on one occasion when he woke from sleep and she accepted that was wrong and she felt remorseful. As to the other bruise she stated this had been caused by Mr K one morning earlier in the week of the 16 March. She estimated it was probably Tuesday 12 March, 2002. She stated she had gone out for a couple of hours to do some tasks and upon her return she found Mr K showering BS and BS spewing up ash and cigarette butts. She stated Mr K explained to her that he had found BS eating cigarette butts and foils and ash from an ashtray and had to quickly and forcefully remove that material from BS's mouth. In doing so he had used too much force and caused bruising to BS's face.

She stated in evidence that she was, "**very proud he did act that way because I wouldn't have known what to do**".

She also gave evidence that BS was "pooing" black stuff days after this episode, consistent with him having swallowed the contents of the ashtray.

Her explanation for the bite was that the dog may have done it and she had no explanation for the other bruise on his buttock. It was her position that Mr K's plea of guilty was based on legal advice and their understanding that the forceful use of first aid that Mr K did on BS was sufficient to constitute the criminal offence of recklessly causing injury and so he pleaded guilty.

There was no record of the criminal proceedings or a copy of the summary of prosecution facts or charge sheets available to this court. There were the taped records

[13] Mr K had a considerable prior criminal history which includes a special condition on a community based order requiring him to participate in drug and alcohol programs. Such a condition in a community based order leads to the inference that the sentencing court on that occasion was told that Mr K's offending was based on some form of substance abuse problem.

of interview of both the mother and Mr K that were tendered into evidence[14] together with various police statements. Unfortunately there were no transcripts of the record of interview so it was necessary to listen to the entire taped records of interview.

On 25 March 2002, nine days after BS was removed from her care, the mother was interviewed by police by way of formal taped record of interview. She was asked a number of questions during that record of interview about the bruises and marks on BS which were detected when he was examined by the consultant paediatrician. She admitted to having caused one of the bruises to his face, stating in the record of interview she sometimes gets angry with him when he cries and "**may have slapped him across the face sometimes when he screams for no reason**"[15]

In the course of the record of interview the mother details an episode on or about the 10th of March where BS woke up about midnight and would not go back to sleep. She described it in the record of interview as follows:

"**I went in. I tried laying him back down and putting his dummy in his mouth but he didn't want his dummy. He just kept screaming his way out. So I picked him up, tried rocking him for an hour. He wouldn't still go to sleep so I just put him on his bed, wrapped him up, gave him a slap across the face then picked him back up because I felt bad and then he fell asleep in my arms".**

The mother was then asked by the interviewing police about the bruising seen on BS on 16 March, 2002. Her initial response upon questioning was to explain that on the Tuesday of that week she went out and when she came back BS had bruises on his face. She explained she had gone to DHS that day and left BS with Mr K at home. When she returned home Mr K had BS in the bath. He put him to bed after his bath.

She and her friend (name removed) “Ms L” found the bruises on BS after Mr K had gone out and she had got BS up from his sleep. She explained to police that when Mr K returned she asked him about the bruises and she states that he denied any knowledge of any bruises to BS.

She then told the police that Mr K offered her a couple of explanations for the

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[14] Exhibit 8

[15] Exhibit 8: It was not possible to cite question numbers and answers without the benefit of a transcript of the record of interview. Consequently quotes from the record of interview are only identified as question (Q) or answer(A).

bruises. The first one that the marks may have been some kind of allergic reaction to the shampoo he used on him in the bath. The second explanation was that he may have fallen on his toys whilst Mr K left him unattended in the bath. The interrogating police member continued to pursue questioning the mother about what she thought had happened to BS as follows:

Q: "What do you think might have happened?"

A: "That Mr K might have hit him across the face because he was being naughty during the day when I was gone".

Q: "What do you think about that?"

A: "Not good because now I've lost my son".

She was asked several times throughout the record of interview if Mr K had given her any other explanation for the bruises on his face. She answered again later in the record of interview:

A: He just said 'I washed his hair with shampoo and might have scratched his face' or he's fallen over in the bath when he's left him in the bath by himself".

Q: Do you find that to be a reasonable explanation, do you, considering the bruising?

A: Well, at the time, yes, but as it went on no.

Q: Have you ever - do you get bruising when you're allergic?

A: No.

The mother was also asked about the other bruises and marks on BS and the bite. She denied having ever seen those other bruises and marks upon him. She gave the police the explanation that the dog had previously bitten BS and that BS is clumsy and falls over a lot and bangs his head on the table. She also told police at the end of her record of interview that she wanted to make a statement about the other injuries to BS.

Indeed the mother did make a statement dated 25 March 2002 and this statement was tendered into evidence.[16] She makes a statement that is consistent with the questions and answers she gave in her record of interview except that she was

[16] Exhibit 7

more expansive in her description of marks on BS's face.

In particular, in the statement she describes seeing the bruising to BS for the first time in the presence of her friend Ms L about an hour and a half after arriving home. She states that she noticed dark black and blue bruising on BS's face which looked very sore….

….."**They took up half his face, they ran from his eye level down to his chin, they were on both sides of his face. I couldn't bear to look at them. I have never seen BS with those types of bruises before. I handed BS to Ms L and walked out of the room. I said to her, 'I can't look at him, take him'. Ms L asked what happened, I told her I didn't know and then told her about Mr K giving him a bath".**[17]

The mother's statement goes on to confirm that she did ask Mr K what happened to BS and that Mr K denied having seen any bruises.

When challenged during cross-examination about why she did not give the police the explanation about the ashtray she gave in sworn evidence in these proceedings she stated it was because she was "nervous" and "forgot" to tell the police that part of the story. It was not put to her that during the record of interview she was actually asked by the police this question:

Q: Did Mr K give any other explanation as to how those bruises occurred?

A: No.

Q: Have you queried with Mr K in relation to those bruises?

A: Yes, and he just said 'I washed his hair with shampoo and might have scratched his face' and he's fallen over in the bath when he's left him in the bath by himself.

Mr K was also interviewed by the police later on 25 March 2002. He confirmed he had been the mother's boyfriend for six to seven weeks and stays fairly regularly at her flat. He was asked about the bruising on BS and in summary he gave the police the following explanation.

He explained that he was minding BS whilst the mother went out. He stated to police he was making a coffee after waking and going into the kitchen. He stated that he went

[17] P.2 paragraph 10 of Exhibit 8

into the lounge room and found BS eating cigarette butts out of an ashtray. He stated that he smacked BS “on the arse”, at which time he started to cry but would not open his mouth. Mr K said he then slapped him across the face saying:

"**Come on mate, spit it out".**

He stated BS was crying upon being slapped but refusing to open his mouth. He described BS as "**biting down**", which required him to forcefully grab BS's face and prise his mouth open. Mr K told police that thereafter he gave BS a bath where he left him unattended for about 20 minutes. He told the police that he told the mother about the ashtray incident when she got home and although she went off at first she “**was OK with it afterwards**”.

Upon further questioning by police he conceded that he had occasionally given BS "**a tap on the arse**" before but never on the face. He also told police that the mother usually slaps him on the face if he does something wrong.

Later in the record of interview he stated he had slapped BS on the face about twice and then said:

"All I ever do is slap him or slap him on the arms".

He stated on several occasions that BS was a **"little bugger for a few days when he came back from his dad's and wouldn't do anything he was told”.**

Further on this issue, the paternal grandmother gave evidence that on the night of 20 March 2002 Mr K came to the supermarket where she worked, introduced himself to her and stated to her she was doing the wrong thing. When she questioned him he told her the marks on BS's face were a rash. The paternal grandmother gave evidence that Mr K told her during that interchange that he hated BS because he looked like his father.

She gave evidence that she had been extremely upset by this encounter but in particular that Mr K had told her he hated BS.

When this was put to the mother in cross-examination that Mr K had said to the paternal grandmother that he hated BS because he looked like his father, the mother stated that Mr K would not have said that he hated BS. She stated however, he may have said he felt sorry for BS because he looked like his father as she had often heard him make such comments.

When Mr K was shown photos of BS's face during his record of interview he stated that BS bruised easily and was a clumsy boy. He went on to say in the record of interview that the mother usually slaps him on the face if he does something wrong.

Mr K also stated later in the record of interview:

"**I know I shouldn't really smack him on the face**".

In sworn evidence Mr K recounted his version of the ashtray incident. Mr K's version in evidence was that he simply used too much strength in trying to prise BS's mouth open. He maintained that he pleaded guilty to the criminal charges because he was guilty of not giving.. "**good enough first aid…… My first aid was reckless".**

He stated he realised his mistake and was trying to make things better for the mother and BS. In the course of his giving evidence he was questioned about the weekend before March 16, 2002 when BS had not been given access with his father and paternal grandmother because the mother had to go to a funeral. Mr K confirmed that he recalled that the mother had had to attend a funeral in (location removed) and recalled it was either her nana, M or E who died and stated he went to the funeral too. Ironically, the mother in her sworn evidence conceded that she had fabricated the story about the funeral to conceal the marks apparent on BS at that time.

Ms L, a friend of the mothers at the time made a statement to the police[18] about her observations of the marks on BS's face on 12 March 2002. In evidence Ms L said that the mother told her that BS may have slipped in the bath or her boyfriend Mr K may have hurt him whilst she was away that morning. In her statement Ms L said the mother kept asking BS:

"**What have you done to yourself?**"

Ms L also stated:

…."**As we walked around the street the mother would make comments to me like, 'Mr K must have done it and I'll have to talk to him about it….'".**

Ms L confirmed in cross-examination that she was not aware about any explanation about an ashtray being removed from BS's mouth.

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[18] Exhibit 29

During April and May 2002 the mother attended clinical psychologist Ms G at the Court Clinic for a court ordered assessment. When asked by Ms G for an explanation as to how BS got the injuries to his face and back, she stated to Ms G[19] she was not there at the time and she attributed the bite mark to the family dog.

When the mother was asked in cross-examination why she had not told Ms L what happened she broke down in the witness box and asked for a break. Upon resuming her evidence after the break she stated that it had been a "long day" on March 12 and she had "forgotten". Her explanation in cross-examination as to why she did not tell Ms G about the ashtray incident on 19 April 2002 when she was at the Court Clinic was that it was the first time she had been in trouble and she "forgets things when she is in trouble".

Further in her evidence she agreed that she had seen Mr K hit BS once by slapping him across the face before the March 2002 removal. Her evidence was that this was a "fairy hit" or a "fairy tap". She agreed it left a red mark on BS's face and noted that "fairy taps will do that". She stated that she told Mr K not to hit him after BS went to bed after this incident of the "fairy tap". Further it was her evidence during cross-examination that bruises did not affect BS at all and still have not to this day.

As to the bruise she caused to BS, she initially said in evidence she could not explain how it happened because it was not a hard hit but later went on to say she was tired and frustrated when it happened.

In conclusion on this issue of the detected injuries to BS, it is important to state the conclusions I have reached about those injuries as they form an important aspect of this case.

<u>Bruising to BS's face</u>

Both the mother and Mr K have conceded they caused the injuries to BS's face. The mother asserts that the slap she gave BS which caused the injury to one side of his face was a one off incident in the middle of the night when she was tired and frustrated. However, during Mr K's record of interview with the police his answers refer to regular striking of BS during the couple of months of his involvement in the household. Indeed the mother in one of her answers to the police suggests in her

[19] Exhibit 57A P.6

answer that there was more than one occasion she hit him across the face. As to the injuries to BS's face which Mr K agrees he caused, I find on the balance of probabilities that those injuries were caused by Mr K striking BS across the face. I reject Mr K's explanation about causation. I do so for the following reasons.
(1) It is inconsistent with the consultant paediatrician’s opinion which was that the injury was not caused by a grasping action or grabbing but a slap.

(2) Mr K's account is internally inconsistent in that he describes BS as crying and distraught and yet at the same time refusing to open his mouth. It is inconceivable that a 14 month old child could cry without opening his mouth.

(3) Mr K’s version for at least the first month after the episode, is not supported at all by the mother in her discussions with Ms L and during interview with Ms G.

(4) The mother's initial accounts to the police, both in her record of interview and her statement make no mention of any ashtray incident given to her by Mr K even when explicitly asked a range of questions on the issue by police. Indeed her answers to police show her concern about the possibility that Mr K may have harmed BS intentionally. It is simply not credible that had the mother been given the “ashtray” explanation by Mr K before being interviewed by the police(which the mother now perceives as behaviour Mr K should be proud of) that she would not have told police of this explanation to minimise the risk of criminal charges against him.

(5) Similarly, the statement and evidence of Ms L corroborates the mother's original account to the police both in her record of interview and police statement that the mother was concerned upon finding the bruising on BS that Mr K had hurt him. Ms L confirmed in evidence that the mother made no mention of any explanation by Mr K of the administration of first aid to BS.

(6) Consistent with this is the report and evidence of Ms G who saw the mother at the Court Clinic in April 2002 at which time the mother told Ms G she had no explanation

for the injuries to BS. It is simply not credible that the mother would have forgotten to tell Ms G the story of Mr K's rescue of BS at a court ordered clinical assessment in circumstances where BS had been removed from her care as a result of those very injuries being discovered.

(7) Mr K's answers to police indicate a practice over the weeks he was in the household of BS being hit by both he and the mother which is consistent with the evidence of the paternal grandmother of noticing marks on BS over those weeks.

(8) Mr K's explanation of his plea of guilty to the criminal charges of recklessly causing injury and the sentence of imprisonment that was imposed upon him(and not appealed) is not consistent as a matter of law with his evidence to this court that he simply performed a lifesaving rescue upon BS. He was legally represented and indeed his evidence was that he entered a plea on legal advice that his "negligent first aid" amounted to this serious indictable criminal offence.

It should be added that this plea to the criminal charges was relied upon as evidence both of remorse and an acknowledgement of wrong doing in these proceedings but in these circumstances I do not find it evidence of either.

Neither the mother nor Mr K was remorseful about the injuries to BS. On the contrary, their position was that there was only a regret that the application of Mr K's lifesaving intervention upon BS should not have been so strong. Given that I have found the entire story of the "ashtray incident" an invention, I can find no remorse for what occurred to BS in these circumstances or acknowledgement of wrong-doing.

Bruising to buttock

The opinion of the consultant paediatrician as to this injury leaves open a few possibilities. However, given the description Mr K in his record of interview of his smacking of BS "on the arse", it raises a real possibility that this bruise has been caused by such a blow.

Bite

I accept the consultant paediatrician's evidence that this bite mark on BS's

back is a human bite and not an animal bite. Both the mother and Mr K offer the explanations that the dog may have bitten BS on the back. I find the more probable explanation that the bite mark was caused by either the mother or Mr K. The consultant paediatrician's evidence was it was not a child's bite but an adult bite. The mother maintains she did not notice it when changing BS's nappy. On the balance of probabilities, I conclude that the mother either caused the bite mark or has failed or refused to notice or acknowledge an injury that Mr K has caused to BS.

Cigarette burn

This injury was noticed by the paternal grandmother in or around December or January 2001, the same month that the mother commenced her relationship with Mr K. The mother was questioned vigorously by police about this burn mark during her interview with police on March 25, 2002. The mother conceded that BS did have a cigarette burn on the inside of his forearm. Ultimately, on the evidence it is not possible to conclude on the balance of probabilities whether that injury was intentionally inflicted by the mother or Mr K or whether it was an accident consistent with the mother's explanation.

In conclusion as to the detected injuries to BS on March 16, 2002, the case for the mother sought to isolate the injuries for which BS was removed from her care in March 2002. The mother's case on this issue was shaped in such a way as to endeavour to leave the impression that Mr K made one inappropriate attempt at rescuing BS from swallowing cigarette butts and that thereafter no opportunity was given to the mother or Mr K to redeem themselves from this piece of poor behaviour.

That they had both pleaded guilty to assaults upon BS was relied upon as evidence of their understanding of their wrongdoing and the assurance that such conduct would not occur again. I have stated my view of this above. In any event, the evidence of physical harm to BS is more extensive than any singular piece of inappropriate conduct and consequently far more troubling.

As at November 2004, the mother has clearly collaborated in and embellished upon Mr K's false account of the ashtray incident. This too is extremely troubling. It is

compounded by the evidence of the paternal grandmother as to her observations of marks and bruises upon BS in the weeks leading up to 16 March. These observations must be seen in the context of the comments Mr K made to the paternal grandmother in the supermarket on the night of 20 March 2002.[20]

It has been the consistent assessment of DHS that the mother's collaboration with Mr K in this implausible account of what happened leaves BS exposed to further potential episodes of physical assaults upon him without any confidence that his mother could or would protect him. The view of DHS, with which I agree, is that the fact that there have been no reported assaults on A does not provide any comfort against such assaults upon BS as he holds a very different place in this family.

Ms G in her assessment expressed the view that if the paternal grandmother's reports were accurate, the mother's denial of family problems and lack of memory of family life may be a reflection of her tendency to avoid addressing issues. This view is consistent with the mother staying with BS's father in an extremely unsatisfactory relationship in which he was being physically violent to her. It is also consistent with the mother's initial explanation of BS's bruises as happening when she was not present and therefore she has no explanation. It is also consistent with her decision to pursue her relationship with Mr K and manage to avoid confronting what had happened to BS.

One must conclude on the evidence that the mother has not been able to choose BS's safety and protection over a relationship with Mr K that was only a couple of months old at that point. Ms G found that the mother's major issues appeared to be her youth and her dependency.[21] Ms G concluded:

"It would also appear that her own dependency precludes an open review of the possible reasons for the bruising to BS which prompted the current investigation. The mother chose to remain with a potential perpetrator or she was allowing Mr K to be implicated while denying her role".

[20] See Pp 40-41 above detailing Mr K telling the paternal grandmother that he hated BS because he looked like his father.
[21] Exhibit 57 P.6

In the space of the several weeks into his relationship with BS Mr K was hitting him, even on his own admissions to the police and the mother's evidence. He was also making such comments about BS as noted above[22]. The mother has not only been unable to stop Mr K and protect her son from such physical assaults and verbal denigration but she has engaged in an apparent acquiescence and tolerated such a regime in the household.

The evidence supports Ms G’s earlier assessment of the mother when concerned about the mother's dependency, she stated:

"The mother's current pattern of denial and avoidance does not auger well for her potential role in parenting”.[23]

(b) <u>the capacity of the mother and Mr K and Mr & Mrs J to understand and respond to BS's needs:</u>

This necessary capacity was identified throughout the evidence as being crucial to how BS would cope with any move from Mr & Mrs J back to his mother and Mr K. Clinical psychologist Ms R who performed an attachment assessment[24] at the request of DHS and attended court to give evidence was very strong in her view on this issue which is best stated at p.22 of her report:

…."**Assuming the care of BS at this point in time requires more than the provision of a safe environment, stimulation and the meeting of basic needs. Assuming the care of BS requires the capacity to assist him through the experience of attachment trauma and to minimise the inherent developmental risks that his history poses, the mother is unable to consider the enormous impact of moving BS from his current placement. She minimises the emotional and psychological sequelae limiting her thought to BS being with his sister and back with her"….**

Of Mr K she says as follows:

…."**Mr K is a dedicated partner and father and he has taken on the mother’s cause, equipped by his unresolved experiences regarding his early care and childhood/adolescence. While Mr K's passion is in some way admirable it**

[22] See p.45 above
[23] Exhibit 57 p.9
[24] Exhibit 58

prevents him from more objective thought about BS's experience and unique needs. This makes anticipation and receptiveness to such needs unlikely"….

(Name removed) "Ms M", clinical psychologist who performed an assessment for the Court Clinic also prepared a report[25]. However, Ms M did not really turn her mind to this issue in particular in her report as she formed an adverse view about the current carers and therefore recommended BS's return to his mother's care albeit very gradually.

During her oral evidence she was cautious about the mother's ability to cope with BS. It seemed that her opinion was based much more on negative views of Mr & Mrs J rather than a positive view of the mother.[26]

As stated above neither of the prospective permanent carers were called to give evidence but there was evidence about their parenting capacity put before the court through the evidence of Ms H.[27] She gave the evidence set out above about how well BS was progressing in the household of Mr & Mrs J. Further, the evidence of the paternal grandmother was that BS was in a loving and caring relationship with Mr & Mrs J such that she felt she could rest easy at night and know he was safe.

The evidence of Ms R set out above was that BS's carers need to be able to understand his needs in the context of his history of past trauma. It was her assessment that Mr & Mrs J had the necessary understanding and skills and insight to do so. She concluded:

….. **"that Mr & Mrs J are sensitive carers able to think about BS's experience through his young eyes. They are able to participate and respond to his needs through their sensitivity to his communication and his unique ways. The quality of their care has allowed BS to manage the upheaval of placement transition. BS presents as making good developmental progress despite his less than optimal care history. This is a credit to Mr & Mrs J's input thus far"[28].**

Ms M made an expert assessment that Mr & Mrs J did not have such skills. However for the four reasons set out below I prefer the evidence of Ms R on this issue.

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[25] See Exhibit 57
[26] See p.58 for discussion about the circumstances of the clinical assessment of Mr & Mrs J at the Court Clinic with Ms M.
[27] Ms H was the Adoption and Permanent Care worker employed by (name removed) (location removed)
[28] Exhibit 58 p.21

Those four reasons are as follows:

(1) I am satisfied on the evidence that Mr & Mrs J had not been prepared for the clinical assessment performed by Ms M and that lack of preparation is likely to have impacted adversely upon their presentation at clinical interview with Ms M and clouded any assessment performed.

(2) Ms R's assessment was performed in a more organised and orderly way in that all parties understood what her role and function was and what she was trying to do and the expectations upon them to participate in such a clinical assessment.

(3) Ms R was able to demonstrate her highly specialised expertise in the area of attachment assessments and associated trauma of poor attachments in children.

(4) Finally, in coming to a view about the differing expert assessments, Ms R's assessment of the capacity of Mr & Mrs J is consistent with the weight of the evidence of significant witnesses such as Ms H and the paternal grandmother both of whom have observed Mr & Mrs J with BS on many occasions between them.

(c) <u>BS's needs and his attachments and the risk to him of disruption from his current placement:</u>

In the past decade there has been growing recognition of the complexities of infants' and children's attachment to their carers. The understanding of these complexities has become an important part of decision making for children's wellbeing. The emphasis on making assessments about where a child's attachments lie, the nature of them and the impact upon the child of disruptions to them is now a regular feature of decision making in this court. Making assessments of those attachments is recognised as a field of expertise outside the ordinary expertise of men and women. Further it is accepted that there is a recognised and organised body of knowledge and learning which therefore brings it within the rules of expert evidence

upon which those suitably qualified can give opinions to the court.[29]

Both Ms M and Ms R performed clinical assessments upon the mother and Mr K and Mr & Mrs J with BS and formed views about his attachments. Ms R and Ms M made findings and recommendations that were at odds with each other.

Ms M performed an assessment on behalf of the Court Clinic pursuant to an order of the court. Ms M made a professional decision that to perform the court ordered assessment she needed to perform clinical interviews and observations and psychological testing of Mr & Mrs J, with whom BS had been living for the past five to six months at the time Ms M assessed them.

That was a decision quite properly open to Ms M on the material she had. It would appear however for whatever reason this intention to perform such an assessment was not conveyed to Mr & Mrs J.

Consequently Mr & Mrs J arrived at the Court Clinic on the appointed day and were taken into an interview room and interviewed and requested to perform psychological testing in circumstances where they had no indication this was to be required of them prior to their arrival. The concomitant of that was that BS was left to be cared for by Ms H from (name removed) and BS was clearly unhappy about that arrangement as was Ms H who felt unprepared for such a role.

The situation appears to have unhappily escalated in the clinic with BS, Mrs J and Ms H, not to mention Ms M herself apparently becoming a little entangled in this distress.

This situation is in marked contrast to the assessment performed by Ms R in which Mr & Mrs J well understood on what basis they were attending. They arrived and participated willingly.

The respective views of Ms M and Ms R on the issue of attachment are set out below.

Ms M concluded on her clinical assessment[30] BS was very insecurely attached to Mr & Mrs J and that Mrs J's interaction with BS was anxious and over enmeshed and stifling his autonomy.

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[29] Fisher v Brown [1968]SASR

[30] Exhibit 57

She disapproved of the instruction given to Mr & Mrs J by (name removed) agency about how to develop and enhance the attachment as between themselves and BS. Ms M found that there was still a fragile bond between BS and his mother and that BS was "totally at ease with his family group".

In her opinion, the mother afforded BS more room to be himself and was not possessive. Ms M's opinion does not paint a strong endorsement of the mother's capacity. Indeed she describes BS's attachment to his mother as "precarious"[31]. As stated above, her recommendations for an attempt at reunification with the mother appear to be based on a negative view of Mr & Mrs J rather than a positive view of the mother and Mr K. Her recommendations also appear to be based on concluding that there is no evidence that Mr K posed any risk of future harm to BS on the basis of her clinical observations and explanations she obtained from the mother and Mr K about the previous injuries to BS. A view, for the reasons expressed above I do not hold.

Ms M also appeared to have made her recommendations based on the view that the mother and Mr K were pressured into agreeing to BS's guardianship order and were not given the opportunity or supports to turn around this decision. Ms M whilst recommending BS's return to his mother acknowledged there were a lot of difficult issues for the mother and Mr K and it would take nine to twelve months to achieve reunification with a lot of work and support. Indeed the ultimate position of Ms M about reunification of BS with his mother and Mr K was a very cautious one, expressed in evidence in this way:

"I'm not saying it is impossible but I am aware of the hurdles which would need to be overcome for such a plan to succeed".

Ms R in her assessment set out the theoretical framework upon which she relied to make her assessment. She set out BS's history of movements from home to home and care giver to care giver throughout his infant life. She fully assessed each couple, the mother and Mr K and Mr & Mrs J. As stated above, in contrast to the Court Clinic assessment by Ms M, this was done with pre-arrangement and with the consent and full knowledge of the parties that it was going to happen. Ms R concluded that BS had formed the beginnings of a secure attachment to Mr & Mrs J.[32]

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[31] Exhibit 57 p.20
[32] Exhibit 58 p. 21

She described BS as thriving in the care of Mr & Mrs J.

Ms R, in describing the various forms of attachment, noted that the fact that BS could even form an *anxious* attachment was a developmental achievement for him given his history. However, it was not her opinion that BS had an anxious attachment to Mr & Mrs J. She noted BS becoming anxious at times but Mr & Mrs J were able to soothe him. She described BS as:

"**Contained, able to be soothed and then go on despite a very long day".**

She also assessed BS as clearly demonstrating to her through his play where his attachment lay. Ms R saw Mrs J as sensitively meeting BS's needs and BS seeing Mrs J as his primary care giver.

Ms R found that BS had formed….

.. **"a bond of psychological dependence to Mrs J. He holds her in mind at times of stress and he is soothed and comforted in the knowledge that he can be with her. He experiences Mrs J as well able to meet his needs. For BS Mrs J feels like Mummy and Mr J feels like Daddy. He has found a place with them and becomes anxious at the thought of not being with them"….**[33]

Ms R concluded:

> **"While Mr K and the mother may now be better placed to provide adequate care to BS, the reality is that BS has formed attachments elsewhere over the interim years. To move him now from a placement in which he is thriving will be to place him at significant developmental risk which he can ill afford given his history. To place BS with the mother and Mr K, to test their ability to care for two young children, one who comes with a history of trauma, now amounts to no less than a dangerous experiment"**[34]

Ms R in evidence expressed BS's position as one in which he was now laying down a secure attachment to Mr & Mrs J but he was still experiencing some of the trauma of his disrupted attachment. In her opinion BS's attachment to his mother 15 months ago was probably a "disorganised attachment". Ms R was clear in her assessment that whilst BS had a bond with his mother, she described this as very different to an attachment.

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[33] Exhibit 58 p.21
[34] Exhibit 58 p.22

She described an attachment as a psychological bond between a child and a primary carer in which the child looks to the carer to comfort and soothe in times of stress and anxiety. She contrasted this with a bond in which one enjoys the company of another.

Ms R stated if there was adequate capacity in a parent, it was possible to reform an attachment but Ms R did not assess that capacity in the mother and Mr K and in my view gave cogent reasons for forming that view.

Ultimately I prefer the view expressed by Ms R on the quality and nature of BS's attachment to the mother and Mr & Mrs J and the likely detriment to BS of disrupting that attachment.

I have accepted Ms R's assessment over that of Ms M for the following reasons:

(1) Ms R's assessment was focused upon the attachment of BS to the adults in his life who are seeking to provide full time care to him. Ms M's assessment was a general psychological assessment of the adults. Whilst it incorporated an assessment of BS with each of the carers, its detail and focus did not match that of Ms R on the assessment and analysis of attachment.

(2) Ms R demonstrated a special expertise in the area of attachment and bonding not demonstrated by Ms M.

(3) The conditions in which Ms R's assessment was performed compared to the conditions in which Ms M's assessment was performed were more conducive to an accurate assessment with all parties understanding what was to happen throughout the day of the assessment.

(4) The observations of other significant witnesses such as Ms H and the paternal grandmother corroborate the opinion expressed by Ms R and run contrary to the opinion expressed by Ms M.

(5) The clinical assessment made by Ms G in April 2002 is also consistent with the findings of Ms R in that Ms G as at May 2002 found the relationship between BS and

his mother as "**less well developed than the relationship BS had with his father"[35].**

(6) Some aspects of Ms M's assessment were based on conclusions she reached which were not consistent with the weight of the evidence in these proceedings. For example, her conclusions about there being no risk posed by Mr K was not consistent with the weight of the evidence. Similarly, her conclusions about the mother's response to DHS intervention was not consistent with the weight of the evidence.

(7) According to Ms R, BS was still testing adults to see if they were reliable and predictable. In the household of Mr & Mrs J, they had been tested but the mother and Mr K have not been tested since BS's removal from their care two and a half years ago.

The decision made by DHS to move BS onto a case plan for permanent care was based on a concern that he had had so many placements that his capacity to develop and securely attach in a relationship with a carer was in jeopardy. (Name removed) "Ms D"[36] echoed this concern, stating a child can end up literally unplaceable if a settled placement is not found in a timely way. I was left in no doubt that at the time BS was moved into a permanent care stream, it was necessary to make those plans for him, given his history and the appropriateness of placements available to him.

It was Ms R's opinion that BS had the beginnings of a secure attachment with Mr & Mrs J which if not interfered with will develop into a secure attachment. The likelihood of a secure attachment with the mother was very low in her opinion. It was also her opinion that were BS to suffer another attachment trauma, he may not be able to form a secure attachment in his life. Ms R expressed the risk of this for BS as "high". Such a risk is a very significant consideration for me.

S. 107 (4)(ab)(ii) The nature of the relationship of the child with his or her parent including the nature of the access between the child and the parent during the period of the order

[35] Exhibit 57

[36] See Witness no. 8 in Appendix 1

The nature of the relationship between BS and his mother has been dealt with extensively above. BS is four years old and has now spent almost two thirds of his life out of his mother's care. Whatever view one takes of why this is so, there is no disagreement that he has now not been cared for by his mother for two and three quarter years.

In his entire life, at most he has spent a maximum of about three months in the same household as Mr K.

Access between BS and his mother during the period of the guardianship order appears to have been mostly positive for BS. However, for the year between March 2002 and March 2003, following BS's removal from his mother, BS's contact with his mother was much less satisfactory for him. His mother seemed to drift away from ongoing contact with him, distancing herself from him both physically and psychologically.

She eventually stopped making any contact whatsoever for about six months of BS's life from October 2002 to March 2003.

Whilst the mother sought to rely on her medical condition during her pregnancy for why she had not maintained this contact, I am satisfied that DHS maintained a constant offer to arrange visits with BS and collect the mother and drive her to attend those visits.

There was no expert medical evidence about the mother's capacity to participate in such visits. The only medical evidence put before the court was a medical certificate on a Centrelink form which was tendered into evidence.[37] This form contained the diagnosis "threatened miscarriage" and certified that the mother was unfit for work and “would not be able to work for eight hours a week for three to six months”. It provides neither actual diagnosis nor any indication as to the mother’s capacity to move around, go shopping, cook, wash and clean or indeed travel in a car to visit BS or attend meetings to discuss his future. I am not satisfied on the balance of probabilities that the mother was physically unable to visit BS during this period.

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[37] Exhibit 61

S. 107(4)(ab)(iii)The capacity of the parent to fulfil the responsibilities and duties of parenthood including the capacity to provide adequately for the emotional, intellectual, educational and other needs of the child

It was agreed between Counsel and accepted by me that Parliament did not intend an assessment of a parent's financial resources, assets or capacity be undertaken pursuant to this subsection. It was agreed that this section contemplated the generally accepted range of qualities, ability and understanding necessary for parenthood. There is no evidence that the mother and Mr K were unable to provide for BS's intellectual and educational needs.

However, the evidence discussed and conclusions drawn in the sections on BS's safety and wellbeing and his attachments does fall squarely into the parent's capacity to fulfil the responsibilities of parenthood, including protecting BS from physical abuse and providing adequately for his emotional needs. It is not necessary to repeat my conclusions from those sections on those issues.

S.107(4)(ab)(iv) Any action taken by the parent to give effect to the goals set out in the case plan

The current case plan for BS is a permanent care case plan. I interpret the relevance of this section to be applicable in those cases where a case plan has been formulated by DHS which requires a parent or parents to do various things or refrain from doing things during the period of the order, to make an assessment about the level of commitment a parent has to a child and their ability to address the protective concerns identified by DHS. That is not relevant in this case.

S.107 (4)(ab)(v) The effects on the child of the continued separation from the parent

This consideration has been dealt with in the section on safety and wellbeing above. (S.107(4)(ab)(i))

S.107(4)(ab)(vi) any other fact or circumstance that in the opinion of the court should be taken into account in considering the welfare and interests of the child

The mother and Mr K's progress since 2002

The mother and Mr K's progress with their parenting of A is a relevant consideration. As has been previously stated, their participation in various parenting programs since A's birth and the apparent stability they have reached in their personal relationship is positive.

Mr K having obtained full time employment, a licence and a car and the couple having settled into a three bedroom home bodes well for A's future. Further, the mother's relative immaturity and the relationship she endured with BS's father and the detrimental impact that must have had on her are all relevant considerations. As is Mr K's criminal history and his apparent capacity to now remain offence free and perhaps move into a mature adulthood where he will not continue to fall foul of the criminal law as his criminal history demonstrates has been the case in the past.

BS's relationship with his sister, A

This feature of this case is a very important consideration too. The benefit to BS of growing and developing beside his sister A and having the shared experiences and support of her for his life and developing identity is not underestimated. However, I have formed the view that the likely detriment to BS of a move now into the uncertain and still potentially unsafe circumstances of his mother's household outweigh the benefit of daily life with his sister.

It is to be hoped the benefits of that sibling relationship are fostered by the mother and Mr K and the prospective permanent carers, as both children grow to know and understand who they are to each other. DHS must ensure that this relationship between BS and A is fostered and nurtured together of course with the relationship between BS and his mother.

S. 107 (4)(a) The court must extend the order if satisfied it is in BS's best interests to do so

It follows from all of the above that I am satisfied it is in BS's best interests to extend the guardianship order.

It remains however, to consider the mother's application to revoke guardianship.

The mother's application to revoke guardianship

On an application to revoke guardianship pursuant to s.109 of the CYPA there are two pre-conditions which must be met before the application can proceed. The first is to establish that there has been a review of the case plan by the Secretary at the request of the applicant which is unsatisfactory. The second is for the applicant to establish that circumstances have changed since the making of the guardianship order.

It was not contentious that the mother had requested a review of the case plan for BS from the Secretary. She did this by letter dated October 6, 2003. The mother found that review unsatisfactory as it upheld the case plan to move BS to permanent care. In closing submissions Mr Littlejohn took issue with the conduct of the review and the failure of DHS to call the reviewer, GJ. It was his submission that an adverse inference should be drawn about such failure.

In my view there was no need for DHS to call GJ in these circumstances. The request for the internal review and its "unsatisfactory" answer is the basis upon which an application such as this is founded. To examine the conduct of that finding in this hearing seems a futile exercise that may generate much heat but little light. I find that precondition has been properly met.

The second precondition requiring the mother to establish changed circumstances within the meaning of s.109(2)(a) was contentious. DHS submitted that the court should give a narrow reading to the words "circumstances have changed" in s.109 and thus should find that the mother's circumstances had not changed sufficiently to satisfy the test. Counsel for DHS submitted that it would open the floodgates if the court took the view that each time a placement changed for a child or

a parent got a job or changed home that constituted sufficient changed circumstances to found an application to revoke guardianship.

Counsel for the mother submitted that the court should give a wide interpretation to "changed circumstances". In any event, he submitted that the mother's circumstances had changed significantly since the making of the guardianship order. He set out those changed circumstances in summary as follows:

(1) At the time of the making of the guardianship order DHS was still involved with her daughter A but withdrew its involvement after the making of the guardianship order accepting there were no further protective concerns.

(2) The mother has now completed the Innovations program and has learned much more about parenting as a result of her participation in that program and is now successfully parenting her young child A.

(3) At the time of the guardianship order the mother was living in a caravan park, had no driver's licence and neither did Mr K. That situation is now changed in that Mr K now has a licence and she is eligible to obtain one.

(4) The mother has now matured. She was 19 years old when BS was born but she has matured and developed considerably since that time.

(5) She and Mr K have now purchased a car and are living in a rented three bedroom home.

(6) At the time the guardianship order was made their relationship was under considerable stress but it is now a stable and settled relationship. It is a long term committed relationship in which they are successfully rearing a child together.

(7) Mr K now has full time employment and has completed his obligations to Community Corrections successfully and not re-offended.

(8) At the time at which the guardianship order was made the mother was not legally represented and consented to that order being made without fully understanding the ramifications of that order.

Both counsel submitted that they could find no authoritative interpretation of the phrase "circumstances have changed" and further it was not defined in the Children and Young Persons Act.

In my view it is not surprising that there is no definition for this phrase either statutory or at common law as it seems almost impossible to define. That Parliament has given the court discretion to be exercised judicially to assess each case taking into account the nature and purpose of the legislation to decide this question is not mysterious.

A careful and proper consideration of the words in s.109(2)(a) must be done in the context of the entirety of the CYPA as well as the more specific objects of the section. One must assume that as Parliament did not create a closed category of "circumstances" it intended not to do so. With respect it seems a wise decision on behalf of the legislature. It is simply not possible to contemplate all of the variables or combinations of circumstances in a child's life or the life of his or her parents that may amount to changed circumstances.

Whilst it is clear that Parliament could not have intended to give a right *ad infinitum* for such applications to be brought, to read it narrowly would do injustice to Parliament's intention. It would be anomalous to be proscriptive about changed circumstances.

Whilst changed circumstances cannot be the mere passing of time, a significant change or combination of changes to a parent's life circumstances since the making of the guardianship order can constitute such a change. It seems to me the proper test to glean from these words is: *Have the circumstances of the child or an applicant parent changed sufficiently since the making of the guardianship order to raise a prima facie case that a judicial reassessment of the child's circumstances is warranted?*

Applying this test I find that the combination of factors which the mother relies upon as set out above does establish changed circumstances sufficient to warrant

a judicial reassessment of BS's circumstances.

Having found changed circumstances, s.109(3)(b) then requires the following question to be answered: *Is the court satisfied that it is in BS's best interests to revoke the order?.*

Section 109 then provides what statutory options are available if the court is satisfied that it is in BS's interests to revoke the order. In this case, having considered all of the matters set out above as part of the application to extend guardianship and having found it is in BS's best interests to extend the order, it follows I have concluded it is not in BS's best interests to revoke the guardianship order.

For the above reasons, I make the following orders:

1. The mother's application to revoke the guardianship order of May 27, 2003 is refused.
2. The guardianship order of May 27, 2003 is extended from 28 April 2004 to 27 April 2005.

Judge Coate

President, Children's Court of Victoria

21 December 2004

Appendix 1 to decision
by HH Judge J. Coate
on 21 December 2004

WITNESSES

1. Senior Constable TB, (location removed) Police S.O.C.A. Unit.

2. Ms B, Social Worker, (name removed) Anglicare (location removed).

3. Ms McD, Child Protection Worker, DHS (location removed).

4. Dr E, Consultant Paediatrician.

5. The paternal grandmother.

6. Ms P, Adoption and Permanent Care Worker, DHS (location removed).

7. Ms L (friend of the mother)

8. Ms D, Team Leader Home Based Care Program, Berry Street, Victoria.

9. Ms H, Adoption and Permanent Care Worker, (name removed) (location removed).

10. Ms A, Manager of Placement Contracting Team, (name removed) Region of DHS.

11. Ms C, Case Manager, DHS.

12. Ms M, Clinical Psychologist, Children's Court Clinic.

13. Ms G, Clinical Psychologist, Children's Court Clinic.

14. Ms R, Clinical Psychologist and Child Psychotherapist.

15. Mr K (the mother's current partner)

16. The mother

Appendix 2 to decision
by HH Judge J. Coate
on 21 December 2004

EXHIBIT LIST - BS

EXHIBIT NUMBER	EXHIBIT
1	Booklet of photos of BS x 8 taken by Snr Const TB (16/6/2002)
2	Photos x 4 taken by Dr E (16/3/2002)
3	Booklet of photos x 5 taken by VICPOL Photographer (17/3/2002)
4	Statement of the father on 17/3/2004
5	Statement of the paternal grandmother on 17/3/2002
6	Statement of CMM on 17/3/2003
7	Statement of the mother on 25/3/2002
8	Tapes of Record of Interview x 2 the mother (25/3/2002) Mr K (25/0/2002)
9	L.E.A.P. history report for the mother dated 22/6/2004
10	L.E.A.P. history report for Mr K 22/6/2004
11	Report of Ms H of (name removed) dated 21/6/2004
12	Case Note of Ms McD (DoHS) 11/7/2002
13	Case Note of Ms McD 7/8/2002
14	Statutory Case Plan Review by Ms McD 15/7/2002
15	S.120 Case Planning Meeting Record (17/7/2002)
16	Case Note of Ms McD re: home visit on 26/9/2002
17	Case Note of Ms McD re: supervised access on 30/8/2002
18	Case Note of Ms McD 29/4/2002
19	Case Note of Ms McD re: access on 6/5/2002
20	Case Note of Ms McD re: access on13/5/2002
21	Case Note of 16/5/2002
22	DoHS report by Ms McD on 30/8/2002
23	‘Link’ report by (name removed) region re permanent care
24	Report by Dr E 16/3/2002 and Radiological Examination Report
25	BS’s Birth Certificate
26	Regulations: (Children’s & Young Persons Act)(proclaimed 11/9/2001
27	Case Notes of Ms P 8/5/2003 & 30/5/2003
28	Permanent Care Case Plan
29	Statement by Ms L
30	Signed letter of consent dated 20/5/2003 for Guardianship by the mother

31	Case Plan review report 20/8/2003
32	Minutes: Record of Case Plan Meeting 20/8/2003
33	Berry Street Report dated 17/4/2003
34	L.A.C. care plan
35	Case Plan Report for 24/10/2002
36	Case Note 14/4/2003
37	Case Note 2/10/2002 Ms D
38	Referral to Permanent Care Team Ms D
39	Case Contract Transfer
40	Transfer Summary
41	Note of Ms H – Re: Children’s Court Clinic visit
42	Notes of Ms H of access 16/9/2003
43	Notes of Ms H of access 16/12/2003
44	Notes of Ms H of access 16/3/2004
45	Photos taken on access on 16/6/2004
46	Notes of Ms H of access 16/6/2004
47	Notes of Ms H of access of 7/9/2004
48	Children’s Court Clinic warning for persons interviewed.
49	Unscheduled Review: Case Planning Record 24/10/2002
50	Case Plan meeting record 7/3/2003
51	DoHS report of 15/4/2003 supervised by Ms A (signed off by Ms A.)
52	General Case note of p/c from Ms D dated 8/4/2003
53	Draft letter to Registrar Re: consent to Guardianship Order.
54	DoHS file Re: A
55	Victorian Risk Assessment Framework Version 1 : 1998
56	Bundle of case notes of Ms C Re: DHS involvement with A
57	Clinic Reports: Ms M’s report & Ms G’s report
58	Ms R’s report & qualifications
59	Assessment Cost Estimate to Family Transitions dated 28/4/2004
60	Letter of 11/12/2003 to RC from GJ re: case plan review and decision as to outcome.
61	Medical Certificate for the mother