In the Children's Court of Victoria

Applicant:	**(NAME REMOVED)** **"THE PROTECTIVE WORKER"** [Department of Human Services]			
Children[1]:	**MD**	**[15/02/2002]**	**AD**	**[16/08/2004]**
	ND	**[05/07/2006]**	**SD**	**[27/05/2008]**

JUDICIAL OFFICER:	**PETER T. POWER**
WHERE HELD:	**MELBOURNE**
DATES OF HEARING:	**21-23/07/2008, 25/07/2008, 28-31/07/2008, 01/08/2008, 04/08/2008, 08-12/09/2008**
DATE OF DECISION:	**12/09/2008 [orders], 29/09/2008 [reasons]**
CASE MAY BE CITED AS:	**DOHS v Mr D & Ms B**
MED. NTRL. CITATION:	**[2008] VChC 2**

Child protection – Protection application – Children aged 6½, 4, 2¼ & 4 months – Protective concerns centred on substantial environmental neglect in an old Ministry of Housing flat, on the oldest child found wandering on occasions some distance from home and on the mysterious disappearance of the parents and children from the family home and their subsequent location in a motel – Whether custody to Secretary orders for the 3 oldest children should be extended and varied to reflect a non-reunification case plan or extended and revoked with the children returning to parental care on supervision orders – Whether youngest child should be placed on a custody to Secretary order [to reside with the maternal uncle] or on a supervision order in the parents' care – – Whether oldest child autistic — Attachment and bonding of children and parents — Recommended sequence for reunification of children with parents — Conflicting professional opinions on reunification analyzed — Criticism of DOHS for its recent handling of this case — 'Traumatic history' of the children's removal from parents and being shuffled around from one placement to another — Conditions relating to access of parents & oldest children – Interim variation of custody to Secretary orders – *Children, Youth and Families Act 2005*, ss.8, 10, 162(1)(c), 162(1)(e), 162(1)(f), 295-297, 302, 308

PARTY	COUNSEL	SOLICITOR
Department of Human Services [Child Protection][2]	**Mrs R Weinberg**	**Court Advocacy Unit – Ms Armstrong**
Mother [name removed] "the mother"	**Mrs M Green**	**Doolan Kemp Townsend-Ms Ardley**
Father [name removed] "the father"	**Mr S Thomas**	**Ms Deanne Jackel**
MD, AD, ND & SD	**Unrepresented - Too young to give instructions**	

[1] The protection application issued for MD had his surname as "B". That for SD had his surname as "B-D". The parents stated that the surnames of all 4 children are "D" and I have named them accordingly in this judgment and in the orders I have made in this case.
[2] Hereinafter 'DOHS' or 'the Department'.

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1. STRUCTURE OF FAMILY & EXTENDED FAMILY

1.1 THE CHILDREN & THE PARENTS

The children the subject of this case are MD [6y7m, 15/02/2002], AD [4y1m, 16/08/2004], ND [2y3m, 05/07/2006] & SD [4m, 27/05/2008]. Their parents are Mr (name removed) "the father" [41y] & Ms (name removed) "the mother" [35y]. Since about August 2004 the parents have resided in Ministry of Housing accommodation at (address removed).

1.2 THE EXTENDED FAMILY HAVING REGULAR CONTACT

- **The children's paternal grandmother, with whom the 3 older children resided pursuant to court orders from 15/02/2007 until 19/10/2007 is Ms (name removed) "the paternal grandmother" who lives in (location removed) "location 2". The paternal grandmother is and has been a "registered foster parent" with Anglicare for some years.[3] The Department administratively removed the 3 older children from the paternal grandmother's care on 19/10/2007.[4]**
- **The children's maternal grandmother, with whom the 3 older children have resided by direction of DOHS since 21/12/2007[5], is (name removed) "the maternal grandmother" [68y] who lives in (location removed) "location 3" with her friend, (name removed) "Mr M" [56y].**
- **The mother has two older children. A boy [12y7m, 09/02/1996] was adopted at birth and the mother has not seen him since. "JB" [11y6m, 27/03/1997] is the subject of a permanent care order and is in the care of the maternal grandmother and Mr M.[6]**
- **The children's maternal uncle (name removed) "Mr B" and his wife (name removed) "Mrs B", with whom SD has resided since he was 4 days old, live in (location removed) "location 4" and have 4 other children aged between 11 & 17 in their care.[7]**

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[3] See Take Two report dated 30/11/2006 at p.4 and evidence of the father at pp.205-206 of my notes.
[4] Proposition with which the protective worker agreed in evidence in chief at p.18 of my notes. See also pp.6-7 of DOHS' Application & Disposition report dated 16/01/2008.
[5] For the 2 month period between 19/10/2007 & 21/12/2007 the 3 older children were placed in foster care with MD initially being in a placement separate from his sisters: see section 23 below.
[6] See Take Two Clinical Review report dated 30/11/2006 at p.4.
[7] These children are "B" [17y] & "T" [16y] who are the children of Mrs B and "J" [13y] & "N" [11y] who are the children of both Mr B & Mrs B.

2. NOTIFICATIONS & COURT ORDERS FOR 3 OLDEST

2.1 NOTIFICATIONS 2003-2006

The Department received 5 notifications in relation to the (name removed) children between March 2003 & February 2006 and were involved with the family as follows[8]:

1	**07/03/2003 to 27/06/2003**	**Report that MD was crying for long periods of time and the mother was failing to respond. Notification was substantiated. Several support services were linked with the family, including Specialist Children's Services, child care and Vic Parenting who worked intensively with the family.**
2	**06/05/2004 to 12/05/2004**	**Report raised concerns that the family was facing eviction from the family home and issues of environmental neglect. Notification was not substantiated and no further action was taken.**
3	**19/07/2004 to 28/07/2004**	**Report raised concerns that the family was homeless and that the functioning of the mother may not have been taken into consideration at intake. Parents had stayed with paternal grandmother and after being asked to leave mother had gone to stay with the maternal grandmother and the father stayed in Melbourne to work. Notification was not substantiated and no further action was taken although it was noted that specific services need to be linked in with the family.**
4	**20/01/2005 to 23/03/2005**	**Report raised concerns of a domestic violence incident that required police attendance, possible substance misuse by the parents, verbal abuse and concerns re the physical handling of a small child. The report was jointly investigated with SOCAU and concerns were substantiated in relation to the poor environmental state of the house: "[T]he home was very cluttered, clothing was strewn over the floors in every room and the presentation of the home was quite dirty." There is no evidence that any of the other concerns raised in the report were substantiated.**
5	**03/02/2006 to current**	**Report raised concerns for MD's & AD's lack of development, severe verbal abuse, lack of parental supervision and ongoing inadequate hygiene issues. The mother was pregnant with ND and had not attended ante-natal care. At the time of the notification the parents stated that they could no longer keep MD safe and were concerned that they may hurt him. Serious concerns were also raised that the parents are not able safely to supervise the children and that MD has been found wandering the streets and taken to (location removed) "location 1" Police Station.[9] At the time of the notification the parents were not utilizing support services.**

[8] The information in the table is compiled from DOHS' Application report of (name removed) "protective worker 2" dated 21/11/2006 at pp.4, 6 & 9-10 and DOHS' chronology tendered at a Directions Hearing on 21/02/2007 at p.1.

[9] See section 14.1 below.

As a consequence of the fifth notification the Department worked voluntarily with the parents for the greater part of 2006 and arranged for the provision of services by Family Life and Specialist Children's Services. However it considered that despite these services, "the family still struggled to manage the behaviours of…MD and care adequately for AD and ND".[10] Accordingly, with the parents' consent, the Department also arranged for the Queen Elizabeth Centre in-home Parenting Assessment and Skills Development Service[11] to be implemented between 02/08/2006 & 24/10/2006.[12]

2.2 PROTECTION APPLICATIONS BY NOTICE IN NOVEMBER 2006

In November 2006 – after consultation between (name removed) "protective worker 2", team leader (name removed) "Ms CC" and specialist infant protective worker (name removed) "Ms TB" and following the recommendation by PASDS – the Department made a decision to issue protection applications by notice for MD, AD & ND. The rationale was "to enable the Department to continue to work intensively with the family and ensure ongoing safety and hygienic conditions for the children and to also allow further assessment and monitored linkage with support services".[13] The protection applications were taken out on the grounds in ss.63(c), 63(e) & 63(f) of the then legislation, the *Children and Young Persons Act* 1989.[14] The Department's recommended disposition for each child was a supervision order for 9 months, leaving all of the children in their parents' care.[15]

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[10] DOHS' Disposition report of protective worker 2 dated 21/11/2006 at p.3.

[11] Hereinafter 'PASDS'.

[12] For details of the PASDS' assessment, see section 13 below.

[13] DOHS' Application report of PW2 dated 21/11/2006 at p.8.

[14] Hereinafter 'the *CYPA*'. Sections 63(c), 63(e) & 63(f) of the *CYPA*, which are in identical terms to ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *Children, Youth and Families Act* 2005, provide-

"For the purposes of this Act, a child is in need of protection if any of the following grounds exist-

c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parent have not protected, or are unlikely to protect, the child from harm of that type;

f) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care."

[15] DOHS' Disposition report of protective worker 2 dated 21/11/2006 at p.2.

2.3 PROTECTION APPLICATIONS BY APPREHENSION DATED 15/02/2007

Following a strange series of incidents in early February 2007 - in the course of which the parents and children disappeared from the family home and were subsequently located in a motel at (location removed) "location 5"[16] - the Department apprehended MD, AD & ND on 15/02/2007 and issued protection applications also on the grounds set out in ss.63(c), 63(3) & 63(f) of the *CYPA*. Each of the children was placed on an interim accommodation order in the care of the paternal grandmother.

2.4 CUSTODY TO SECRETARY ORDERS DATED 24/04/2007

The protection applications were initially contested by the parents and evidence was heard by my colleague Magistrate Levine on 07-09/03/2007.[17] Counsel for the mother was ill on 13/03/2007 and the case was unable to proceed. That day Magistrate Levine referred the case to the Children's Court Clinic for a "general assessment about family functioning". The children and parents were seen by clinical psychologist (name removed) "witness 3" on 16/04/2007. Her report was provided to the parties on 20/04/2007. On 24/04/2007 the parents agreed to the protection applications being found proved on each of the grounds and to each child being placed on a custody to Secretary order for 8 months until 23/12/2007.[18] Because the case settled Magistrate Levine did not provide a written judgment and I cannot tell from the Court files whether the protection applications were proved on the "actual harm" or "likelihood of harm" limbs of ss.63(c), 63(e) & 63(f) of the *CYPA* or on both limbs. However, from the material in the DOHS' reports it seems improbable that the applications were proved on the "actual harm" limbs of ss.63(c) & 63(e). The position in relation to s.63(f) is not as clear cut. Each of the custody to Secretary orders contained the following 15 conditions, the implication from which is that Magistrate Levine anticipated that the caseplan would be for reunification:

1. **Parents must accept visits from and cooperate with DOHS.**
2. **Parents must accept support services as agreed with DOHS.**

[16] For further details see sections 14.2-14.4 below.

[17] The contest came on quite quickly after the apprehension because a contest had already been booked for the protection applications by notice which had been issued in November 2006.

[18] Magistrate Levine endorsed the Court files: "Parents agree to order (as result of Clinic recommendation)".

3. Parents must go to counselling as agreed with DOHS and must allow reports about attendance to be given to DOHS.

4. Father must go to a course on anger management or Men's Behaviour program as agreed with DOHS and must allow reports about attendance to be given to DOHS.

5. Parents must allow the child to be taken to paediatrician Dr DE or Dr CJ, Royal Children's Hospital, for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.

6. Parents must tell DOHS at least 24 hours before changing address.

7. Father must not threaten DOHS' staff.

8. Parents must allow the children to be taken to the Maternal Child health Nurse as often as the Nurse recommends.

9. Parents must allow the children to be taken to the doctor for regular check ups as required by DOHS or the doctor and must allow reports to be given to DOHS.

10. Mother and father must keep a clean, safe and suitable home.

11. Parents to attend a neuropsychological assessment and must comply with any recommendations of this assessment. Reports to be provided to DOHS.

12. Parents to have access with the children three times per week at places and times as agreed between the parties. One of the accesses to occur in the home of the parents only if the home if assessed as suitable for this to occur on the day of access. Access to be supervised by DOHS or its nominee unless supervision is deemed not required. Access to be reviewed on a bimonthly basis and increased if deemed suitable in line with possible reunification.

13. Parents to accept the TAP program and comply with any recommendations of this service.

14. Parents must accept the support of the PASDS program [inhome] or any other relevant parenting support and assessment program, residential or inhome, and must follow through with recommendations of these services.

15. Children to attend childcare.[19]

3. P.A. & COURT ORDERS FOR SD

Shortly after he was born by caesarean section on 27/05/2008 DOHS apprehended SD at Royal Women's Hospital and issued a protection application on the grounds set out in ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *CYFA*.[20] On that day a bail justice made an interim accommodation order placing SD formally at Royal Women's Hospital and prohibiting the mother and father from having contact with him overnight. The following day this Court made an IAO leaving SD in hospital but including a condition: "Father & mother may have access with the child at the hospital at times as determined by the hospital."

On 30/05/2008 Magistrate Wynn-Mackenzie placed SD on an interim accommodation order in the care of his maternal uncle, Mr B. That order contained 7 conditions:

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[19] This condition is very unsatisfactorily drawn as it does not state who is responsible for ensuring that each of the children attends child care.

[20] These are identical to ss.63(c), 63(e) & 63(f) of the *CYPA* set out in footnote 17 above.

1. Mother must accept visits from and cooperate with DOHS.

2. Father must accept visits from and cooperate with DOHS.

3. Mother must accept support services as agreed with DOHS.

4. Father must accept support services as agreed with DOHS.

5. Father must not verbally threaten DOHS' staff.

6. Mother & father must allow the child to be taken to the Maternal & Child Health Nurse as often as the nurse recommends.

7. Mother & father may have access with the child for a minimum of 3 times per week at times and places as agreed between the parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Such access may include attendance by the children with the maternal uncle to the Maternal & Child Health Nurse.

The case was adjourned for a 3 day contest by evidence on 11/06/2008. On that date the IAO contest was not reached and the protection application was adjourned to 08/07/2008 to be consolidated with the Directions Hearing for the 3 older children.[21] Though the father denied the necessity for condition 5 on the IAO, the IAO was extended and condition 7 was varied to the following:

7. Mother & father may have access with the child for a minimum of 3 times per week at times and places as agreed between the parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary. Parents to confirm access by 9am on the day of access.

The IAO has subsequently been extended on a number of occasions in the same terms. At the end of the day on 01/08/2008 I refused an application by counsel for the mother for parental access with SD no longer to be held at DOHS' office at (location removed) "location 6". I had thought counsel was seeking the access be held in lieu at the maternal uncle's home but she later told me that it was for the access to be held at the maternal grandmother's home. I would have come to the same conclusion anyway, albeit for partly different reasons.[22]

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[21] Though the parents' legal representatives asserted by notation on 30/05/2008 that "the parents have been denied the opportunity to run a contest by submissions today" and though the case was "not reached" on 11/06/2008 the reality is that SD's case could never have been split from the contest involving the other 3 children because DOHS' case on "likelihood of harm" is almost entirely based on the historical evidence involving the other 3 children and DOHS' involvement with the family since 2003. An IAO contest was always going to take much longer than 3 days and could not have been heard on any earlier day.

[22] My primary reason for refusing to alter the access venue was that it seemed to me to be inappropriate in this case to interfere with the *status quo* until all of the evidence had been completed.

4. CURRENT APPLICATIONS

In this case I am required to determine the following applications:

4.1 THE DEPARTMENT'S APPLICATIONS

AD1 **applications dated 06/12/2007 to extend the custody to Secretary orders for MD, AD & ND made on 24/04/2007;**

AD2 **applications dated 08/07/2008 to vary the custody to Secretary orders for MD, AD & ND, giving as details: "Conditions 10, 11 & 14 are no longer relevant. Condition 12 re access requires variation as it is assessed that specified access frequency is no longer in their best interest.";[23]**

AD3 **the protection application dated 27/05/2008 in relation to SD.**

4.2 THE MOTHER'S APPLICATIONS

AM1 **On 18/06/2008 the solicitor for the mother filed applications to revoke the custody to Secretary orders for MD, AD & ND, giving as details: "Seek the return of the child on a supervision order."**

5. POSITIONS OF THE PARTIES IN THIS CONTEST

5.1 THE DEPARTMENT'S INITIAL POSITION

AD1 & AD2 **The Department sought that these applications be granted and that the custody to Secretary orders for the 3 older children be extended for 12 months and the conditions be varied to the following:**

1. **Parents must accept visits from and cooperate with DOHS.**
2. **Parents must accept support services as agreed with DOHS.**
3. **Parents must go to counselling as agreed with DOHS and must allow reports about attendance to be given to DOHS.**
4. **Father must go to a course on anger management or Men's Behaviour program as agreed with DOHS and must allow reports about attendance to be given to DOHS.**
5. **Parents must allow the child to be taken to a paediatrician for assessment and must comply with any recommendations made. Reports to be given to DOHS.**
6. **Parents must tell DOHS 24 hours before changing address.**
7. **Father must not threaten DOHS' staff.**

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[23] These applications were unhelpfully filed on the day of a Directions Hearing in relation to the 8 day contest listed to commence on 21/07/2008. I make no further comment on the unhappy wording: "Condition 12 re access ***requires*** variation."

8. **Parents must allow the children to be taken to the Maternal Child Health Nurse as often as the Nurse recommends.**
9. **Parents must allow the children to be taken to the doctor for regular check ups as required by DOHS or the doctor. Reports to be given to DOHS.**
10. **Parents to accept the TAP program and comply with any recommendations of this service. Reports to be given to DOHS.**
11. **Access to be supervised by DOHS or its nominee at times and places agreed between the parties.**
12. **Children to attend childcare.**[24]

At the outset I expressed some disquiet about an access condition which involved agreement between the parties and did not specify any minimum frequency or duration of access. Counsel explained DOHS' rationale for seeking a varied access condition as follows:

> **"The current access regime is onerous and the Department wants some time taken out of the current access regime so that there is some diminution of access to reflect that there is no longer a reunification plan."**[25]

AD3 The Department sought that the protection application for SD be found proved on the likelihood limbs of ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *CYFA* and that SD be placed on a custody to Secretary order for 12 months with 10 conditions. Conditions 1-9 are in substantially the same terms as conditions 1-9 for the other children but condition 10 contains an additional requirement:

10. **Access to be supervised by DOHS or its nominee at times and places agreed between the parties. Parents must confirm by 9am on the day of access.**

5.2 THE PARENTS [26]

AD1, AD2 & AM1 The parents conceded an extension of the custody to Secretary orders for the 3 older children but opposed the variation applications and said that the orders should be revoked and the three children returned immediately to their care on supervision orders. However, in her final submission counsel for the mother - while still urging the immediate return of SD - conceded that "consideration might be given to a staged reunification in relation to the other 3 children".

AD3 Counsel for the mother initially said that her client opposed the proof of the protection application for SD. After I pointed out the inherent inconsistency in conceding supervision orders for the 3 older children – with their inherent

[24] These fairly poorly drawn draft conditions are taken from DOHS' Addendum report dated 23/06/2008 at p.9. They were neither drawn nor settled by counsel. They were subsequently amended in DOHS' Addendum report dated 03/09/2008 at pp.6-7 by deletion of condition 10.
[25] See pp.1 & 217 of my notes.
[26] See p.4 of my notes.

admissions that those children were still in need of protection – counsel said that her client did concede proof of the protection application on the likelihood limb only and conceded a supervision order in respect of SD. Counsel for the father said at the outset that his client's position was the same as that of the mother.

5.3 THE DEPARTMENT'S AMENDED POSITION

During the evidence of the protective worker late on 29/07/2008 - the 6th day of this contested hearing - I made a comment to counsel for DOHS hinting at certain difficulties in her client's decision to caseplan each of the children, including SD, for permanent care. Counsel for DOHS encouraged me to spell out my then view of the case and the other counsel did not demur. I did so. Subsequently all counsel obtained instructions about my comments and for some 1½ hours at the start of the next day counsel negotiated. However, settlement was not able to be reached. Counsel for DOHS then spelt out for me her client's offer:

> **"I proposed to my friends with respect to MD, AD & ND we can have either an adjournment pending assessments or an extension to the custody to Secretary orders now with AD & ND going back to witness 3 for a continuing assessment with an emphasis on the means of reunification with their parents and with MD not going to be part of that reunification but part of a permanent care process and having an [autism] assessment at Latrobe [University]. With respect to SD there should be a bonding/attachment assessment, not necessarily by witness 3 because of the age of the child.[27] It could be done by Dr Sharne Rolfe or anyone who is an expert. I've spoken to [the unit manager] Ms Howard and she has indicated she will immediately try and see who is available and who is an expert. The Department also believes that it is in the best interests of the child reunification that the parents and the child be admitted to Queen Elizabeth Centre…for a residential stay and followed up by PASDS outreach on the recommendations of QEC and that would mean having to extend the IAO pending the results of all of that with respect to SD. I put this to my friends. It is obvious the most urgent aspect of these 4 children is SD given his age and that's why DOHS is looking into finding someone who is appropriate to do that assessment as soon as possible."[28]**

In some ways this was not an ungenerous change of position by DOHS, presumably based at least in part on my comments the previous day and on an independent assessment of the evidence and of the Department's case by its counsel. I certainly could not – and do not – criticize the Department for its changed position although I did not agree with all of it. I did not ask counsel for the parents to spell out their

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[27] This was a reference to the possibility that witness 3 may have other work commitments, not any criticism of witness 3's expertise in relation to bonding/attachment generally or in relation to infants specifically.

[28] Counsel volunteered this in open court at the commencement of the hearing on 30/07/2008: see pp.75-76 of my notes. Hence it was not made "without prejudice" and operates as a waiver of any claim of privilege.

client's responses to this offer but given that the children were all unrepresented, I would not at that stage have accepted certain aspects of the Department's offer even if the parents had. In particular:

1. **I was of the strong view that any required assessments[29] should be done by one psychologist and under the auspices of the Children's Court Clinic.**
2. **I could not say on the evidence at that stage – and indeed I am still unable to say even though all of the evidence is now to hand – that it is appropriate at present for MD to be case planned for permanent care.**
3. **On the evidence at that stage I could not find that the requirement in s.10(3)(a) of the *CYFA* - that the Court ensure that intervention into the relationship between the parent and child was limited to that necessary to secure the safety and wellbeing of the child – would permit me to order that the parents and children participate in a residential program at QEC, whether or not such attendance would be "useful" for the parents.[30]**

Child protection proceedings differ from civil proceedings generally in that the Department's charter and s.8(2) of the *CYFA* prevent it from settling a case in a way which it considers not to be in the best interests of its client child. Given that Mrs Weinberg had – quite properly – chosen to advise me in open court of the Department's offer, it is clear that DOHS now concedes that the evidence which it was capable of adducing to me cannot justify a permanent care case plan for AD & ND and that any assessment in relation to those children should contain "an emphasis on the means of reunification with their parents". That was therefore one of the specific questions which I asked the Clinician, witness 18, to address in the assessment which she conducted on 15/08/2008.[31]

[29] Leaving aside an assessment as to whether or not MD's behaviours grounded a diagnosis of autism.
[30] At the end of the case I remained of the same view: see section 18.7 below.
[31] See her evidence in section 20 below.

6. REPORTS & OTHER DOCUMENTS

I have read the following tendered reports and other documents:

	SHORT DESCRIPTION OF DOCUMENT	DATE
	DOCUMENTS TENDERED BY DOHS	
D1	DOHS' Application/Disposition report cosigned by (name removed) "witness 1" (Unit Manager)	16/01/2008
D2	Unsigned & undated document headed "Best Interests Plan" (17 pages) bearing witness 1's name on page 13	November 2007 (?)
D3	DOHS' Application report re MD, AD & ND written by protective worker 2	21/11/2006
D4	DOHS' Disposition report re MD, AD & ND written by protective worker 2	21/11/2006
D5	DOHS' Addendum report re MD, AD & ND written by protective worker 2	05/03/2007
D6	DOHS' Addendum report re MD, AD & ND written by protective worker 2	20/04/2007
D7	DOHS' Addendum report re MD, AD & ND written by the protective worker	18/02/2008
D8	DOHS' Addendum report re MD, AD & ND written by the protective worker	25/03/2008
D9	DOHS' Addendum report re MD, AD & ND written by the protective worker	23/06/2008
D10	Amended DOHS' Application & Disposition report re SD written by the protective worker	10/06/2008
D11	DOHS' Addendum report re SD written by the protective worker	27/06/2008
D12	Report re the mother of neuropsychologist (name removed) "witness 8" in the form of a letter	26/03/2008
D13	Report re the father of neuropsychologist (name removed) "witness 9" in the form of a letter	07/04/2008
D14	Final report of Parenting Competencies Assessment prepared by (name removed) "witness 10" (Queen Elizabeth Centre (name removed) Region Home-based Parenting Assessment)	05/12/2006
D15	DOHS' Addendum report re MD, AD, ND & SD written by the protective worker	03/09/2008
D16	Ozchild interim report prepared by witness 16	10/06/2008
D17	Ozchild Together Again Program report by witness 16	July 2008 [32]
D18	Take Two Clinical Review Report by (name removed) "witness 17"	30/11/2006
D19	Victoria Police LEAP report for the father	09/09/2008
	DOCUMENT TENDERED BY COUNSEL FOR THE MOTHER	
M1	Ozchild referral form containing details provided by DOHS[33]	Aug/Sep 07
	DOCUMENTS TENDERED BY COUNSEL FOR THE FATHER	
F1	QEC PASDS referral form completed by protective worker 2 prior to the birth of ND and in relation to MD & AD	Before 05/07/2006
F2	Copy letter from Dr DE [Royal Children's Hospital] to the father re	21/02/2007

[32] Witness 16 gave evidence that this report was prepared on or about 18/07/2008: see p.142 of my notes.

[33] Although this form bears Ms CH's name and the date "August/September 2007" I accept witness 16's evidence that the form did not "come across her desk" until after she was allocated to the case on 12/03/2008: see p.152 of my notes.

	MD	
F3	Copy Specialist Children's Services Initial Visit Report re MD written by HS.	Visit 03/02/2005

Of my own motion I have also read the following report and other documents[34]:

	SHORT DESCRIPTION OF DOCUMENT	DATE
	DOCUMENTS READ BY ME OF MY OWN MOTION	
C1	Children's Court Clinic report of witness 3 re MD, AD & ND	Assessment 16/04/2007
C2	Complaint & summons for an intervention order by the father against a neighbour (name removed) "JLS" of (address removed)	19/12/2005
C3	Complaint & summons for an intervention order by the mother against a neighbour JLS of (address removed)	19/12/2005
C4	Handwritten notes of Judge Grant re application by DOHS for an order to identify MD, AD & ND in a media release under s.534 of the CYFA	14/02/2007
C5	DOHS' chronology tendered at a Directions Hearing on 21/02/2007	
C6	Children's Court Clinic report of witness 18 re MD, AD, ND & SD.	Assessment 15/08/2008
C7	Copy permanent care order made by Melbourne Children's Court in relation to "JB"	02/10/2001

7. WITNESSES

I heard evidence from the following 20 witnesses.

THE FOLLOWING WITNESSES WERE CALLED BY DOHS		
	NAME	**DESCRIPTION OF WITNESS**
W1	(name removed) "witness 1"	Unit manager (location removed) "location 7" DOHS. Her only real role in this case has been to chair a Family Group Conference, described in the associated document as a "Best Interests Planning Meeting" held at location 7 DOHS on 12/11/2007 and who co-signed a DOHS' Application/Disposition report dated 16/01/2008.
	Adopted documents D1 & D2	

W2	Protective worker 2	DOHS' protective worker assigned to the (name removed) children from April 2006 to April 2007.
	Adopted documents D3, D4, D5 & D6	

W4	The protective worker	DOHS' protective worker who was allocated to the cases of the older 3 children on 29/01/2008 as one of her first cases and who is the current protective worker.
	Adopted documents D7, D8, D9, D10, D11 & D15	

[34] As I am entitled to do under s.215(1)(d) of the CYFA.

W5	**(name removed) “witness 5”**	**Access support worker employed by McArthur Management who supervised accesses between one or both parents and SD at location 6 DOHS offices on 17/06, 19/06, 23/06, 27/06, 01/07, 04/07, 11/07 & 15/07/2008.**

W6	**(name removed) “witness 6)**	**DOHS’ case support worker who supervised accesses between one or both parents and SD at (location removed) DOHS offices on 03/06, 06/06 & 10/06/2008.**

W7	**(name removed) “witness 7”**	**DOHS’ case aide who transported the 3 older children from location 3 to location 1 for access on 8 Saturdays between 24/05/2008 & 19/07/2008 and who observed the interaction between the parents and the children and the state of the family home.**

W8	**(name removed) “witness 8”**	**Neuropsychologist employed by (name removed) Health who performed a neuropsychological assessment of the mother on 19/03/2008.**
Adopted document D12		

W9	**(name removed) “witness 9”**	**Neuropsychologist employed by (name removed) Health who performed a neuropsychological assessment of the father on 01/04/2008.**
Adopted document D13		

W10	**(name removed) “witness 10”**	**Maternal & Child Health Nurse employed by QEC who was involved in the PASDS assessment from August to September 2006 and wrote the report.**
Adopted document D14		

W11	**(name removed) “witness 11”**	**Enhanced Maternal & Child Health Nurse employed by (name removed) City Council who provided MCHN services for the family and the children from November 2004 to October 2006.**

W12	**(name removed) “witness 12”**	**Social worker in Women’s Social Support Services in the Social Work Department at Royal Women’s Hospital who had some involvement with the parents and SD in May 2007.**

W13	**(name removed) “witness 13”**	**Counsellor with (name removed) Family Life who has provided counselling for the father on 15 occasions and is his ongoing counsellor.**

W14	**Leading Senior Constable (name removed) “witness 14”**	**Police officer who has attended at the family home on social welfare related matters on 3 occasions: 15/03/2006, 06/02/2007 & 09/02/2007.**

W15	**(name removed) “witness 15”**	**Counsellor with (name removed) Family Life who provided counselling for the mother on 7 occasions between 11/09/2007 & 11/03/2008 but is no longer providing the mother with counselling services.**

W16	(name removed) "witness 16"	TAP program manager employed by Ozchild and author of reports dated 10/06/2008 & July 2008.
Adopted documents D16 & D17		

W17	(name removed) "witness 17"	Author of Take Two Clinical Review report dated 30/11/2006.
Adopted document D18		

THE FOLLOWING WITNESSES WERE CALLED BY THE COURT		
	NAME	DESCRIPTION OF WITNESS
W3	(name removed) "witness 3"	Clinical psychologist who performed a general assessment of the family at the Children's Court Clinic on 16/04/2007.
Adopted document C1		

W18	(name removed) "witness 18"	Clinical psychologist who performed a general assessment of the family at the Children's Court Clinic on 15/08/2008.
Adopted document C6		

THE FOLLOWING WITNESS WAS CALLED BY THE MOTHER		
	NAME	DESCRIPTION OF WITNESS
W19	The maternal grandmother	The children's maternal grandmother and current carer of the 3 older children.

THE FOLLOWING WITNESS WAS CALLED BY THE FATHER		
	NAME	DESCRIPTION OF WITNESS
W20	The father	The children's father.

The mother did not give evidence in this case. Nor did the Department call:

- **the paternal grandmother (name removed) who might be thought to have been important on the issue of the family's disappearance in February 2007 and on observations of the interactions between the parents and the children generally;**
- **the person who conducted the intellectual assessment of MD;[35]**
- **any of the protective workers involved between April 2007 & January 2008;**
- **MD's paediatrician Dr DE or any direct paediatric evidence in relation to AD or ND; or**
- **SD's carers, Mr & Mrs B, or any paediatricians or other medical professionals involved with SD who might be thought to have been of importance if there were concerns about SD's health which would militate against him being moved to his parents from his current care placement.**

[35] Although she has seen the relevant reports the protective worker was very vague on this person, saying (at p.70) she believed it was a speech pathology and cognitive assessment conducted in January or February 2008 which was done by the school and arranged through the education system.

In *O'Donnell v Reichard*, after citing a number of authorities including *Jones v Dunkel*[36], Newton & Norris JJ held-

> ***"[W]here a party without explanation fails to call as a witness a person whom he might reasonably be expected to call, if that person's evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person's evidence would not have helped that party's case."*[37]**

Based on this dicta I infer that none of the potential witnesses whom the Department has chosen not to call would have helped its case. However, I do not draw the same inference in relation to the mother. Counsel did not give an express explanation as to why she was not calling her client but in the circumstances of this case – especially given her cognitive deficits and given that the father and the maternal grandmother both gave evidence in relation to her – the reason is clear and accordingly I do not infer that the mother's evidence would not have helped the parents' case.

Although I do not agree with all of the opinions expressed by a number of the professional witnesses, I consider that all of the professional witnesses gave their evidence honestly. I found the maternal grandmother (name removed) a very good witness and I have given great weight to most of her evidence. However, I do not agree with her lay opinion – lay in the sense that she is not a qualified psychologist although she had been a registered nurse for 34 years – that the three older children could safely all go back at the one time to their parents' care.[38]

Though nothing much turns on it, I believe that the maternal grandmother should have been called by DOHS. She has acted as agent for DOHS in the role of custodian of MD, AD & ND for over 9 months. During a discussion with counsel I had said I would sub-poena her using my powers pursuant to s.532 of the *CYFA* if none of the parties called her. There could therefore have been no question about my view of the likely relevance of her evidence. Although proceedings in this Court are adversarial in nature, there is much authority that at least in criminal proceedings the Crown is obliged to act at all times with fairness and detachment and is required to call all available material witnesses unless there is some good

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[36] (1959) 101 CLR 299.
[37] [1975] VR 916 at 920. The emphasis is mine.
[38] See her evidence at p.184 of my notes and see section 22 below.

reason not to do so. The fact that a witness may give an account inconsistent with the Crown case is not a sufficient reason for not doing so.[39] It remains a moot point whether DOHS is bound by the same rules of procedural fairness in Family Division cases. However, since proceedings in the Family Division have similar aims of establishing the truth and ensuring that justice is done as between the individual and the State, I do not see any reason why the State's obligation to accord procedural fairness to all of the individuals involved in a Family Division proceeding should be lower than its obligation in a criminal trial.[40]

By any standard the father was a poor witness. He made a number of assertions which were objectively highly implausible. For instance, his assertion that his solicitor, Ms Jackel, "works with DOHS, is connected to DOHS" and his assertion that he did not know the mother was pregnant with SD until she was about 6 months. He also presented as a man claiming excessive virtue and minimizing any blame which might be directed to him for almost anything and over-willing to complain about others, especially others in authority. He was quite unable to answer questions briefly and frequently went off on lengthy tangents. He was an easy target for Mrs Weinberg's incisive cross-examination. Despite that, I never doubted his abiding concern, solicitude and love for all of his children.

In coming to my decision in this case, I have given greatest weight to the evidence of witness 3, witness 18 & the maternal grandmother. I have also given significant weight to the observations - but not the ultimate conclusion & recommendation - of witness 16 and to the very helpful evidence of witness 17 in relation to the services which TakeTwo is capable of offering to this family and to families generally.

[39] See paragraph 3.5.4 in Chapter 11 of the Research Materials on the Children's Court website www.childrenscourt.vic.gov.au. See also *R v Calway* [2005] VSCA 266 at [37] per Nettle JA; *R v Lucas* [1973] VR 693 at 697 per Smith ACJ and at 705 per Newton J & Norris AJ; *R v Parsons and Stocker* [2004] VSCA 92 at [109] per Smith AJA.

[40] See paragraph 3.5.6 in Chapter 11 of the Research Materials on the Children's Court website www.childrenscourt.vic.gov.au.

8. THE CHILDREN'S CHARACTERISTICS & HEALTH[41]

8.1 MD

- **MD presented to witness 16 as "a friendly and active little boy who enjoys playing footy and has a passion for hot wheels cars". She found MD to be a very friendly little boy who was keen to interact but who found it difficult to follow the conversation and often responded inappropriately to conversational cues. His speech was often difficult to understand but he did not appear to get distressed when he was unable to make his meaning clear.**
- **Witness 18 considered MD to be poorly co-ordinated for his age, slow in his movements and somewhat slow and immature in his speech, consistent with a diagnosis of intellectual disability. He presented to her as an emotional, sensitive and unhappy child who seemed to lose confidence easily and was seen to over-react to mild negative feedback and to limits being set. However he gave witness 18 good eye contact and was polite and socially appropriate with her although he engaged in attention-seeking limit-testing behaviour with his parents and grand-parents.**
- **The maternal grandmother advised witness 16 that she is concerned that MD may have mild cerebral palsy as he walks on his toes and has trouble controlling his saliva, as a result of which he is constantly dribbling. These are traits which the maternal grandmother has also observed in MD's half-brother JB who has been diagnosed with mild cerebral palsy.**
- **MD has been diagnosed with a Moderate Intellectual Disability (IQ < 50), developmental delay[42], some difficulty with social skills and behaviour difficulties generally. He is quite delayed in comparison with his peers at school in most aspects of his education and behaviour. He has been struggling socially at school and often finds it hard to read social cues and behave in socially appropriate ways. Witness 16 said that he will often refuse to comply with requests at home and at school although it must be said that the maternal grandmother appears to experience no difficulty in dealing with him. He sometimes has temper tantrums and at school he has periods of time where he lies on the floor and rocks rather than joining in with classroom activity.**
- **Noting that MD's school report confirms that his reading and maths were considered to be within the normal range (C) for Prep but his writing skills were behind (D), witness 18 opined – in my view correctly – that these results are inconsistent with a Moderate Intellectual Disability and that either the Ozchild report has misquoted the result or the assessment has under-estimated his capacities, perhaps because of motivational factors on the date of assessment.**
- **Witness 18 considered that MD demonstrated appropriate play skills when playing alone and appropriate play skills that could and did engage his younger sister. However he seemed to initiate contact with his siblings less than they did with him and seemed more interested in having social contact with adults. He showed some pride in, and orientation towards, his own emerging literacy and drawing skills.**

[41] In this section most of the material relating to the 3 older children is taken from the reports of witness 16 dated 10/06/2008 at p.2 and July 2008 at pp.4-6 and from the report of witness 18 dated 25/08/2008 at pp.4-6 & 12-13. See also DOHS' Application & Disposition report dated 16/01/2008 at pp.2-3. Some of the material in witness 16's reports can be traced back to the DOHS' referral dated Aug/Sept 2007. Most of the material relating to SD is taken from witness 18's report at pp.4-5 & 17-19 and from DOHS' reports of the protective worker dated 27/06/2008 & 03/09/2008. There was virtually no challenge in cross-examination to any of this material and - with the exception of the information in the reports about AD's kidneys and about MD's IQ - I accept that the material is accurate.

[42] The protective worker conceded (at p.72) that M's delay is "something more than environmental neglect".

- **MD generally enjoys good health.**

Asked to describe MD before his removal from his parents, the maternal grandmother said:

> **"MD was a very happy little boy. Also a very – I can't think of the right word – he has a pretty good temper and he does like his own way. But he was a happy little boy. I know he wandered a couple of times and his mother wandered as a child and his grandfather was known to the police in (location removed) "location 8" and (location removed) "location 9". They used to pick him up and take him home, so I think wandering is in the genes."[43]**

8.2 AUTISM ASSESSMENT OF MD

Counsel for the mother put to the Unit Manager, witness 1, that MD "may have autism". She replied: "I was told that recently. There is a question mark about that."[44] Witness 16 noted in July 2008 that it is possible that MD has autism although this has not yet been formally diagnosed.[45]

In her assessment witness 3 "didn't see any clear signs of autism". The following evidence was given on 23/07/2008:

> **Mr Thomas- "In your assessment in April 2007 what did you notice about MD? Did you think there was a slight autism?**
> **Witness 3- I think from the description in my report I certainly wasn't certain about autism or anything like that. I spoke about the difficulties that both parents had had in managing his behaviour and I commented I thought he was taking things to an extreme you probably wouldn't typically see. I wasn't sure if he had learned to do that by his parents overly responding or inappropriately dealing with him. It could raise issues about his ability to learn or understand.**
> **Mr Thomas- You were not sure whether it was environmentally promoted or hard wired?**
> **Witness 3- Yes and I didn't see any clear signs of autism.**
> **Mr Thomas- In the Ozchild report witness 16 says MD has been diagnosed with a moderate intellectual disability [IQ < 50] and it is possible he has autism. When can a diagnosis for autism be made?**
> **Witness 3- I'm working with someone at Latrobe University diagnosing very, very early – 2 years of age. If he does have autism he should have intervention as soon as possible.**
> **Mr Thomas- Even good parents have trouble dealing with autistic children?**
> **Witness 3- Yes. They have a really, really hard time.**
> **Mr Power- How does one get a child to your colleague for assessment?**
> **Witness 3- You can just ring the Olga Tennison Autism Centre, Dr CD.**
> **Mr Thomas- If there is a mild autism in MD would that go some way to explain his developmental delay?**
> **Witness 3- Yes. It often is combined but it also explains his behaviour problems because children with autism appear to learn very differently and they often can't understand cues so they need to be taught in a very different way which is why parents need help as early as possible or else they struggle with behaviour difficulties.**
> **Mr Thomas- Parents would need help outside?**
> **Witness 3- Yes, whoever you are.**

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[43] At p.185 of my notes.
[44] At p.8 of my notes.
[45] Report of witness 16 dated July 2008 at p.4.

<u>Mr Thomas</u>- Even if MD does have a mild autism, the parents would be able to deal with him over a course of time?
<u>Witness 3</u>- I can't say definitely one way or the other but the parents need the opportunity to see if they can do that. I wouldn't like to say based on the neuropsychological reports because they tell us cognitive limitations but do not talk about functional limitations or strengths. If learned functional strategies for living lives or managing as parents [they] will do quite well."[46]

In the light of the above, I made the following order on 04/08/2008:

> **"DOHS is to arrange an autism assessment of MD, if possible at the Olga Tennison Autism Centre at Latrobe University. The parents are to allow reports to be given to DOHS. DOHS is to forward to a legal representation of the mother and of the father any such report which it receives."[47]**

Unfortunately the evidence of witness 3 about the availability of the Olga Tennison Centre was wrong. The protective worker said:

> **"[I] spoke to Dr D who informed that an assessment could not be arranged as the Olga Tennyson Centre do not [do] completed assessments as their work is research based…The (name removed) Autism Assessment Service was contacted to arrange an assessment. The waiting list for this assessment was extremely long."[48]**

Subsequently the protective worker arranged an autism assessment to be conducted by a private psychologist, Mr GS, and sent him a referral letter on 01/09/2008.[49] An appointment had not yet been made as at 08/09/2008.

Witness 18 did not consider it likely that MD had any form of autism:

> **"The issue of MD's 'autism' seemed somewhat bizarre to [me] as [I] saw a child whose social skills and behaviour seemed exemplary."**
>
> **"[I] think it is extremely unlikely that MD has autism, but he may have a developmental co-ordination disorder that is characterized by low muscle tone and this can cause dribbling and of course also involve poor gross motor co-ordination and poor balance."[50]**

In cross-examination she reiterated and elaborated on this:

> **"I thought it was unlikely he was autistic. His history of toe walking can be a feature but it is not enough of itself. Head banging/rocking is associated with children who have autism. Intellectual disability can be associated with autism. On assessment with me he appeared to show little [in the way of] deviant interactions. There was some delay consistent with intellectual disability. He was trying very hard to engage his parents. It was within the normal realm - given his mental age – of the kind of social interactions that might be expected.**

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[46] At p.36 of my notes.
[47] I had intended to make this order on 01/08/2008 but I had forgotten. Accordingly on 04/08/2008 I asked Mrs Weinberg, Ms Ardley & Ms Jackel to come into Court, all three having been at Melbourne Children's Court for other cases. This order was made with their consent.
[48] DOHS' Addendum report of the protective worker dated 03/09/2008 at p.3.
[49] Evidence in chief of the protective worker at p.132 of my notes. I have no criticism of the protective worker in relation to any delay in this referral for I had sent her on a wild goose chase.
[50] At pp.12 & 6 respectively of witness 18's Children's Court Clinic report.

I'd like to see his intellectual assessment to look at the patterns of his cognitive skills which is another indicator of autism but that wasn't available to me at the time of the assessment."[51]

Given the opinions of witness 18 & witness 3 I would be very surprised if it was to transpire that MD was autistic. However, I am satisfied that it is in MD's best interests for the referral to Mr GS to proceed so that the question can be definitively answered. Accordingly I included the following condition on MD's varied custody to Secretary order:

> **15. DOHS must facilitate an autism assessment for the child. The parents must allow reports to be given to DOHS. DOHS is to forward to a legal representative of the mother and of the father a copy of any such report which it receives.**

8.3 AD

- **AD presented to witness 16 as "a happy, easy going girl who loves everything 'girly' such as Barbie dolls and fairies". She appeared to be a bright and bubbly little girl with a happy and placid disposition who did not exhibit any obvious emotional or behavioural difficulties and was developmentally normal in regard to her social skills. She was an engaging and friendly little girl who was able to engage in age appropriate play, to respond to cues appropriately and to contribute to meaningful play. She also seemed to be acutely aware of what the adults around her were doing.**
- **Witness 16 noted that there are some indications that AD may also be developmentally delayed, particularly in relation to her speech. She found AD's speech difficult to understand at times but with persistence was generally able to understand what she was trying to communicate.**
- **To witness 18 AD appeared a thin but well-looking girl who impressed as a likeable, poised, well-regulated and independent child who had good social skills that allow her to read social situations and to engage others effectively. She dresses and undresses herself and she can clean her teeth. She made few demands on others as she showed an adaptive interest in mastery activities such as building Lego and drawing. Her parents were as likely to engage her as she was to engage them. She showed caring and helpful behaviours towards SD and towards ND and her mother. She tended to gravitate towards MD the most as a playmate when she wanted company.**
- **AD's expressive language and her drawing skills seemed somewhat delayed which made her independent functioning and good social skills all the more remarkable to witness 18. Her language was sufficient to make her needs understood and she appears very capable of using her language and social skills to get her needs met.**
- **AD generally enjoys good health. She has a mild form of asthma which is currently managed well and simply requires management and monitoring. She was born with a kidney condition. She only has one functioning kidney whose function is reviewed annually by a paediatric renal specialist at Royal Children's Hospital.[52]**

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[51] At p.175. The intellectual assessment was not provided to me either nor was the assessor called.

[52] Witness 16 said that AD had one kidney surgically removed shortly after birth. The father denied this: "She has a kidney problem which was picked up in the womb by an ultrasound. She has one functioning kidney and one bad kidney. She was assessed by Mr (name removed). She has never had a kidney removed. Her left kidney is the size of 95 six months' old babies together." See p.207 of my notes. I prefer the father's evidence for he is the person who had direct communication with Mr (name removed).

8.4 ND

- **ND presented to witness 16 as "a bright, quiet but active little girl who is very inquisitive about the world around her. She loves to climb on things and enjoys her time playing outdoors." She was quite indiscriminate in her affection and readily asked witness 16 to pick her up and hold her. However she seemed to witness 16 to be developmentally normal in regard to her social skills. Her affect displayed the spark of sharp intelligence as she appeared to understand and follow everything that was happening around her.**
- **The maternal grandmother has described ND as "a climber and an escape artist like her mother and her grandfather".**
- **Witness 16 only heard ND say a couple of simple words such as 'yes' and 'no'. She attempted to copy some other words such as 'worm' but her father and maternal grandmother did not appear to understand her attempt and she stopped vocalizing and used hand gestures instead to convey her meaning. Witness 18 was told that ND's single word vocabulary had "exploded in the last 3 weeks but she is not yet joining words".**
- **To witness 18 ND presented as an appealing child of considerable charm. She was of slight build and is not toilet trained but is starting to take off her wet and soiled nappies and give them to the maternal grandmother. She impressed as affectionate, socially orientated and very responsive to the attention she receives from others. She initiated interactions and attempted to convey to others what was on her mind throughout the assessment day although her language was such that she uses single words and often did not appear to be understood. She showed a pleasing ability to play by herself at times and did not constantly demand attention. She showed caring and helpful behaviours towards SD. Her activity level seemed to be within normal limits as did her attention and concentration.**
- **Witness 18 observed ND to clunk her head and get on with it, suggesting that she has some internal resources to self-soothe while experiencing minor physical discomfort.**
- **ND generally enjoys good health.**

8.5 SD

- **To witness 18 SD presented as a young infant who appeared overweight for his age and who fluctuated between periods of calm and alertness and periods when he seemed easily unsettled. He appeared to be a baby who has as yet developed little skill in regulating himself and whose signals at this age are not easy to read by others. He varied in terms of how effectively an adult response could soothe him. He seemed an anxious baby who was somewhat hyper-vigilant about surveying his environment. When he was most calm and relaxed he seemed most able to lock his gaze on to another and to initiate social signals for contact such as lifting his hands up and vocalizing and smiling. At other times, when social interaction was offered to him, or when he attempted it, he seemed to frighten himself by becoming overwhelmed and then withdraw his gaze. His mother appeared to have the most consistent success at calming him. He appeared to hold his gaze about equally to Mrs B and to his mother.**
- **SD has always refused to take a dummy and is a child who cries frequently. Sometimes he can be settled by being picked up by his carers but sometimes he cannot. He likes his bath and when not in pain he is a smiling, happy child who is just starting to chuckle when he smiles. As at 15/08/2008 he could not yet roll over but was trying. He could bring two hands together, track an object with his eyes, turn to noise, suck on his fist and hit a toy with his hand.**

- **During the day SD has two 3 hour sleeps and can play in his portacot for up to 1 hour on his own or be in a rocker for 30 minutes. After this he wants to be held. He has also required bottles on a 2 hour basis during the day, a pattern of a somewhat younger infant. His sleeps occur when he is put down awake and cries himself to sleep with music as an aid. He has not stretched his night sleep cycle. As at 15/08/2008 he was sleeping for one 4 hour period at night but upon waking and being given a bottle he continues to wake about every hour.**
- **Both foster parents reported to witness 18 that SD had been a challenging child to parent because he had a number of health problems that they believed had contributed to his unsettled behaviour because he was in physical pain. On 11/06/2008 SD was taken to (location removed) "location 10" Hospital as a result of having a swollen testicle. Subsequently a hernia was discovered for which he had an operation on 04/08/2008. He also appears to have suffered a bladder infection in August. Mrs B reported that just prior to his hernia operation SD stopped feeding and very quickly became dehydrated. On 20/08/2008 SD was admitted to (location removed) "location 11" Hospital as he had appeared swollen and lethargic, was not eating, sleeping or drinking and was irritable. He remained overnight at the hospital and was discharged the following day appearing better. His G.P. has recently diagnosed SD with an allergy to sulphur based antibiotics.**
- **It is possible that SD may have infantile asthma. He also has reflux problems for which he has been prescribed Zantac antacid and a thickener for his milk. A side effect of the thickener is constipation for which he takes drops.**

The evidence in relation to SD's current health problems is hopelessly incomplete. The Department chose to lead no medical evidence (either by way of *viva voce* evidence or reports) from any of the paediatricians or any other medical professionals who have been involved with SD at any time. It is not even clear whether SD actually has infantile asthma. The suggestion about this comes second-hand from Mrs B who advised the protective worker on 12/08/2008 that "SD had a bronchial infection but this has now cleared. The doctor thinks this could be bronchial asthma and he has a puffer (ventolin) for asthma when required."[53] Nor did the protective worker even contact location 11 Hospital to speak to a doctor or paediatrician, let alone obtain a medical report. She was satisfied with "regular updates" she was getting from the carers.[54] But neither of the carers was called either. If the Department considered that SD has health problems which are serious enough to militate against him being moved from Mr & Mrs B's to his parents' care, it ought to have led appropriate professional evidence to this effect. It did not do so.

8.6 SPEECH PROBLEMS OF THE 3 OLDEST CHILDREN

[53] Evidence of the protective worker in cross-examination by counsel for the mother at p.137 of my notes.
[54] *Ibid.*

The three oldest children all have speech problems. Witness 18 was asked about this and hypothesized at least a partly genetic cause:

> **Mrs Weinberg- "Is there any explanation why all 3 children have speech problems?**
> **Witness 18- I was interested to see the mother herself had some educational difficulties. She repeated grade 4 and grade 5. Quite likely she herself had speech and language difficulties and there is a constitutional sub-stream to whatever is happening. It is certainly not all environmental based on that risk factor. Knowing that it did seem to me that would help explain why the children partly may have some delays.**
> **Mrs Weinberg- Is it able to be rectified by speech pathology or does it need psychiatric or psychological intervention?**
> **Witness 18- Speech and language intervention will help the children. Being in a kinder and school environment will also help. These children have been placed in child care which optimizes language development and these children's language is still delayed. Specialist Children's Services is the major governmental service children are referred to for help. AD has been referred and is on a waiting list. I'm not sure realistically what else can be provided at this stage."[55]**

This was corroborated by the father: "The mother and I were late talkers."[56]

MD's speech problems appear the most pronounced. When he was still in the care of his parents – from the time he was "a bit over 12 months old" according to the father – his parents had taken MD to the (name removed) Clinic where he had regularly received speech pathology and physiotherapy services from (name removed) "Ms LC", Speech Pathologist and (name removed) "Ms HA", Physiotherapist.[57] Because the parents moved out of the catchment area MD was referred to Specialist Children's Services in location 7. After an Initial Visit Report was prepared by Education Advisor, (name removed) "HS", MD had been attending appointments with Specialist Children's Services to work on behaviour.[58] As I understand it, this included his speech. Speech pathology appears to have ceased after the apprehension. The maternal grandmother has tried her best to reinstate it but without success:

> **"MD has a speech problem which is improving. He hasn't got a speech pathologist because it is impossible to get one. He is under the Department of Education. Because it is such a large area and there are very very few education speech pathologists he doesn't get seen very often. I have tried innumerable avenues to get speech pathology for MD but at the moment it is just a 'no go'. He has been assessed by the school and by the speech pathologist at the school but if it is unavailable there is nothing I can do. I have tried several fields and it doesn't work."[59]**

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[55] At p.171 of my notes.
[56] *Viva voce* evidence of the father at p.204 of my notes. The cynic in me would say that the father is making up for it now.
[57] See *viva voce* evidence of the father at p.204 of my notes and Specialist Children's Services Initial Visit Report of HS dated 03/02/2005.
[58] See my notes of *viva voce* evidence of witness 1 at p.16 & protective worker 2 at p.45.
[59] Evidence of the maternal grandmother in cross-examination by counsel for the father at p.193 of my notes.

However the maternal grandmother did finish this part of her evidence on a positive note: "He brings a reader home every night and he is going very very well."[60]

9. SCHOOL & CHILD CARE ARRANGEMENTS

During 2008 MD has been attending location 3 North primary school. He is in Prep and has a teaching aide allocated for 15 hours per week. The maternal grandmother said:

> **"He was allocated an aide for 15 hours because of his developmental delay and the fact he might wander. I might also add perhaps when the welfare officer did the report, (name removed) "SG" stretched a little more to ensure MD got the maximum aid he could possibly get. There is an excellent relationship between MD and his aide. (Name removed) "S" is a lovely woman. They have rugby league in common. They can talk sport. They have a very, very good rapport."[61]**

MD initially found it very difficult to adapt to the new routines and expectations of the school environment. His teacher told witness 16 that he is quite delayed in comparison with his peers in most aspects of his education and behaviour. However he has become more settled as the year has progressed and his most recent school report indicates that his reading and mathematics are within normal range.[62]

AD & ND are currently attending ABC child care/crèche/learning centre at (location removed) each week on Tuesday, Thursday & Friday.[63] Nothing untoward has been noted about their behaviour. The maternal grandmother said:

> **"The girls love going to ABC. AD is always talking about going there and so and so being there."[64]**

For a significant period prior to being removed from their parents' care MD and AD had attended child care at (name removed) "P" Child Care Centre in location 1. This is located within walking distance of the parents' home. During protective worker 2's involvement with the family from April 2006, MD was attending 4 days per week and AD was attending 2 days per week. The operating hours of P were 7am-6pm and the children were dropped off by the father mostly at around 7.30-

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[60] *Ibid.*
[61] At p.187 of my notes.
[62] See report of witness 16 dated 10/062008 at p.2 & Children's Court Clinic report of witness 18 at p.12.
[63] See report of witness 16 dated July 2008 at p.2, Children's Court Clinic report of witness 18 at pp.12-13 and *viva voce* evidence of the maternal grandmother at p. of my notes.
[64] At p.184 of my notes.

8am.[65] However in late November 2006 there was a heated conversation between the father and (name removed) "Ms MH", an employee of P, in which the father effectively burned his bridges, bridges which were already shaky as a consequence of his refusal to pick MD up from child care by 4.30pm every day.[66] Protective worker 2 described what happened:

> **"The father was reported to be very rude to Ms MH and expressed his feelings calling her a liar with regard to the condition in which his children presented at Childcare.[67] Ms MH advised that a meeting had been held with her superiors and that a decision had been made to suspend MD and AD for 2 days until Monday 04/12/2006. A further meeting was held and (name removed) "Ms BP" from DOHS was informed of the situation and for the ongoing safety of the staff at P Childcare it was decided to advise the family that the children no longer had a place at the centre."[68]**

In her report witness 18 commented on the parents' failure as yet to explore child care and school options:

> **"Neither parent appears to have proactively explored childcare and school options yet. No childcare facilities or schools have been visited nor has the issue of how to juggle childcare and school attendance been considered. None of the children have their names down on another childcare facility just in case. This likely represents the parents' current feelings of disempowerment and helplessness but it may also reflect a style of these parents: a style which involves them living in the present, and a preference to deviate away from structure, organization and planning. This preference maintains freedom of choice and is likely a *laissez faire* approach to life that is just a part of who these people are."[69]**

The Department sought to capitalize on this in cross-examination. But in my view this criticism – if it is a criticism – is quite unfair. While the parents' formal position and desire in this case was for the return of all 4 children immediately, it is probable that they had legal advice that any return of the older children was likely to be gradual. Indeed that was the thrust of Ms Green's final submission. In any event, it is clear that the father is a resourceful man so far as sounding out services is concerned. At one point he said: "I'll have my son in school within 24-48 hours, straight away."[70] I have no doubt that he would. Asked whether there was a crèche nearby where he would be able to enrol SD he said: "In (name removed) "O" Road.

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[65] *Viva voce* evidence of protective worker 2 at p.13 of my notes.

[66] P's requirement that MD be picked up by 4.30pm was because P had arranged a specialist worker to be at the centre for the time MD attended child care and this worker completed her daily shift at 4pm: see p.13 of my notes.

[67] For details of P's account of the children's presentation see section 25 below.

[68] DOHS' Addendum report of protective worker 2 dated 05/03/2007 at p.4.

[69] Children's Court Clinic report of witness 18 at p.11.

[70] At p.212 of my notes.

I wouldn't be able to take him to P. O Rd is maybe a 10-15 minute walk, if that."[71] I have no doubt that the father & the mother understand the importance of their children's education and will do everything in their power to ensure that any child in their care is enrolled in and attends an appropriate educational facility.

I had asked witness 18 to make recommendations about appropriate child care if the children were returned to their parents' care and the parents remained living in location 1. She recommended the (name removed) "SB" Childcare Centre and also recommended a school, the (name removed) "SP" Primary school:

> **"The Child Care that would work best for this family would be the one that can offer whole day care and have a kindergarten program attached to it. Furthermore, a Child Care centre that is at the very least on the same route as the Primary School attended by the older children now or in the future would also be an advantage as change of centre is to be avoided if possible. On these grounds the SB Childcare Centre, (address removed)…is highly recommended as it meets all the criteria: it has a reputation for being a childcare centre and kindergarten that is welcoming and accepting of difference and a reputation for having a particularly nurturing and inclusive approach to all members of its community. Moreover, this childcare/kindergarten centre has the further advantage of being close to one of the most inclusive and pastorally oriented Primary Schools in the whole of Victoria: SP Primary School. This school's outstanding record in student well-being is recognized by other local schools who seek out advice from this school on issues of well-being and this school has been approached to provide training in this area. This school is particularly good at liaising with and engaging parents from a range of backgrounds. These children will soon be going to school and school becomes a vital protective setting for these children in all sorts of ways, so it is helpful to consider childcare and school alongside each other for a family that has several children of different ages."[72]**

The parents live in the municipality of (name removed) "B". SP Primary school is in the municipality of (name removed) "P". I was concerned that it might therefore not be available on geographic grounds even though it is comparatively easily reached by tram. Witness 18 telephoned the school and advised me that the school said "they have to take people in their zone. After that they have a few places available and it is at the principal's discretion whom they will take."[73] I agree with witness 18's recommendations on both school and childcare if they are practicable but in my view one ought not expect that the principal of SP Primary School would exercise his/her out of zone discretion in favour of enrollment of a student who

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[71] At p.209 of my notes.
[72] Children's Court Clinic report of witness 18 at p.36.
[73] *Viva voce* evidence of witness 18 at p.175 of my notes.

requires a half-time teaching aide. To a question about his school intention for MD if he was returned to parental care, the father made a thoughtful reply:

> **"I've looked at a few primary schools. I've looked at S Primary school in (name removed) "S" Rd and (name removed) "CS" South primary school in (name removed) "G" Rd which has a fence around. Each would be 10 minutes by tram. AD would go to (name removed) "B" preschool. It's a quick train ride and a 2 minute walk. ND would attend the same play group."[74]**

10. PARENTS' BACKGROUNDS & CHARACTERISTICS

10.1 PARENTS' OWN ACCOUNTS OF THEIR BACKGROUNDS

In the course of her assessment under the Together Again Program, witness 16 conducted 5 home visits with the parents between 09/04/2008 & 16/07/2008 and observed the children with the parents on 28/06/2008 at the parents' home and on 14/07/2008 at the maternal grandmother's home.[75] In her report she summarized the parents' background, her summary being based on information given to her by the parents in joint interviews in which they appeared to be participating freely.[76] Both parents reported having experienced a difficult childhood and adolescence. I précis their respective backgrounds and characteristics as follows:

10.1.1 THE FATHER

- **The father grew up in location 12 and had 8 siblings. The 2 siblings closest in age to him are both deceased. "A" was older than the father by one year but committed suicide when he was 21. The father's younger brother "P" was a year younger than him but died of spinal meningitis when he was only 3 months old. The father's surviving siblings, with whom he does not maintain any regular contact, are an older sister, an older brother, 3 younger sisters and a younger brother. The father describes his father as a very strict man who used a harsh form of physical discipline to control his children's misbehaviour and as an alcoholic who was not often available to his children other than when he was disciplining them. The father's mother was a chronic gambler who depleted the family's funds through betting at the TAB and made life very difficult financially for the family. His parents separated when he was 11 years old due to continuous arguments and domestic violence and this, in combination with a lack of nurturing, led the father to become "a bit of a rebel, a shithead". He remained with his mother and lost contact with his father. He describes himself as a child who was out of control, who liked to stay out roaming the streets until "all hours, on me bike". He does not see his father because his father disowned him after a disagreement at a funeral. His father called him names such as "Dumb and an idiot. No brains. Arsehole." The father's father lives in (location removed) with his new partner and the father's five half-siblings with whom he does not have any contact.**

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[74] At p.203 of my notes. S Primary school is not to be confused with SP Primary school. The former is in (name removed) Rd not far from (name removed) Station. The latter is more than 2km further north.

[75] See her *viva voce* evidence at p.142 of my notes.

[76] See report of witness 16 dated July 2008 at pp.6-8 and her *viva voce* evidence at p.144 of my notes. See also report of witness 18 at pp.6-7 & 27-28. None of this material was challenged in cross-examination.

- **The father went to the local technical school until he was 15. He left school to begin work as a machine operator. In 1992 the father studied year 10 & year 11 at TAFE. He then attempted year 12 twice at the same TAFE but found it too difficult and did not complete it. He subsequently worked in various jobs including work as a foreman, forklift driver and at Sydney Olympics. His most recent employment was as a baker's apprentice at Bakers' Delight but had to give that up as his obligations re access and Court were making him an unreliable employee. He is currently unemployed.**
- **The father appeared to witness 18 as an affable, alert and energetic man who seemed cheerful for the most part. He smiled and was talkative but he mostly avoided eye contact. He spoke rapidly and at great length, leaving few gaps for the other person to get a word in.[77]**
- **The father is colour blind and has 10% vision in one eye but reported to witness 18 no other physical or health impairments.**

10.1.2 THE MOTHER

- **The mother described herself to witness 16 as 'the black duck' in the family, saying that she never felt like she belonged and gradually isolated herself from the rest of her family. She is the youngest of four children [names removed] and grew up feeling that her siblings were favoured and loved more than her, particularly her older brother (name removed) who – so she said – bullied her.[78] She felt that nobody in her family ever listened to her or understood who she was. She spent most of her childhood and adolescence riding on and playing with her horse and playing with her dog. She said that she just 'shut down' especially when her parents separated due to continuous conflict when she was 11 years old.**
- **The mother left school in year 10 after being expelled for drinking alcohol on the school grounds during school hours. She then attended (name removed) TAFE and did a hospitality and catering course. She then went to the CAE to do years 10, 11 & 12 over 2 years but was not able to complete it. She had a goal to join the navy so in order to qualify to enlist she went to (name removed) TAFE again to attempt years 10, 11 & 12. In 2001, while she was attending TAFE she joined a Job club where she met the father. They became good friends and eventually each of them ended their previous relationships to begin a relationship as a couple.**
- **The maternal grandmother told witness 16 that she regrets not having been a better mother to the mother but was controlled so much by her husband at that time and didn't dare cross him. The mother remained with her mother. She told witness 16 that her mother was available to help her with her homework and similar practical tasks but wasn't supportive emotionally. The mother feels that she has trouble opening up to people and can't express her feelings because she has never had anybody that she has trusted enough or who she feels really understands her and the way she thinks and feels.**

While I accept that the mother honestly feels that she has trouble opening up to people that does not come through strongly to me. I have heard evidence about a number of dealings with professionals in which both the mother & the father have

[77] As he also did in the witness box in this Court: see section 7 above.

[78] The mother did not herself give evidence and the maternal grandmother was not asked any questions about the relationship between the mother & (name removed) her "older brother" either as children or now. Accordingly I do not make a positive finding that the older brother bullied his younger sister. I merely include this allegation to enable a better understanding of the mother's perception of the relationship between her and her older brother.

been involved in the past 4 years and both appear to me to have been very open and honest in the way in which they have "opened up" to those professionals.

- **The mother impressed witness 18 as a likeable woman who was not inclined proactively to initiate engagement but who responded, albeit with a mild degree of surprise, to witness 18's concerted effort to engage her. The mother appeared to be someone who prefers to keep her own counsel and likes and needs some solitude to maintain her wellbeing because she is introverted in terms of personality style.**
- **The mother has significant ongoing chronic health problems: poor iron absorption and low blood pressure. Witness 18 also accepts that the mother "has possible issues with depression" and added "after SD was taken away in such circumstances it was probably exacerbated".[79]**

10.2 PARENTS' NEUROPSYCHOLOGICAL ASSESSMENTS

A central feature of the recommendations in April 2007 made by the Children's Court Clinician, witness 3, had been that each of the parents should undergo a neuropsychological assessment:

> **"In summary, the mother and the father appeared motivated to be good parents but they appear to lack the capacity to do so at present. Whether their capacity is compromised by lack of sufficient knowledge due to their past, or lack of cognitive ability and thus compromising their learning is not possible to determine. These issues should be investigated. It is imperative that they learn to manage MD's behaviour because his behaviour puts himself and his sisters at risk as the situation stands at present."[80]**

Based on witness 3's recommendations, condition 11 of the custody to Secretary orders made on 24/04/2007 required each of the parents to attend a neuropsychological assessment and comply with any recommendations thereof. For reasons which are not entirely clear there was a substantial delay in compliance but the delay appears to have been occasioned both by DOHS and the parents.[81] The assessments were finally conducted by neuropsychologists employed by (name removed) Health. (Name removed) "witness 8" assessed the mother on 19/03/2008. I accept her findings:

The mother's verbal and non-verbal intellectual functioning is within the Low Average range of ability, with no significant difference noted between the two domains. The main areas of difficulty identified on testing include higher level attentional difficulties, namely severely slowed psychomotor speed and mild to moderately slowed information processing speed. Working memory was also mildly reduced, as were idea generation, planning and response inhibition. Her performance on a task of mental flexibility/divided attention was

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[79] Witness 18's opinion about depression derives from her *viva voce* evidence at p.190 of my notes. The maternal grandmother agrees it is "a possibility" that her daughter may be depressed: see p.186 of my notes.

[80] At p.10 of witness 3's Children's Court Clinic report.

[81] The mother was reluctant to attend an earlier appointment made by DOHS with another neuropsychologist.

effortful for her. Conversely, performances on tests of verbal and non-verbal learning and memory were intact. Visuospatial/constructional reasoning and problem solving skills were within expected limits. This profile is likely to reflect a number of contributing factors including her longstanding level of intellectual functioning and cognitive strengths and weaknesses, as well as her limited education and learning difficulties.[82]

(Name removed) "witness 9" assessed the father on 01/04/2008. I accept her findings:

On formal neuropsychological assessment the father presented as a man of at least average intelligence seen in the context of a pattern of distinct cognitive strengths and weaknesses. The strengths were:

- **Verbal intellectual abilities at an above average level revealing a good fund of general knowledge and sound understanding of social rules.**
- **Verbal memory functions were at an above average level with good capacity for new learning and retention of newly acquired information over time.**
- **Good capacity to differentiate essential from non-essential information.**
- **Sound verbal fluency.**
- **Sound arithmetical reasoning.**

The weaknesses were:

- **Below average immediate attention span and working memory capacity.**
- **Variable speed of processing information.**
- **Inefficient planning, organization and non-verbal problem solving.**
- **Low average capacity to reason in the abstract.[83]**

In *viva voce* evidence:

- **Witness 8 agreed that the test results showed no reason why the mother could not remember and learn but added that "it would be useful if things were written down and the mother was given more time because her processing time is slower and because of her working memory component".[84]**
- **Witness 9 said that the test results suggested that the father "can learn under appropriate conditions" but noted that her test results suggested that while the average individual can take into the mind at any time 7 ± 2 pieces of information, The father was able to recall only 4 pieces of information. That suggested to her that the father was "susceptible to overloading and may not be suitable for multitasking".[85]**

[82] Neuropsychological report of witness 8 dated 26/03/2008 at pp.3-4.
[83] Neuropsychological report of witness 9 dated 07/04/2008 at pp.3-4.
[84] At p.93 of my notes.
[85] At pp.97 & 95 of my notes respectively.

10.3 PARENTS' RELATIONSHIP & THE FATHER'S PLANNED RETURN TO WORK

One of DOHS' initial protective concerns was the nature of the relationship between the parents. Without any real supporting evidence this concern has managed to get transmogrified into "domestic violence" in some DOHS' generated documents. For instance in the referral which protective worker 2 prepared and sent to QEC, the stated protective concerns included "History of domestic violence."[86] And in protective worker 2's addendum report dated 05/03/2007 she stated: "The father has a history of violence against the mother."[87] Counsel for the father asked her the basis for this sweeping assertion and she said: "The report reflects intervention by police due to attending the premises for a domestic violence issue."[88] But the one notification involving police attendance has not been substantiated.[89] The father believes it was Ms JLS, an upstairs neighbour, who was ringing the police and making false accusations against him and the mother. On 19/12/2005 both parents made a complaint for an intervention order against Ms JLS and on 10/01/2006 intervention orders were subsequently made for 2 years. The odds are that the father's belief about Ms JLS is correct. The mother denies involvement in any domestic violence with the father:

> **<u>Ms Green</u>- "I'm instructed that [the mother] has never been involved in any domestic violence with the father. You don't have any direct evidence to controvert that?**
> **<u>Protective worker 2</u>- I haven't seen evidence of domestic violence during my time with the couple."[90]**

I am not satisfied on the balance of probabilities that there has ever been any physical violence inflicted by the father on the mother. However "domestic violence" – at least so far as it impacts negatively on children – is not confined to physical violence. It is not contested that from time to time in the past there has been a mutual frustration between the parents which has led to verbal conflict between them. This evidence was from several sources but was described by witness 10 as follows:

> **<u>Mrs Weinberg</u>- "How do you know the relationship was difficult?**
> **<u>Witness 10</u>- We were told in referral by DOHS but in conversations with the mother & the father they would often discuss the difficulties, complain a lot about each other. A lot of families will do that. They described verbal aggression.**

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[86] Evidence of witness 10 at p.98 of my notes. The emphasis is mine.
[87] DOHS' Addendum report dated 05/03/2007 at p.13.
[88] At pp.25-26 of my notes.
[89] See section 2.1 above.
[90] At p.28 of my notes. See also her evidence at p.22 of my notes.

> **Mrs Weinberg- Did you have a conversation with ether parent?**
> **Witness 10- I had a conversation with the mother. She described their relationship as difficult. There was often conflict. She didn't discuss anything about physical aggression but definitely verbal."[91]**

And there is also evidence that from time to time the parental relationship has not been stable. For example, the TAP referral which Ms (name removed) "CH" of DOHS completed in August/September 2007 says:

> **"Their relationship does not appear stable. On several occasions the mother has kicked the father out of the home. She has however taken him back on both occasions. The writer has concerns the relationship is not stable."[92]**

Writing in July 2008, witness 16 said:

> **"The father and the mother's relationship appears to be quite unstable at the current time. There was a recent argument that led to the father being asked to give the mother his key to the flat they share. It is [my] understanding that this is a relatively common occurrence and that the couple will split up and get back together a few days later. When [I] asked the father and the mother about their most recent argument they were only prepared to say that they have worked things out and that everything is fine."[93]**

The father presented to me both in Court and in the witness-box as an anxious and very intense man. Witness 18 described him well:

> **"[H]e presented as a man who has some well-worn scripts that he sticks with, but which become somewhat repetitive, and perhaps a little wearing for someone who is involved with him in an intimate relationship."[94]**

Given her partner's intensity I can understand why the mother said "adamantly" to witness 18 that "she would like the father to return to work because it gets him out of her hair and she needs her space"[95]. This concerns me although not sufficiently to include a condition that the father not return to work. Given the Herculean task of parenting a number of young children and the fact that the parents will need to continue working at a team if reunification is to succeed, I wonder whether work is practicable at present even on the basis which the father described in his evidence:

> **"I'd like to return back to work. I'd go probably on a night shift which would give me the opportunity to look after the kids and SD during the day. I'd wake up probably about 2.30pm. Pick MD and the girls up. I haven't applied yet for any job because of the legal proceedings going on. I'll try very hard to get work full-time with a company or contract work through an employment agency**

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[91] At p.100 of my notes. See also her report at p.6 and evidence of witness 11 in section 12 below.
[92] TAP referral form at p.4. The words "several" & "both", used in consecutive sentences, are inconsistent.
[93] Report of witness 16 dated July 2008 at p.8.
[94] At p.7 of witness 18 Children's Court Clinic report.
[95] *Op.cit.*, p.10.

because I have a forklift licence. As soon as I get the kids back I'd try to get back into work as quick as I can so there is a weekly wage every week." [96]

In order to minimize the risk of future verbal conflict between the parents – with its concomitant risk of causing emotional harm to the children – and in order to strengthen the parents' relationship, I believe it is important for both parents to be involved in ongoing personal counselling and family therapy.[97] **Hence I have included conditions to this effect.**

10.4 THE FATHER'S "ANGER" – NOT A RISK TO THE CHILDREN

From time to time during DOHS' involvement reference has been made to the father being angry or aggressive in his dealings with DOHS' staff. The most recent occasion was on 27/05/2008 at Royal Women's Hospital where police were called to assist with the apprehension of SD. I am satisfied from the evidence of (name removed) "witness 12" that the reason for the police presence was not because the father was a risk of absconding with SD as the protective worker and her colleagues appear to have believed but because he was distraught at the prospect of yet another of his children being removed from his care by the state authorities and was reluctant to surrender SD. I accept witness 12's observations in cross-examination by counsel for the father:

> **Mr Thomas- "Did the father try to escape from the hospital with SD?**
> **Witness 12- No. Escape isn't the word. We were just concerned because he was agitated and holding the baby."**[98]

All of this happened in the precincts of the Special Care Nursery at the Royal Women's Hospital and I am satisfied that SD was not placed at any risk of harm at any stage.

I accept witness 18's insightful assessment of the father's functioning:

> **"While a friendly man, he impressed as lacking the mother's psychological complexity and his mother's report of his verbal abuse of her in public and his past confrontations with the childcare centre suggest that this is a man who is prepared to confront conflict because he expects others to see his point of view**

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[96] At p.203 of my notes.
[97] The recommendation for family therapy was made by witness 18 at p.35 of her report and in her *viva voce* evidence at p.174 of my notes. She specifically recommended a referral to a clinical psychologist at (name removed) Professional Therapy & Counselling Service (address removed), a service which does have provision for and bulk-bill some low income families. However, there is a waiting list.
[98] At p.115 of my notes.

and he does not appear to be a man who easily backs down or acknowledges that he may have made a mistake."[99]

One of the father's "well-worn scripts" is the perfidy of the Department. This has most recently been manifested by his criticism of the protective worker and by his rudeness to and about her. I am not significantly critical of the protective worker's evidence or her role in this case. I do not accept all of her evidence and disagree with some of her opinions but it must be remembered that she is very inexperienced. This case was one of her first allocated cases. She does not deserve to have been called "young, dumb and incompetent" by the father to her face[100] nor to have been described by him to witness 17 as recently as 09/07/2008 as "a scrag, bimbo, dumb blonde"[101]. Despite the stress[102] engendered by the removal of his children and DOHS' significant mishandling of this case, no protective worker deserves to be treated with such appalling disrespect. Hence I have included a condition "Father must not use insulting words to or about DOHS staff" but I have not included a condition "Father must not threaten DOHS staff."

It is clear to me that the relationship between the father and the protective worker has completely broken down. I have the strong opinion that it is not fair to either the protective worker or the children to keep her involved as the protective worker in the case. I cannot order DOHS to change its allocated protective worker but I strongly recommend it and in doing so I intend no criticism of the protective worker at all.

Despite the above, there is no evidence of the father's "anger" or "stress" or "frustration"– however it be categorized – which gives me any concern that any of the father's children are at risk of physical harm from him as a result of "anger" or "stress" on his part. I am entirely satisfied that he would not harm or hurt his children in any way by any deliberate act.

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[99] At p.7 of witness 18's Children's Court Clinic report.
[100] Evidence of the father himself at p.213 of my notes.
[101] Evidence-in-chief of witness 17 at p.156 of my notes.
[102] The father sees himself as "extremely stressed" rather than "angry": DOHS' report 16/01/2008 at p.4.

10.5 PARENTS' ATTENDANCE AT COUNSELLING

The parents have attended irregularly at counselling in indifferent compliance with condition 3 on the original custody to Secretary orders.[103] Both counsellors gave evidence. I found them quite impressive witnesses.

The father's attendance, though spasmodic, has been much better than the mother's. The father has attended counselling on 15 occasions with (name removed) "witness 13" of (name removed) Family Life between 14/08/2007 & 29/08/2008. This counselling has had elements of anger management and I consider attendance upon witness 13 is sufficient compliance with condition 4 requiring the father to go to a course on anger management or a Men's Behaviour program. However, the counselling was not regular, most of the sessions having been in the last couple of months. Witness 13 still regards the father as a client and said: "I believe I have a pretty good relationship with him."[104]

The mother attended counselling with (name removed) "witness 15" of (name removed) Family Life on 7 occasions between 11/09/2007 & 11/03/2008. During this period the mother missed 6 appointments. The mother's counsellor went well over and above the course of duty to chase the mother up and encourage her to attend. In the final session witness 15 said that because the mother's attendance had been so irregular, she would have to close the case if the mother missed the next appointment on 17/03/2008. Despite this, the mother did not attend and the case has been closed. It would not be right to say that the counselling was fruitless, although the mother did not follow up with the parenting programs recommended by witness 15:

> **"With her relationship with the father, the mother was quite receptive and open to the strategies we explored and she would follow up on some strategies: assertive communication and to discuss more with the father her thinking and feeling. With parenting I provided her with several contacts to parenting programs: positive parenting program, a free 6 weeks program at (name removed) Community Advice Bureau and "Parenting for Fun – Getting Your Children to Listen More" at the (name removed) Neighbourhood House."[105]**

It is a great pity that the mother - whom witness 15 described as "generally very respectful and apologetic" whenever contacted about non-attendance – was not

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[103] Condition 3 requires both parents to attend counselling.
[104] At p.119 of my notes.
[105] Evidence in chief at p.125 of my notes.

prepared, for whatever reason, to persevere with counselling by the impressive witness 15.

While I am not at present persuaded that attendance at counselling is an essential pre-condition to the commencement of a reunification process, I believe it is in the best interests of the children and hence important-

(i) for the father to maintain the relationship with witness 13 for as long as witness 13 recommends; and

(ii) for the mother to re-engage with a counsellor nominated by her mother[106] and to attend for counselling for as long as her counsellor recommends.

10.6 PARENTS' CAPACITY & WILLINGNESS TO LOOK AFTER THE HEALTH NEEDS OF THE CHILDREN

There is a great deal of evidence that the parents are capable of looking after the health needs of all of their children, are willing to do so and did so competently when the children were in their care. See, for example, the letter dated 21/02/2007 from Dr DE, a consultant paediatrician employed at the Royal Children's Hospital:

> **"I have been MD's Paediatrician at the Royal Children's Hospital since January 2005. He has been attending appointments regularly with his father regarding a range of minor health, developmental and behavioural issues.**
>
> **MD has attended appointments reliably with his father. I have been able to observe appropriate interactions between them. I have seen no direct evidence of MD having been mistreated in any way."[107]**

Witness also the parents' attendance at the (name removed) Clinic with MD for speech therapy with Ms LC and physiotherapy with Ms HA and their subsequent involvement with Specialist Children's Services.[108] And witness also the father's taking of AD to hospital when she had suffered a mild form of asthma and witness 11's comment on this: "He was very good like that."[109]

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[106] In her evidence the maternal grandmother nominated (name removed) "TG" in (location removed) "location 14" who is currently counselling the mother's son JB: see p.186 of my notes.

[107] This letter was tended by counsel for the father. Dr DE was not called by DOHS and no explanation was given to me.

[108] See Copy Specialist Children's Services Initial Visit Report re MD written by HSS at p.1. See also section 8.6 above and viva voce evidence of the father at p.204 of my notes.

[109] See p.109 of my notes.

11. WHETHER THE FATHER THREATENED WITNESS 11

Witness 11 is a registered nurse, midwife and enhanced Maternal & Child Health Nurse employed by (name removed) City Council who was involved with the family from November 2004 to October 2006.[110] She was sub-poenaed by DOHS to give evidence in this case and did so in the afternoon of 31/07/2008. I found nothing about witness 11's evidence that day which was questionable or objectively implausible. I noticed no difference in her demeanour – which I had thought seemed a bit "superior" - from the start of her evidence until the end. She certainly seemed as far from being "overwhelmed" as it was possible to be. She raised no concerns with me that day about any aspect of the court process. However, when she was contacted by the protective worker after she had returned to her office she said that the father had been "making threatening eye contact with me and mouthing things at me"[111]. When recalled to give evidence of this she was asked by counsel for DOHS when this happened and she said:

> **"When taking a break between the two barristers questioning me and the father was giving me very evil eye contact and saying 'You're dead'. Not once but several times. Over and over again. I looked away and didn't make eye contact again."[112]**

Witness 11 explained to counsel for DOHS that she mentioned none of this to anyone at Court – certainly not to me and not even to Security – "because I didn't know the process and I felt uncomfortable when leaving the Court and I wanted to leave the premises immediately"[113].

Asked by counsel for the father to explain what she meant by "giving me very evil eye contact", witness 11 said:

> **"Squinting to the side and mouthing 'You're dead.' He was looking this way at me." [DEMONSTRATING TO RIGHT HAND SIDE OF FACE][114]**

The following cross-examination ensued shortly thereafter:

> **<u>Mr Thomas</u>- "Mouthing things at you?**
> **<u>Witness 11</u>- Mouthing 'You're dead, you're dead, you're dead. He kept on mouthing to me as I was giving evidence.**

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[110] Her evidence of her various observations of the family is set out in detail in section 12 below.
[111] Evidence in chief of witness 11 on 08/09/2008 at p.131 of my notes.
[112] *Ibid.*
[113] *Ibid.*
[114] At p.131 of my notes.

Mr Power- I thought you said it was in the break between the two counsel questioning you?
Witness 11- It was, yes.
Mr Thomas- But you didn't say anything to anyone at the time?
Witness 11- No. I didn't.
Mr Thomas- Not to His Honour?
Witness 11- I wasn't sure if I was allowed to. I wasn't sure of the protocol. Now I know I should have said something. I felt overwhelmed. It was a very formal process.
Mr Thomas- You didn't ring the protective worker?
Witness 11- No. She rang me.
Mr Thomas- You wouldn't otherwise have said anything?
Witness 11- Probably not but I may have followed it up with other Maternal & Child Health Nurses if they had to give evidence.
Mr Thomas- Your demeanour didn't change in the witness box?
Witness 11- Yes [INDICATING AGREEMENT].
Mr Thomas- You were cool, calm and collected throughout your evidence?
Witness 11- Yes [INDICATING AGREEMENT].
Mr Thomas- Have you experience in lip reading?
Witness 11- Well, no, but combined with facial expressions it wasn't a very positive 'Hello. How are you?'
…
Mr Thomas- You didn't know that the father had only 10% vision in his left eye?
Witness 11- No.
Mr Thomas- You wouldn't know if he was looking at you at all?
Witness 11- Well, that's how I interpreted it."[115]

In his evidence in chief the father denied the allegations made by witness 11:

The father- "I deny what she said. I've never made a threat towards any Maternal & Child Health Nurse. I've no need to.
Mr Thomas- She said you were mouthing threats.
The father- That's incorrect.
Mr Thomas- You were not mouthing anything?
The father- If anything I was shaking my head 'No' to supposedly having my children put faeces on the walls, that we weren't up in time to answer the front door to the Maternal & Child Health Nurse because at the time I was always up because I had to take MD to P Play Group."[116]

Nothing expressly put to him in cross-examination led me to question the honesty of the father's denial of threatening witness 11. It is true that the father has a few prior convictions relating to dishonesty offences and offences of violence[117] but there is nothing in those priors which leads me to doubt the truth of his denial. I myself did not witness anything which would support witness 11's account. It would not be surprising that I didn't see the father do anything if he had because I usually focus on my computer and look from time to time at the witness. However, I would have

[115] At pp. 131-132 of my notes.
[116] At pp.207-208 of my notes. See footnote 123 in section 12 below for discussion of witness 11's somewhat overstated evidence about faeces on walls and her evidence about the parents not being up when she came to visit.
[117] These include a fine for resisting police in 2002, a sentence of 4 months imprisonment with 3 months suspended for recklessly causing injury in 1991 (according to witness 17's report at p.4 this was related to a motor bike accident) together with a fine for theft & assault/resist police at the same time and probation for burglary in 1986 (at which time he was 19 years old).

expected to have noticed some change in witness 11's tone or demeanour or presentation in the witness-box. I have no reason to believe that witness 11 was dishonest in her allegations but I consider that she was a poor witness on this issue. In particular she was inconsistent about when the alleged threats occurred and her answer to counsel's question about her expertise in lip-reading suggested that she was making some very broad assumptions. Hence, despite the father being a poor witness generally, I am not able to find - on the balance of probabilities taking into account the dicta of the High Court in *Briginshaw v Briginshaw*[118] - that witness 11 is correct in her belief that while she was in the witness-box the father threatened her in the way she alleged or in any way. This was a small issue but a very important one in the context of whether the children should be reunified in the care of their parents for my ultimate opinion might be different had I found the father so lacking in self-control as to threaten a witness in the formal environment of a court room.

12. PROFESSIONAL INVOLVEMENT OF WITNESS 11

It is fair to say that in some respects witness 11's evidence was not favourable to the parents. I find it odd that it does not read quite as unfavourably as it sounded to me in Court. Perhaps that had something to do with witness 11's tone of voice and/or body language. Witness 11's role as an enhanced MCHN involved her going out and visiting the family at their home. She was involved from November 2004 to October 2006. I summarize the salient points of her evidence as follows[119]:

- **Witness 11 used to see the children once a week or once a fortnight when they were younger but as they got older once a month. The family used to link in to the Special Needs playgroup at location 1 Health Centre.**
- **This family used to access the universal MCHN as well as witness 11, the enhanced MCHN.**
- **Witness 11 visited regularly to ensure the living conditions were satisfactory. Asked what was wrong with them she said they were dirty, there were faeces on the wall, smelly carpet, dishes everywhere. She did not see any improvement in the environment from week to week. The parents did not appear to hoover or wash dishes.[120]**

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[118] (1938) 60 CLR 336 at pp.343 & 362.

[119] This material is taken from pp.107-112 of my notes.

[120] It transpired in cross-examination (see p.111) that the reference to faeces on the wall was on one occasion in about August 2006, the same occasion as described in the next dot point when AD was observed to have an overfull – described as a 'loaded' - nappy. There is no evidence that any of the children have ever had nappy rash which became infected.

- **'MD had repeated adenoid problems, colds, coughs and had to have his tonsils removed. I don't know if that was related to his nutrition. AD had nappy rash. Her nappy had not been changed. On one day when AD was still in bed she had faeces all the way up her back. Nappy rash can pose a risk and can become infected and lead to septicemia in young children. They are very vulnerable.'**
- **Witness 11 talked with the parents about cleaning up a little, stressed routines & nutrition and highlighted the need to place baby ND on her tummy on a clean floor in order to ensure proper development. There was a problem in the relationship between mother and ND. There was not a lot of eye contact. The mother was often very flat when witness 11 attended. Witness 11 was concerned that she might be depressed – whether depression *per se* or post-natal she could not say. Witness 11 got the mother into a 5 day residential program in May 2006.**
- **The father had more interaction with the children. He was probably the lynchpin of the family.**
- **When she was first working with the family a support service Community Bubs was working with the family, looking at the relationship between mother and child and teaching parenting skills, was working voluntarily with the family until AD was 12 months old.**
- **Witness 11 did not think that anyone did the cooking or cleaning. Asked what everyone ate, she said: 'Noodles. One day we got there MD was eating stock cubes at 10am and mum and dad were still in bed. He got into the cupboard and got that out. He was 3 ½ to 4 years old.'**
- **Witness 11 did a lot of role modelling for the parents. She taught the mother how to cook.**
- **The environment deteriorated when they had ND. They never had any money to buy food. Asked why, witness 11 initially said: 'Spending money on car or other things' but later conceded that she did not know why.**
- **The children did meet their developmental milestones physically. They were within range.**[121]
- **MD's speech was delayed and he was cognitively delayed.**
- **MD and AD attended child care.**
- **Witness 11 "sometimes" saw the parents engaging in activities with AD & ND.**
- **When AD was diagnosed as asthmatic, the father had taken her to hospital: "He was very good like that."**
- **Witness 11 had never seen either parent smoking inside the house.**
- **Witness 11's professional involvement had formally ended after the children were removed. She "rang the father but he said he wouldn't engage with us any more…It was his right not to be involved and we had to respect that." Prior to that the parents had engaged with witness 11. They were always "open", "chatty" and "friendly" even if witness 11 "had to get them up". In particular the mother was "very engaging".**
- **"The parents often spoke about the difficulties and challenges they had with MD. He was a challenging little boy, a 5 year old in a room with junk. We talked about going to the park, going to the beach. We talked a lot about how they could improve that."**
- **"They spoke about their relationship and the difficulties they were having. They had 3 children and MD being difficult that put a lot of pressure on their relationship as well." Asked what problems they were facing in their relationship witness 11 said 'The father**

[121] In answer to a question by me at p.109 and followed up in cross-examination by counsel for the mother.

got annoyed because the mother wouldn't do anything. She just lounged around. Then she would tell him off. The lack of money was frustrating. They wanted to get a car that worked. The car they bought with the baby bonus I don't think ever worked.'

- **The mother was very isolated in the location 1 area. People tend to keep to themselves on that estate.**
- **Witness 11 raised concerns with protective worker 2 12 times between July 2006 & February 2007.[122]**
- **For each of the 3 older children witness 11 measured head circumference & weight gains and assessed cognitive skills, fine motor and gross motor performance, attachment, length and the interaction between the children and the parents. She 'looked at everything" including a "full physical" [that] involved genitals, teeth, skin condition, fontanelle, what they were doing about rolling, head control, crawling, exploring, things in mouth." She agreed that "that was all going well. AD used to seek out her father a lot. There was an attachment there."**

13. QEC PARENTING COMPETENCIES ASSESSMENT

The Queen Elizabeth Centre PASDS performed a home-based Parenting Competencies Assessment for the parents between 02/08/2006 & 24/10/2006.[123] Most of QEC's 'hands-on' work during the assessment was done by a social worker (name removed) "Ms Y" who is a specialist in early childhood issues. QEC claims expertise only in relation to children aged between 0-3 so MD was not formally part of the program although the material in the program was quite relevant to him as well.[124]

Most of the observations detailed in the QEC report were made by Ms Y who discussed them with witness 10, the program co-ordinator, who in turn assessed them and wrote the final report.[125] A few of the observations were made by witness 10 herself at early visits.[126] In general terms witness 10's report demonstrates some significant reductions in risk in the course of the program but notes that for some indicators [notably attachment to ND, provision of learning experiences, behaviour management, coping with changes and safety & protection] the mother's and the father's parenting competency remained less than adequate.

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[122] Compare however witness 11's evidence that she had had no contact with the parents and children after October 2006 except for an occasion on 01/02/2007 when she saw the family at an estate picnic.
[123] The Queen Elizabeth Centre is hereinafter described as 'QEC'. The QEC involvement was initiated by a referral completed by protective worker 2.
[124] See *viva voce* evidence of witness 10 at p.104 of my notes.
[125] This report was entitled "Final report of Parenting Competencies Assessment" which was prepared by witness 10 (QEC (name removed) Metropolitan Region Home-based Parenting Assessment) and is dated 05/12/2006. The person who made most of the observations on which the report was based, Ms Y, was not called as a witness.
[126] *Op.cit.*, p.99.

There is one particular aspect of the QEC report which requires clarification and explanation. That is the very prejudicial and overstated assessment of the degree of risk for the children's physical health and safety which was described as follows:

> **"From direct observations and information gained from 01/08/2006 to 24/10/2006, we believe that in the care of the mother and the father, MD, AD and ND [are] almost certain to die or sustain a preventable serious permanent disability."[127]**

In cross-examination by counsel for the father, witness 10 acknowledged that this assessment related entirely to evidence "of the children leaving the flat unattended, aged 4 years and 2 years old, crossing very busy streets and being found a long way from the flat".[128] It was suggested to witness 10 that "'certain to die' is a bit colourful" and she conceded:

> **"This is the formatted risk we use. Each area of risk covers certain terminology. There is a definite extremely high risk."[129]**

It is noteworthy, however, that after the conclusion of the PASDS involvement and notwithstanding this 'certain to die' comment, DOHS was still recommending to the Court that the children remain in the care of their parents, albeit on supervision orders.[130] Nor did DOHS take immediate action to change its disposition after receiving witness 17's file review report dated 30/11/2006.[131]

It follows that DOHS must have considered that those indicators which QEC considered remained less than adequate and the conclusions drawn by witness 17 did not place the children at unacceptable risk of harm in parental care. On the evidence I have heard in this case, I agree with DOHS' position at that time. What then changed? Clearly it was the family's disappearance and the odd events of 04-15/02/2008. What is not so clear to me is why these events – concerning though they are - became the straw that broke the camel's back and led to DOHS recommending custody to Secretary orders in March 2007.

[127] See report of witness 10 dated 05/12/2006 at p.11.
[128] See p.104 of my notes.
[129] *Ibid.* Interestingly witness 3 had not given great weight to this 'certain to die' assessment, also attributing it to "something they write as their standard response to high risk": see her answer in cross-examination by counsel for the mother at p.41 of my notes.
[130] See for instance DOHS' Disposition report of protective worker 2 dated 21/11/2006 at p.3.
[131] For details of which see section 17 below.

14. POLICE INVOLVEMENT & EVENTS OF 04-15/02/2007

14.1 LEADING SENIOR CONSTABLE (NAME REMOVED) "WITNESS 14"'S EVIDENCE

Witness 14 of location 1 Police Station has attended the (name removed) family home on 3 occasions on social welfare related matters.

On 15/03/2006 he attended in relation to MD, then aged 4y1m, who had been reported as missing by his father. He was found about 1km away from the home, having crossed several streets and the (location removed) Canal en route. He had left the house via a bedroom window. He was found by someone who took him to location 1 CIU who then took him back home. The father told witness 14 that MD had got out that window before and another neighbour told him that MD had been found in (name removed) Highway, also some distance from the home. The father had asked the Ministry of Housing to fix it. On this visit witness 14 said "the flat was in quite an untidy state, I'd say unhygienic, there was quite a bit of dirty laundry, the lounge room was best…The kitchen was bad, piles of dirty dishes, very untidy. I asked the mother & the father to clean up the premises as soon as possible due to the state of it."[132]

His second visit was on 06/02/2007. Police had received a request from protective worker 2 of (location removed) DOHS to do a welfare check on the mother because "there were concerns for her mental health and also concerns for the children". Witness 14 attended the address and spoke to the mother:

> **"She seemed fine, quite affable. I had no concerns for her mental health. I went into the house to check on the children. Three children were present: MD, AD & ND. Again the hygiene of the premises was very poor, the general state of the kitchen, dirty dishes – quite a lot of them, dirty children's underwear and a lot of clothing about. I made a note at the time it was quite poor and contacted protective worker 2 back as I did in 2006. We checked on the children's welfare. They seemed fine. There were no immediate concerns for the children."[133]**

His third visit was on 09/02/2007. He went with Sergeant F to do a welfare check on the family at the request of DOHS. It was necessary to force a door in the patio area and in the process a window broke as well. Witness 14 said:

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[132] Evidence in chief of witness 14 at p.122 of my notes.
[133] *Op.cit.*, p.123.

"No one was in the premises. There were some things missing. I don't remember what. I believe it might have been toys, some clothing items, other items, beds, most things you would expect to find in a house. I believe [the house] was slightly cleaner than the first time I was there. There were indications from neighbours that [the occupants] possibly left in a vehicle either the same day or the previous day…"[134]

14.2 PROTECTIVE WORKER 2'S EVIDENCE

Protective worker 2's evidence was more comprehensive than that of witness 14 but was significantly different in some material respects:

"The father contacted myself and raised concerns for the mental wellbeing of the mother. She was hallucinating about a dead family pet (dog) and he had concerns for himself and the children. I set up a safety plan for the father that he and the children spend a few days at the paternal grandmother's home. The arrangement was made on 05/02/2007 and I attended the family home to speak to the mother on 06/02/2007 but no one was present. In the last conversation on 05/02/2007 the father said he was going to return from (location removed) "location 12"to location 1 to get bottles etc. The paternal grandmother contacted DOHS late on 06/02/2007 and said the father hadn't returned and had the children with him. She had prepared beds and at 1am he hadn't returned with the children. We engaged police to do family welfare checks at the home in location 1 as the paternal grandmother was quite concerned that the father hadn't returned with the children. She felt it was out of character. Police informed DOHS that on Sunday 04/02/2007 they received a phone call from South Australia by an unknown person stating the father and the children were dead inside the premises which caused concerns but they didn't tell DOHS until later.

As a result of that DOHS issued a protection application by apprehension and a media release which had been authorized by Judge Grant. The children and the parents were located at location 5 Motor Inn on 15/02/2007. The children were apprehended and taken to location 15 Police Station. The father was highly aggressive and agitated and police kept him separate. I didn't have the opportunity to speak to him on his own at that time. It was MD's birthday and police had organized a party and cake for him so he was quite excited. MD had severe sunburn on the back of his shoulders and very bad nappy rash. AD was untidy and messy but the family hadn't been home for several days and had limited clothing. The baby was the same. She was 7 months old but unable to sit on her own. All the children were taken back to location 7 DOHS' office. The mother was quite teary. She also had injuries to her hands and feet at that time which she said was a result of falling at a train station platform."[135]

Protective worker 2's evidence of the police having received a phone call from South Australia on 04/02/2007 stating that the father and the children were dead inside the premises was not corroborated by witness 14 who had neither note nor knowledge of it.[136]

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[134] A pastiche of answers of witness 14 in evidence-in-chief & cross-examination at pp.123-124.
[135] Evidence-in-chief of protective worker 2 at p.15 of my notes.
[136] See his answers in cross-examination by counsel for the father at p.123 of my notes.

14.3 THE FATHER'S EVIDENCE

The father gave detailed evidence about these strange events:

Mr Thomas- "On 05/02/2007 DOHS received a phone call from you expressing grave concerns for the mental health of the mother?
The father- I did make a phone call to DOHS, not because as DOHS assumes she was talking to dead animals but because we were having some problems and what could be done to help us, to lead us in the right direction, to see where we could go. We didn't know where to turn because in that area we weren't having many services to turn to.
Mr Thomas- Who did you speak to?
The father- I don't recall.
Mr Thomas- What happened?
The father- My mum had offered me to stay at her place. I said I had to go home to give the kids something to eat. About 4pm mum returned back to her place at location 2. It would have been on a Sunday. I said 'I'll take the kids home and give them a feed. Can I get about $5 from you to get petrol. If I can get back in time, I'll come back. If not, I won't come back.' She said 'OK. No problems.' I left about 4.30pm after getting the kids together and in the car. I arrived back home about 5-5.30pm allowing for traffic. When I got home I was just about to start tea for the kids and I said 'OK kids, I'll chuck a kids' DVD on to watch.' I didn't know our place had been busted into and our DVD combo knocked off. The kids had tea. I said 'I'll give youse a bath.' It was a fairly warm day, 34 degrees.
Mr Thomas- Where was the mother at this time?
The father- I pulled the car up at my mother's and the mother said she was going for a walk to the city or something. I said 'OK'.
Mr Thomas- What happened after that?
The father- I realized the DVD had been stolen and the videos we had. I didn't know but they had forced entry through the back door. I put TV on, prepared dinner for the kids. They said they were tired. They went to bed around 7pm. My son went off to sleep because he had a big day. ND was only new-born. She was easy to put to bed. They went straight to sleep. That's why I never returned back to mum's.
Mr Thomas- You ended up at the location 5 motel?
The father- When we first moved in [to the (name removed) St flats] there was not a problem with any of the neighbours. We kept to ourselves and minded our own business. Then we had a woman JLS, a tenant (address removed), and she started ranting and raving at me at 7am a couple of months after we moved in about August 2004…She came down making allegations about a dog barking all night. She said straight out – begging your pardon Your Honour - 'You are a fucking dog.' I said 'Excuse me. I don't know you. I've got little children in the flat asleep. Can you please show respect?' She ran around saying 'I'm going to put a knife in you in front of your kids.' We informed the location 1 Police on a number of occasions. I went to location 16 Police who said the best thing you can do is seek an intervention order.
Mr Thomas- Did you get an intervention order?
The father- Myself and the mother both took an AVO against her because of the position we were in. I found her very threatening. I did fear for myself, her and our children.
Mr Thomas- How did you come to be at the location 5 Motor Inn on 15/02/2006?
The father- I went down every 4-6 weeks to see the grandparents. Because of threat after threat after threat it wasn't really applicable for us to stay at the premises considering we had told location 1 Police what was going on and the action location 1 Police were taking was very lacklustre on their behalf. They said 'You were threatening her.' I was told my car would be fire-bombed by (name removed), (address removed), a known drug dealer whom I've walked past and seen dealing drugs in the open. I and the mother heard him yell out 'Tell that fucking arsehole in the VH Commodore I'm going to fire-bomb his car and his kids in it.' And I thought 'It's getting out of hand.'
Mr Thomas- What did you do?
The father- I had to protect my kids from harm.
Mr Thomas- What did you do?

The father- I went down [to location 3] to see grandma as regular. I took the kids to see JB and poppy and grandma so she could see the kids as well and interact. The mother said 'I'm petrified for my own safety' and I said the same and that's how we ended up in a hotel because I felt very unsafe.
Mr Thomas- There was a bulletin out on TV trying to locate you.
The father- I didn't see it at all. I turned my mobile phone off and I received a phone call from a friend who works in the law and he said 'You have been on TV.' I had no idea what was going on.
Mr Thomas- Why not stay at the grandmother's place?
The father- She said I don't have room to stay. Can stay 2, 3, 4 nights and then back to Melbourne. I had friends in the country."[137]

14.4 MY FINDINGS

The father's evidence raises several areas of conflict between his account of what happened and protective worker 2's account. Where there is a conflict which involves something which protective worker 2 knew first-hand, I prefer her evidence to that of the father. However, one difficulty for me in making positive findings about the commencement of this strange and disturbing episode is that – without explanation - the Department did not call the paternal grandmother to give evidence of the conversation she is reported to have had with the father. I therefore infer that her evidence would not have helped the Department's case. Objective corroboration for the father's explanation of his family having received death threats from neighbours is provided by the details of the complaints against JLS which he & the mother had filed with Melbourne Magistrates' Court on 19/12/2005 and which subsequently resulted in intervention orders being made on 10/01/2006. But his evidence raises a number of questions in my mind. Why had the parents not told the maternal grandmother about these threats? I accept her evidence on this as on nearly every other issue:

Mr Power- "Do you remember anything in the media about the family having disappeared?
The maternal grandmother- Yes. I had the police on my doorstep.
Ms Green- Did you know of their whereabouts?
The maternal grandmother - No. They had stayed with us around that time and then they had gone visiting. I've no idea of the dates and the police landed on the doorstep and the children didn't come back. We were expecting them back.
Ms Green- When they were staying with you have you noted any concerns about your daughter or the father?
The maternal grandmother - No. No. They were very good."[138]

What were the parents really trying to achieve? How long were they intending to stay at the location 5 Motor Inn? How could they – with their very limited financial

[137] At pp.200-202 of my notes.
[138] At pp.188-189 of my notes.

resources – afford to stay there anyway? Is this just another example of the parents' unplanned *laissez faire* approach to life, to which witness 18 had referred in her report?[139] Or is there something more about it which the father preferred not to tell me? In the end, since I am required to determine any contested issues not on suspicion but on the balance of probabilities[140], I find that the parents' precipitous disappearance was a consequence of death threats received from neighbours and was not a planned enterprise designed to hide the children from DOHS.

15. THE "BEST INTERESTS" PRINCIPLES

Section 8(1) of the *CYFA* requires the Court to have regard to the principles in Part 1.2 (where relevant) in making any decision or taking any action under the *CYFA*. Section 8(2) places the same obligation on the Secretary when making any decision, taking any action or providing any service under the *CYFA* to children and families.

The relevant principles binding on the Court and the Secretary in relation to each of the four (name removed) children are set out in s.10 of the *CYFA*. The fundamental principle, set out in s.10(1), is that for the purposes of the *CYFA* the best interests of the child must always be paramount. Section 10(2) requires the decision-maker, when determining whether a decision or action is in the best interests of a child, always to consider the need to protect the child from harm, to protect his/her rights and to promote his/her development (taking into account his age and state of development). Section 10(3) provides that, in addition to ss.10(1) & 10(2), when determining what decision to make or action to take in the best interests of a child, the decision-maker must have regard to 18 listed matters where relevant. For the purposes of the present case, the following 15 matters in s.10(3) - not always easy to reconcile - appear to have some relevance:

(a) The need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.

(b) The need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child.

(d) The child's views and wishes, if they can be reasonably ascertained, should be given such weight as is appropriate in the circumstances.

(e) The effects of cumulative patterns of harm on a child's safety and development.

(f) The desirability of continuity and stability in a child's care.

[139] Children's Court Clinic report of witness 18 at p.11.
[140] See s.215(1)(c) of the *CYFA*.

(g) A child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child.

(h) If the child is to be removed from the care of the parent, consideration is to be given first to the child being placed with an appropriate family member or other person significant to the child before any other placement option is considered.

(i) The desirability, when a child is removed from the care of the parent, to plan the reunification of the child with his or her parent.

(j) The capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child.

(k) Access arrangements between the child and the child's parents, siblings, family members and other persons significant to the child.

(l) The child's social, individual and cultural identity and religious faith and the child's age, maturity and sex.

(n) The desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities.

(o) The desirability of allowing the education of the child to continue without interruption or disturbance.

(p) The possible harmful effects of delay in making the decision or taking the action.

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

It is not uncommon to find cases in which at least some of the matters set out in ss.10(2) & 10(3) of the *CYFA* are difficult to reconcile. The present case has an additional complication which was referred to by counsel for the mother in her closing submission and led me to ask rhetorically: "How do I look at the best interests of all four children if those interests are inconsistent?"[141] In this case what is in MD's best interests presently appears to me to be significantly at odds with what is in the best interests of each of the other 3 children.[142] Hence in applying the "best interests principles" to multiple children who have different circumstances, I have to take the course of action which will maximize the interests of the majority even if that means that the interests of the minority are adversely affected.

16. ACCESS BETWEEN CHILDREN, PARENTS & OTHERS

Under the orders current during this hearing the children are entitled to access with their parents a minimum of 3 times per week. The parents have been fairly conscientious about attending access although they have sometimes failed to confirm access and from time to time only one of the two parents has attended. I draw no inference against them for the latter, especially given the significant expense and

[141] At p.217 of my notes.

[142] See section 26.3 below.

difficulty involved in travelling by public transport from location 1 to location 6 & location 3, an expense made even more significant by the fact that the parents are on social security benefits.

16.1 ACCESS WITH SD

The parents have been scheduled to have access with SD at the location 6 offices of DOHS on Monday, Tuesday & Friday from noon to 2pm. (Name removed) "witness 5" has supervised 8 of these accesses. (Name removed) "witness 6" has supervised 3. Though witness 5 seemed to me to be rather negative so far as the parents were concerned and made much of an incident on 27/06/2008 in which she believed the father had been about to give a cold bottle to SD,[143] the content of the documentation which she had completed painted a very positive picture of the parents' involvement with their son. In particular, for the following dates she made the following observations:[144]

19/06/2008	**Often on mother's lap, handled infant in a gentle way often.**
23/06/2008	**Mother looked at child often, eye contact often, touched often, held closely often, sat on lap often and handled infant in a gentle way often.**
27/06/2008	**Mother attended to child's cues, spoke and vocalized to the child, looked often, eye contact often, touched gently often, held closely often, kissed often, sat on lap often and handled him in a gentle way often.**
01/07/2008	**Both parents often attended to child's cues and spoke and vocalized to the child often.**
04/07/2008	**Mother behaved appropriately, attended to child's cues often, spoke often, eye contact often, touched gently often, played often, kissed him often, sat on lap often, handled him in a gentle way often, helped him if any difficulties often, could see from SD's movements he was in pain from reflux and was able to settle him by rubbing his back and holding him upright.**
11/07/2008	**Mother attending to child's cues, spoke and vocalized often, looked at child often, touched him gently often, cuddled him often, kissed him often, sat him often on lap, handled in a gentle way often, responded when crying and soothed him often.**

Witness 5 also noted that in the father's interaction with SD he was "quite animated and quite chatty to SD. That was on 2 occasions. He would hold him and sometimes give him a kiss and basically hold him and say 'How's it going mate?'". For the accesses she had supervised between SD & the father, witness 5 had ticked "cuddled

[143] At p.82 of my notes.
[144] Evidence in cross-examination by counsel for the mother at p.83 of my notes.

often", "handle infant in gentle way often". The father appeared to speak more to SD than the mother did.[145]

None of witness 6's observations of the interaction between SD and the parents in June 2008 raised any concerns in my mind.

No access was held on 04/08/2008 or 05/08/2008 because SD was in hospital. No access was held on 11/08/2008 or 12/08/2008 because new carpets were being laid in the parents' home. The parents did not attend access on 22/08/2008 because they "did not want to bother SD due to him recently being in hospital".[146] **DOHS wanted me to draw a negative inference against the parents for this but their attitude seems to me to have been quite responsible even though they had been told that he was well enough to attend access.**[147]

The most recent accesses with SD were as follows:[148]

25/08/2008	**Father attended alone. No concerns noted. Mother was at home waiting for tradesmen.**
26/08/2008	**Father attended to all of SD's needs. At times SD was unsettled so father asked access worker to assist. Access worker would hand SD back to the father when SD was asleep. Father's clothes appeared unwashed and dirty, smelling of smoke. SD slept for the second half of access.**
02/09/2008	**No access notes available.**

The maternal grandmother has been permitted by DOHS to have very little contact with SD. She doesn't know why and nor do I for it makes no sense at all for her contact with SD to be supervised:

> **Ms Green- "Have you had SD to look after?**
> **The maternal grandmother- No. I'm not allowed.**
> **Ms Green- Because of your son?**
> **The maternal grandmother - No. Because of the Department.**
> **Ms Green- What have they said to you in relation to the care of SD?**
> **The maternal grandmother - I can only see SD if Mrs B is there.**
> **Ms Green- At your son's home?**
> **The maternal grandmother - No. Mrs B can come to my house.**
> **Ms Green- Has it been explained to you why?**
> **The maternal grandmother - I don't know why.**
> **Ms Green- Who told you that? The protective worker?**
> **The maternal grandmother - Yes. [Mrs B] can't drop him off and go shopping. She's got to be there at all times.**

[145] At p.80 of my notes.
[146] DOHS' Addendum report of the protective worker dated 03/09/2008 at p.5.
[147] I doubt that SD was in fact well enough to attend access that day. The evidence of the protective worker is that on 22/08/2008 at 4pm the mother was informed of SD's allergic reaction to antibiotics: see p.135 of my notes and see also DOHS' Addendum report of the protective worker dated 03/09/2008 at p3.
[148] These are derived from DOHS' Addendum report of the protective worker dated 03/09/2008 at pp.4-5. I do not know who provided the protective worker with these observations.

Ms Green- Have you asked the protective worker why that's the case?
The maternal grandmother - No. That's just what I was told."[149]

The maternal grandmother said that she had a good relationship with Mr & Mrs B "but certainly not day to day. It might be weeks and I don't hear from them but I have a good relationship with them."[150] Witness 18 was asked: "Did you get the impression there was not a naturally warm relationship between the maternal grandmother and her son?" She replied: "Not from the waiting room but I was told by her in the interview there was some degree of tension between them at that time."[151] The maternal grandmother was reluctant to concede "tension" but her response to the proposition was acerbic enough to make me think there might be some strain at the moment:

> **"I don't think it could be tension as such. Mr B was very narky to me on the phone one day in relation to SD. Probably because I hadn't been on the phone every other day to check on how things were and I would hear news from Mrs B's mother."[152]**

Whether because of this or otherwise, MD, AD & ND have also had very little contact with SD. They saw him once when he was about 4 weeks old.[153] They saw him at the Clinic on 15/08/2008. And they had respite at Mr & Mrs B's home on the night of 16/08/2008.[154] This seems to me to be pretty poor compliance by DOHS with its obligation under ss.8(2) & 10(3)(b) of the *CYFA* to strengthen, preserve and promote positive relationships between SD and his siblings.

16.2 ACCESS WITH MD, AD & ND

The parents attend at the maternal grandmother's house at location 3 on Monday afternoon and have access then, overnight and before school on Tuesday morning with MD, AD & ND. Her evidence disclosed no issues or concerns in the interaction between the children and the parents:

Ms Green- "What have you observed in the interaction between the parents, especially the mother, and MD, AD & ND when they come to your home?
The maternal grandmother - On Monday they used to arrive about lunchtime but since access with SD was changed [by DOHS] to location 6 on Monday they usually don't get to our place until 4.30-5pm. They bath the children, listen to MD's reading, play with the children, put the children to bed, help with the meals.
Ms Green- How do they allocate the tasks? In turn?

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[149] At p.182 of my notes.
[150] In answer to a question by me at p.183 of my notes.
[151] In cross-examination by counsel for DOHS at p.162 of my notes.
[152] In evidence-in-chief at p.187 of my notes.
[153] Evidence-in-chief the maternal grandmother at p/.186 of my notes.
[154] DOHS' Addendum report of the protective worker dated 03/09/2008 at p.6.

The maternal grandmother - Not when they come to visit us because usually they both do it. They both bath, dress. The father usually takes MD to bed and reads him a story and listens to his reader. If the father isn't there the mother does all that.
Ms Green- You do hand over care of the children to them both and have a break?
The maternal grandmother - Yes. Definitely.
Ms Green- In your observation what sort of food do they prepare?
The maternal grandmother - I usually cook the meal, I must admit. Firstly, they aren't there in time to get it ready anyway.
Ms Green- What do you mean by feeding?
The maternal grandmother - Helping with the meals, ensuring they eat their meals, just making sure they do the right thing at the dinner table, no fighting.
Ms Green- How have you observed the mother coping with discipline, fighting between the children? What sort of things do they do?
The maternal grandmother - Oh well, just send them out to a naughty corner for some time out basically.
Ms Green- How effective has it been?
The maternal grandmother - It has worked. MD might object a little bit but ND if she has been naughty she goes there anyway [by herself]."[155]

On Saturday the 3 older children are driven by DOHS from location 3 to location 1 where they have 2 hours' access with the parents in the family home.[156] A DOHS case aide, (name removed) "witness 7", gave very positive evidence about 8 accesses between 24/05/2008 & 19/07/2008 in which she transported the children from location 3 to location 1 and back and which she supervised. She has not written a report and none of her very positive material has found its way into a formal DOHS' report.[157] She said: "I've got lots of observations". I shall summarize the most salient, most of which - to Mrs Weinberg's credit - were elicited in evidence-in-chief:[158]

- **Asked 'Are the children happy to go?' witness 7 replied 'They are very excited, very excited.' 'On most occasions when I arrive at the maternal grandmother's home they race out of the door screaming we are going to see mum & dad. They can't wait to get into the car. On the way there either MD or AD would say they were excited whether they are going to the park or playing on the new play station they have got or reading or whatever.'**
- **Asked 'Are the parents happy to see them', witness 7replied 'Yes.'**
- **The house is very tidy, the floors look vacuumed, the kitchen looks clean. It's a fairly old place. The walls and floors are quite dirty actually but that's wear and tear in an old place.**

[155] At pp.183-184 of my notes. See also DOHS' Addendum report dated 18/02/2008 at p.3 where the protective worker quoted the maternal grandmother as saying that "access has been positive and that it is a good experience that the parents can have access and make it more productive and educational rather than only having 2 hours at a time."
[156] Information provided by counsel for DOHS at p.1 of my notes.
[157] I do not know whether this is a deliberate omission of relevant information by the protective worker or her superiors or simply a measure of the protective worker's inexperience as a protective worker. But it is vital that protective workers understand that the Court expects that all relevant material be included in DOHS' reports whether the material happens to support the Department's recommendations or not.
[158] This material is taken from pp.86-89 of my notes.

- **The father cooks the meals and cleans up after the meals. The children are always given fruit.**
- **AD 'just loves being with mum & dad. She often does her own little thing. She pulls out her toys and reads with mum & dad.'**
- **ND has lots of toys there, plays with playdough, maybe draws. It depends on what she feels like on the day.**
- **MD usually behaves quite well. However on two occasions he became quite abusive verbally to his parents. Once when he was not allowed to play on the play station. The other time was when he wanted to play footy inside and reacted badly to being told 'No.'. The parents reacted by giving him a 6 minute time-out. He kicked and screamed all the way to his room. He made a bit of noise for 1 minute or so in the room and then settled. He came out behaving. Other than those 2 occasions MD doesn't hog a lot of the parents' time. The parents did have difficulty managing MD's behaviour on those 2 occasions but having a child behave like that any parent would have difficulties.**
- **'Lots of times the parents have been reading a book to the children. Sometimes MD would actually read as well.'**
- **'On 2 occasions out of the 8 MD & AD cried quite a bit when they had to go back to location 3 and were quite withdrawn on the drive back. They didn't want to leave mum & dad.'**
- **The parents are not necessarily incapable of looking after the 3 children when they have gone to the park. One time the father was busy with MD and the mother was busy with ND and AD started to walk off. The parents both made eye contact with me and I said 'I'll look after her.'**
- **It has definitely been a very positive experience for all 3 children to be with their parents. The parents have coped very well and the children have coped very well with the 2 hours they have had with their parents. Witness 7's personal belief is that if it were within her power to increase the level of access that would be appropriate given the children's enjoyment of access.**

Since she gave that very positive evidence, witness 7 has not supervised another access. The father said "What she said was that she was going to start in term 4. That has never occurred. She was removed off the access supervision."[159] This does not make sense to me because term 4 hasn't started yet. So I don't know why witness 7 has not been allocated to supervise recent accesses but I trust it is not because she was honest enough to give evidence supportive of the parents' case in this court on 30/07/2008.

MD, AD & ND have had access/respite at the paternal grandmother's house on the 4th weekend of each month. The last access was on 22/08/2008.[160] This is arranged between the two grandmothers, as the maternal grandmother explained:

[159] Evidence in cross-examination by counsel for the mother at p.209 of my notes.
[160] DOHS' Addendum report of the protective worker dated 03/09/2008 at p.6.

> **"We go to all the [rugby] league matches played in Melbourne if possible and we are members of the (location removed) Jazz Club which is why the paternal grandmother has the children on the 4th weekend of the month because we go down for that. We take the children down to her on Friday after school and pick them up after the Jazz on Sunday and they have access with the parents from her place on a Saturday."[161]**

In my view this access arrangement should continue and I have included a condition to this effect.

16.3 WHETHER ACCESS NEEDS TO BE SUPERVISED

The parental access conditions on the current orders provide for access to be supervised by DOHS or its nominee unless DOHS assesses that supervision is not necessary. For all the time that the children have been out of their parents' care their access with their parents has been supervised although the level of supervision during parental access in the maternal grandmother's & Mr M's home is probably pretty light. Witness 16 had recommended in July 2008 that "the father & the mother continue to have regular supervised contact with the children." In cross-examination she was asked about the need for supervision. Surprisingly, because she was generally quite a good witness, her response was most unconvincing, a classic example of boot-strapping:

> **Ms Green- "You have recommended regular supervised contact to continue?**
> **Witness 16- Yes.**
> **Ms Green- On [the basis of] one argument between the parents on one access visit?**
> **Witness 16- That's one of the reasons.**
> **Ms Green- What are the others?**
> **Witness 16- I haven't had an opportunity to observe [the accesses].**
> **Mr Power- Haven't you got that the wrong way around? Most parents have unsupervised contact with children unless there is some demonstrated reason why contact should be supervised.**
> **Witness 16- Because of my concerns with the father's & the mother's capacity to care for the children, I believe that supervised contact is in the best interests of the children."[162]**

It is abundantly clear to me that it is not in the best interests of any of the children for the parents' access to be supervised. I agree with witness 18 on this.[163] The only evidence which might remotely be thought to justify ongoing access supervision is that of the events of 04-15/02/2007 and the concomitant risk that the parents might again abscond with the children. In my view the risk of this is slight and comes

[161] Evidence of the maternal grandmother at pp.197-198 of my notes. She added that although she does not know the paternal grandmother very well, she believes that they have a very good relationship.
[162] At p.150 of my notes.
[163] See witness 18's amended Children's Court Clinic report at various places on pp.30-34.

nowhere near justifying the degredation of quality which is inherent in access being confined to a room in a DOHS' office, as the parents' access with SD has been.

Nor does any other relative's access need to be supervised. Frankly it is just insulting to the maternal grandmother to require her access with SD to be supervised. I have included conditions regulating access for various family members, all of which is to be unsupervised.

17. OPINION OF WITNESS 17 / TAKE TWO SERVICES

17.1 WITNESS 17'S FILE REVIEW OF NOVEMBER 2006

Witness 17 is a highly qualified and very experienced social worker and lawyer employed by Take Two, a consortium of Berry St Victoria, Austin CAMHS & Latrobe University. She was a witness of quality. In late 2006 she received a referral from (name removed), the Child Protection Manager of the (name removed) Metropolitan region, to do a review of the files of the (name removed) children. The reason for the referral was that "the PASDS organization had made very concerning recommendations in their report and so a second opinion based on file information was requested"[164]. The purpose of the file review was "to synthesize a number of files and history and to inform case planning for DOHS"[165]. Witness 17 had a meeting with the mother in the context of asking for her consent and permission to look at the files. She also observed ND. She did not meet the father, MD or AD in the course of this review. Witness 17's conclusion from her file review was as follows:

> **"Unfortunately the combined issues…suggest a poor developmental prognosis for the 3 (name removed) children.**
>
> **There is evidence across time of continued but unsuccessful efforts to ameliorate both the physical environment of their home and the parenting changes which may lessen risk to them in being unsupervised and under-stimulated.**
>
> **This report acknowledges the impressive array of services which have provided input to the (name removed) family. A number of services have worked concurrently and services duplicated at different stages."[166]**

[164] Evidence-in-chief of witness 17 at p.155 of my notes.
[165] *Ibid.*
[166] Take Two report of witness 17 dated 30/11/2006 at p.8.

I interpose to note that the father believes that this duplication or multiplicity of services was sometimes confusing for him and the mother, commenting on what he ironically described as "20,000-30,000 people coming in and giving different explanations"[167]. Witness 17's conclusion continued:

> **"However, it would appear that the mother and the father, though motivated and compliant with services are unable to adapt the skills they are shown to their care of their children. They appear to struggle to develop adaptive coping resources over time to deal with day to day living issues of stable housing, financial management and the demands of effectively parenting three small children.**
>
> **This report concurs with the QEC's concerns for the three (name removed) children in their parents' care.**
>
> **Additionally it is [my] assessment that there is evidence of extremely poor prognostic indicators for (a) the future safety of the three (name removed) children; repeated notifications, continued interventions with little sign of success or amelioration of risk, impoverishment of environment due to parental limited capacity and a growing [*sic*] and a poor understanding of accumulating risk (e.g. the children's ability to escape from the home and surroundings) and (b) poor prognostic indicators for the (name removed) children being able to achieve normal developmental milestones and the cumulative impact of this on their future social, intellectual and psychological functioning."**

This conclusion led witness 17 to make a number of recommendations including that "the three (name removed) children be urgently considered for a protective order which ensures that their safety can be maintained in the care of an adult or adults who are able to supervise and adequately care for them."[168] Notwithstanding this and witness 17's other recommendations, DOHS did not proceed to apprehend the children at this time.[169]

17.2 SERVICES WHICH TAKE TWO CAN PROVIDE

The second part of witness 17's evidence in chief was generated by Mrs Weinberg's question "Would Take Two have anything to offer the family if any or all of the children were returned to the parents?"[170] I accept her enthusiastic response, the salient points of which may be summarized as follows[171]:

- **"Yes. I believe so. I certainly hope so. There are a range of things we would happily provide: (1) A very skilled neuropsychologist who holds a degree in neuropsychology and works exclusively with children and would be able to provide a thorough assessment of the children if that were necessary; (2) if the children required it, we offer**

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[167] Evidence of the father in cross-examination by counsel for DOHS at p.209 of my notes.
[168] *Op.cit.*, pp.8-9.
[169] I am not critical of DOHS for this: see section 13. A file review is no substitute for a full assessment.
[170] This question and witness 17's detailed answers are at pp.156-159 of my notes.
[171] This material is taken from pp.107-112 of my notes.

intensive therapeutic services – which we describe as dyadic work – working with them and the parents towards increasing and enhancing attachment and attunement and parental awareness of the child's issues."

- **"Usually parents are willing to work with us. We are fortunate in having collaborative relationships with parents."**
- **We are quite often engaged with child clients for years if DOHS is also involved in some way, albeit not necessarily by protection order. Once DOHS ceases involvement with the children then Take Two can only remain working with the family for a further 3-6 months though there is some discretion to allow for longer.**
- **Take Two is located in country as well as metropolitan areas. There is a (location removed) office which services location 3.**
- **Take Two does not offer speech pathology but does offer paediatric counselling.**
- **Take Two can work with a parent who has a cognitive disability and children who have developmental delay. We can also work with a child like MD who may or may not be autistic. I don't know what the mother's cognitive profile or limits would be. We work as best we can with what skills a parent does have.**
- **The way in which the program works is that it is a "totally tailored" holistic approach. We have our own stable of professionals. During the first 8 weeks after referral takes place there is an assessment of the child and a detailed report prepared to inform how the clinician is to work with that child. We meet the family at home or neighbourhood houses. Simultaneously we establish a care team which means a range of professionals who share a common interest in the child's development. Responsibilities are handed out and brought back to care team meetings so there is a co-ordinated way of addressing professional input.**
- **We also work with collateral carers such as schools and kindergartens. Where they are willing they would form part of the care team.**
- **The waitlist varies but would never be longer than 8 weeks except in the country where we have fewer clinicians.**
- **Take Two does not only engage with parents. We also engage with carers. Whether the children are going to remain in care or return to parental care is not a bar to therapy.**

In the parental support services condition on each of the children's orders I have included a comment that: "Such services may include – but are not restricted to – financial counselling services and/or services assessed as appropriate and/or provided by Take Two."

18. OBSERVATIONS & OPINIONS OF WITNESS 3

18.1 REPORT AND GENERAL COMMENT ON *VIVA VOCE* EVIDENCE

Witness 3 did a general family assessment of the mother, the father and the three older children on 16/04/2007. It was her assessment and report which led to the parents consenting to the making of custody to Secretary orders by Magistrate

Levine on 24/04/2007.[172] I am bound to say that she presented as a very good professional witness and there is nothing in her evidence which I do not accept. It is clear from the way in which she answered questions by all three counsel that she did not support the Department's permanent care case plan at all. I had arranged for Ms Weinberg to cross-examine witness 3 first because I had thought that witness 3's evidence would probably be closer to the Department's case than to the position of the parents. Ultimately that did not prove to be the case and her evidence, although very objective and balanced, seemed to me to be a lot more supportive of the parents than the Department. I shall summarize some of her evidence about attachment, child-parent interaction, parents' deficits, "good enough parenting" & reunification.

18.2 THEORETICAL OPINION ABOUT REUNIFICATION OF SD WITH PARENTS

SD had not even been conceived at the time when witness 3 did her report. She has not had the opportunity to observe SD in the presence of either of his parents or his carers or indeed at all. Nevertheless I give significant weight to the qualified expert opinions which are contained in the following extract of her evidence elicited in cross-examination by counsel for the mother:

> **Ms Green- "You are aware there are 4 children the subject of applications before the Court and to a large extent they have been grouped together. SD to some extent has been overlooked. He was born on 27/05/2008. He has been out of his parents' care all his life. Theoretically would you have concern about attachment/bonding issues in relation to the parents should it be deemed appropriate that SD be returned to his parents' care?**
> **Witness 3- It's difficult to say. The parents appear to be making an effort to see SD when they can from what I've heard here. That indicates their bonding with the child is appropriate. The issue is with the baby and whom the baby identifies as his primary attachment figure.**
> **Ms Green- At the moment SD is with the maternal uncle and his wife who reside in location 4 and the parents are seeing SD 3 times per week on Monday, Tuesday & Friday at location 6 DOHS' offices. Knowing what you now know about the case[173], could you envisage having SD returned to the parents' care in a graduated way but moving fairly quickly? Are there concerns about his young age?**
> **Witness 3- Definitely.**
> **Mr Power- Is it theoretically appropriate that reunification of such a young infant be done in stages?**
> **Witness 3- No, I don't think so. Not in terms of the baby's emotional development. The baby would manage OK [with an immediate return] although there may be some**

[172] Mr Levine has endorsed the Decision Sheet for 24/04/2007 with the comment "Parents agree to order (as a result of Clinic recommendation)." It seems fair to infer from the evidence I have heard in this case that the parents would never have consented to the custody to Secretary orders on 24/04/2007 if they had contemplated that the children would not be returned to their care during the currency of the orders.

[173] In part this is a reference to the neuropsychological assessments of the parents, copies of which witness 3 had been given to read before she was called for cross-examination.

unsettled behaviour. The issue would be whether the parents can take on that task, whether they are ready.
Ms Green- If in fact the Court was to look at the allegations of the house, the environmental issues, not being of such great concern that the baby was not able to be returned immediately, it would be possible to return SD to the parents immediately?
Witness 3- In those circumstances I would still want to ensure the monitoring of how the parents are managing, expectations the parents would ensure the environment was hygienic, clean, but the urgency the situation represents is for the baby to identify his primary caregiver and the risk of leaving the baby out of the parents' care is some confusion over whom the baby will become attached to.
Ms Green- In time the uncle and aunt will be seen as primary caregivers and it will be much, much harder to return SD to the care of the parents?
Witness 3- Yes. That's true.
Ms Green- The urgency would be to return SD sooner rather than later?
Witness 3- Yes. That's so."[174]

18.3 OBSERVATIONS OF INTERACTION OF PARENTS & CHILDREN

Witness 3 agreed with counsel for DOHS that the parents and children "all seemed to love each other" and observed that the children had been distressed when the parents left.[175] She spoke positively of the parents and children as a group:

Mrs Weinberg- "No doubt the parents like the children and vice versa?
Witness 3- Yes. I thought that. And also as a group they functioned very well. And a DOHS' worker made that comment as well.
Mr Power- Who was the DOHS' worker.
Witness 3- (name removed).
Mrs Weinberg- What do you mean 'as a group'?
Witness 3- With both parents."[176]

However these comments need to be read in conjunction with her observations which suggested that MD appeared to destabilize the 'group' by putting too great demands on the parents to the detriment of the girls:

"The mother and the father, in contrast to earlier reports, appeared very interested in their children. They reacted in a positive manner to seeing their children. In turn MD, AD and ND looked pleased to see their parents. While both the mother and the father were present there was a calm and manageable environment. They both worked well as a team and were able to occupy all the children and balance their demands. There was however a tendency for both parents to become preoccupied with MD and his demands. He was able to manipulate both his parents. He made demands for food and then refused to eat and both parents became 'trapped' into taking time to try and persuade him to eat. Meanwhile AD and ND were left to their own devices. This pattern of interaction became more pronounced when the mother, or the father, were on their own with the children. MD would make demands on their attention – he was clearly used to getting his own way with his parents (he kicked and cried, and rolled on the floor, for a considerable time – children if ignored will often stop this behaviour quickly). The father or the mother were then caught in the vicious cycle of trying to pacify MD and he became worse (not better). The worrying issues about these interactions were that MD is clearly used to manipulating his parents (when his parents left his [paternal] grandmother

[174] At pp.37-38 of my notes. The emphasis is mine.
[175] At p.34 of my notes.
[176] At p.30 of my notes.

dealt with him by just making him sit still and when he became settled she gave him a drink); when MD behaves in this manner with his parents they both focus on him (instead of ignoring him) which only escalates his behaviour and teaches him to ignore any of their requests. Finally, AD and ND are ignored during these events. ND, at one stage, was left to crawl up the corridor by herself, with no supervision from the father, at another point she was left trying to draw with a sharp pen, on her own in the corner.

The difficulties for the mother and the father are that they care for their children but they do not have adequate skills as parents and they do not have the capacity to set firm boundaries with MD. This makes his behaviour problematic and leads to his sisters being ignored. This pattern is pronounced when the parents are on their own."[177]

While it may be that the effective use of appropriate periods of 'time-out' by the parents - observed by witness 7 on two recent occasions[178] - is evidence that the parents have learned how to deal with MD's disruptive behaviours, I believe it is too early to tell, especially until the autism assessment which I have ordered is completed.[179]

Witness 3 agreed with counsel for DOHS that the focus of her assessment had been on MD and explained why in a way which suggests that reunification of the girls with their parents is not likely to be unduly problematic:

Mrs Weinberg- "Most of your assessment dealt with the parents' coping with MD. One thing which becomes fairly apparent is everyone is dealing with MD and AD & ND are really forgotten.
Witness 3- Yes. Re-reading my reports MD did take up a lot of time and effort so the others tended to be left…I remember ND being a very easy-going smiley baby. Unfortunately it would be easy to leave her because she looked so easy-going. AD seemed to occupy herself so well even though she was so young. It would be easy for them to be left and probably not attended to as frequently as they ideally should be."[180]

In reply to a question by counsel for the mother as to what observations she had made of the attachment between the parents and ND, witness 3 said:

"I was a bit surprised reading the PASDS report because ND looked a very settled, happy baby when I saw her and there were no signs the parents didn't respond to her and vice versa. My recollection is they reacted well with each other, especially greeting each other for the first time. However, once the parents became overwhelmed [with MD] ND did tend to be left on her own without supervision. That was my main concern. Once the family became disorganized, a very young baby was left unsupervised. She had a sharp pen in her hand, not really appropriate for her age and left to crawl down the corridor. It wasn't a lack of emotional response that I saw. I just saw a lack of organization. That was primarily the demands of MD."[181]

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[177] At pp.9-10 of witness 3's Children's Court Clinic report.
[178] See section 16.2 above.
[179] See section 8.2 above.
[180] At p.31 of my notes.
[181] Answer to questions by counsel for the mother and by me at p.39 of my notes.

18.4 OPINION ABOUT PARENTING WITH NEUROPSYCHOLOGICAL DEFICITS

Witness 3 had been provided with a copy of both neuropsychological reports and had read them prior to her cross-examination. She was asked by Mrs Weinberg- "When either deal with MD neither can deal with AD & ND, with the father walking out and the mother not able to cope with all the problems. Can the problems be overcome? Can people with neuropsychological deficits…can the parents overcome this inability to parent adequately?" Witness 3 replied:

> **"Yes I believe they can and I believe the neuropsychologists [both] did a very good job, especially the mother's. She commented on the need to have a structure set up such as a checklist. Sometimes with these sorts of impairments you need to think of visual as well as verbal representations. If there is a checklist & visual presentation, there may have to be some diaries. All sorts of structures can be put in place to help someone with these difficulties. You may have to instruct someone like this to take on not more than one task at a time. They may have to learn to keep the other children safe somewhere and deal with one child and then come back to the next child. It is a different way of learning. A problem with people in our system is an assumption that people can process information adequately verbally or can read things and understand and process whereas someone with these difficulties may require other types of learning strategies."[182]**

It appears that the parents complied with the QEC-PASDS' recommendations for a while and then fell away. Witness 3 opined that "that may indicate they really needed more structure in learning the skills and may need to be over a longer period of time". Asked what period she envisaged, she replied:

> **"I can only answer in a more general way. When there are long-standing difficulties for someone and one is looking at change occurring, it is not uncommon to have to work intensively for about 12 months and then one may be able gradually to withdraw. I know it seems a long time but…"[183]**

Counsel for the mother asked witness 3: "If the neuropsychological assessments were given some weight might it be possible for the parents to move forward in a positive way and learn differently than from the QEC assessment? Witness 3 replied:

> **"Their approach I've no doubt was very good. It is more in maintaining and following up with the skills the parents may need to learn. There may also be a need to break down the skills into further smaller steps so the parents can learn at a slower rate and take on the information more gradually."[184]**

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[182] At p.29 of my notes.
[183] Answer in cross-examination by counsel for DOHS at p.30 of my notes.
[184] At p.37 of my notes.

Although the neuropsychological reports do not, in my view, paint the parents as neuropsychological "basket cases" in quite the way that might perhaps be inferred from some of their counsel's questions, the contents of the reports – which she had strongly recommended over a year before – nevertheless clearly made a big impact on witness 3's subsequent evidence about parenting capacity and skill development:

> **Mrs Weinberg- "At the time you saw these parents you must have thought about the parenting model you are recommending?**
> **Witness 3- Not until I looked at the neuropsychological reports today. One issue was I wasn't certain why the parents were not benefiting. It was a big question for me in relation to trying to understand what was going on and that's why I was recommending a neuropsychological assessment at the end of my report. DOHS was suggesting [the cause] might be psychiatric. A neuropsychologist focuses on intellectual capacity, memory, processing, storage, retrieval, organizational skills.**
> **Mrs Weinberg- Brain function basically.**
> **Witness 3- Yes."[185]**

18.5 OPINION ABOUT SIGNIFICANCE OF PARENTS' FAILURE TO ACCEPT BLAME FOR CHILDREN'S REMOVAL

Having been dealt a hand which was fairly light on for trumps, Mrs Weinberg spent quite a bit of time with various professional witnesses exploring the theme that if the parents had failed to accept any blame for the removal of their children, it would be difficult for the Court to have faith in their capacity to deal with protective issues in the future. Witness 3 trumped this theme very convincingly:

> **Mrs Weinberg- "Both parents continue to deny any responsibility for the children's removal.**
> **Witness 3- They did say they didn't understand why the children were removed…You seem to be interpreting that as the parents denying problems whereas if you look at someone with concrete thinking, no insight and low IQ that's how they will respond.**
> **Mrs Weinberg- But the father doesn't have that. His denial is not lack of cognitive capacity.**
> **Witness 3- I wouldn't be certain.**
> **Mrs Weinberg- If he is in denial he isn't in a position to learn anything from any parenting model because there is nothing to learn.**
> **Witness 3- It may be true but one aspect of interacting with someone in a therapeutic setting that's what we have to deal with, their tendency to come in believing they are OK. People often come in not understanding why they need help.**
> **Mrs Weinberg- But the father adamantly denies the allegations.[186]**
> **Witness 3- If I was dealing with someone who came in with those types of comments and I had serious doubts about the way they manage parenting, I'd ask them to consider the importance of getting out of the situation they were in. I wouldn't challenge their views. The sort of therapeutic approach I would take is to concentrate on what they would need to do to get out of the problem they are in.**
> **Mrs Weinberg- Before the parents could undertake that, they would need to go to fairly extensive psychotherapy.**
> **Witness 3- Not necessarily. If you take the outlook 'You may not agree with DOHS. DOHS doesn't necessarily agree with you. How do you get out of it? You don't have to convince them your position is right."[187]**

[185] At p.34 of my notes.
[186] Here Mrs Weinberg read material from witness 16's TAP report of July 2008 esp. at pp.14-15.

18.6 'GOOD ENOUGH' PARENTING

In cross-examination by counsel for DOHS witness 3 made some comments about 'good enough' parenting, both generally and in the context of this family, with which I entirely agree:

> **Mrs Weinberg- "What about children whose parents have to have extensive education. What's the impact on children with parents learning to be adequate?**
> **Witness 3- There is a concept in psychology called 'good enough parenting'. It's what one is aiming for. It doesn't have to be perfect or at the high end. It is a very old theory in psychology. It is a very important concept. It may be a long way from what you would say is ideal but if it is adequate…One reason DOHS does this frequently is if the children have wider social contacts in the community through child care, kindergarten, sport etc, then that supports the parenting as well.**
> **Mrs Weinberg- There is some evidence to suggest that AD might have some developmental delay. She has one kidney and asthma and possibly psychological issues. How does a child who is not optimal fit into 'good enough parenting'?**
> **Witness 3- It tends to be an interaction between the temperament of the child and the environment. AD was very quiet and able to concentrate and sit and do something. Even if she has difficulties or delay she may be able to function in a 'good enough' environment. MD is actually a contrast because of his more difficult looking temperament. He looked a more anxious, highly strung child, probably more reactive to the environment. He may need more containing, calmness, routine, understanding of his temperament and that's where the matching between the parent and the child needs to be more than just adequate.**
> **Mrs Weinberg- Is his temperament because of developmental delay or environment?**
> **Witness 3- I don't know but we know babies are born with different temperaments - from birth.**
> **Mrs Weinberg- AD isn't easy-going or anxious? She is just quiet, almost in her own world?**
> **Witness 3- It did look a bit like that. External environmental considerations could assist her like going to child care, as an ongoing contribution into her life that she had external support as well.**
> **Mrs Weinberg- How does 'good enough parenting' impact on a newborn?**
> **Witness 3- The same thing. Children do survive under less than ideal circumstances.**
> **Mrs Weinberg- Whereas good enough parenting model is a prototype, in real life it may not be in the best interests of a child?[188]**
> **Witness 3- It does mean the parenting is sufficient for the child to develop in every way.**
> **Mrs Weinberg- Intellectually and cognitively?**
> **Witness 3- Yes, although a lot of that can be done outside the family home. It doesn't have to be done at home.**
> **Mrs Weinberg- Creche? Kindergarten? That can come from an external source. Children don't survive if there is no intellectual encouragement?**
> **Witness 3- The children usually catch up. If they have capacity to thrive cognitively they will.**
> **Mrs Weinberg- What if there is no capacity to survive, e.g. AD?[189]**
> **Witness 3- That's when external supports can assist.**
> **Mrs Weinberg- Isn't a child like that entitled to more than a 'good enough' parent so they can achieve the best they can achieve?[190]**
> **Witness 3- Is it better a child is removed from parents who are not of the better model so the child can develop? What we know is the very, very negative impact on children**

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[187] At pp.33-34 of my notes.
[188] I am not sure that my notes accurately reflect Mrs Weinberg's question.
[189] I do not believe the evidence comes anywhere near supporting this proposition.
[190] With great respect to Mrs Weinberg, this proposition sounds chillingly Orwellian to me, smacking of the discredited notion of eugenics.

as they look back on their early lives and one of the most negative things that can happen to them is removal from their parents. I wouldn't argue under all circumstances children remain with parents. That would be silly. But trying to find ways in which they can remain is how I approach it. It is what I try to do.[191]
Mrs Weinberg- Your position it would have to be, I think, a very bad home environment before it would be valid to take a child out?
Witness 3- There would have to be serious risks to the child and I would hope, for example in this case, we have exhausted every effort to do everything these parents might require to make the environment adequate or 'good enough' for the children."[192]

It is my strong view that we have not yet "exhausted every effort".

18.7 REUNIFICATION RECOMMENDATIONS OF WITNESS 3

In a second part of very helpful cross-examination by counsel for DOHS, witness 3 foreshadowed a gradual process of reunification of the 3 older siblings, probably at some time after SD had been reunified with his parents. However she was unsure whether AD & ND should be reunified together or whether AD should be first:

Mrs Weinberg- "At the time [of your assessment] the parents were not capable of looking after their children?
Witness 3- Yes, in the sense of how I outlined that.
Mrs Weinberg- If the parents lacked capacity at that time would you be confident in returning the children now?
Witness 3- If it was up to me at this point – even earlier on – I'd like to look at some sort of gradual approach.
Mrs Weinberg- With respect to MD, AD & ND?
Witness 3- Yes, I think so. I would like to see the intervention with the parents and then assessing with the least challenging arrangement possible first.
Mrs Weinberg- Which would be what?
Witness 3- I'm not entirely sure whether AD & ND together or whether AD because it appeared she may be able to engage her parents more easily while the parents develop their skills but I know MD would be the more high-risk child.
Mrs Weinberg- And how would it impact on the parents' ability to learn if SD was already in their care?
Witness 3- SD is 2 months old. It would make it stressful so it may be better to work on SD and the parents initially because a 2 month old baby would require 24 hour care basically so it would be stressful because they would be up at night and not getting normal sleep to feel calm and relaxed. It's not an easy question and I'd probably want to talk to the parents. I do think the issue of SD and his attachment is of very prime importance."
Mrs Weinberg- That sort of new learning for the parents would have to be with respect to SD also?
Witness 3- Yes.
Mrs Weinberg- Once they understood that and had some sort of ease of management of one child you would then return perhaps AD?
Witness 3- Yes. So I would be looking at a planned approach.
Mrs Weinberg- And then ND or AD?
Witness 3- I'm not sure. It's clear where SD and MD stand.
Mrs Weinberg- Home first, home last?
Witness 3- When I saw them MD presented with very high demand.
Mrs Weinberg- Could MD upset the learning process with respect to the 2 little girls and SD?

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[191] And, I would add, that is effectively what s.10 of the *CYFA* requires the Court to try to do as well.
[192] At pp.31-32 of my notes.

<u>Witness 3</u>- Yes, sadly. It's a terrible thing to think about. His demands are much higher and it would be harder to get all these routines in place when he is there.
<u>Mrs Weinberg</u>- His demands are not the norm?
<u>Witness 3</u>- Not from what I saw. He is very persistent.
<u>Mrs Weinberg</u>- Do you think a residential stay in QEC – given the neuropsychology reports – with the baby and the little girls would be beneficial so they could design a program? A positive step for future therapeutic involvement?
<u>Witness 3</u>- An excellent service who do a fantastic job. They do great work. I'd like to go back to one of the questions earlier. Continuity of contact would be of vital importance. It needs to be the same person because even within the one service different people will have a slightly different approach."[193]

Having heard all of the evidence in this case, I am not persuaded that a residential stay would be appropriate. Such a stay would inevitably be short-term. If DOHS is of the view that further skills development is appropriate for the parents – and I would not criticize it for that although for my part I do not consider it a necessary pre-requisite to reunification of any of the children except MD - that would best be provided in-home to maximize the chances of consistency of approach.

Witness 3 was asked about the cost to the children of a failed attempt at reunification and was unable to quantify it. Nor can I. But in the circumstances of this case, I strongly agree with her comment about "erring on the side of trying":

<u>Mrs Weinberg</u>- "Let's assume the Court decides [that] all the children go home on supervision orders and assume people go in and provide flow charts and diaries and after one year it hasn't worked. What sort of damage does that cause to the children?
<u>Witness 3</u>- I don't know the sort of damage but clearly it would be damaging.
<u>Mrs Weinberg</u>- What is the cost at the end?
<u>Witness 3</u>- We can't weigh up the cost of not trying versus trying and failing. The outcomes are really bad. I'm erring on the side of trying.
<u>Mrs Weinberg</u>- DOHS has tried. Not with modules you have suggested. It tried for one year on a voluntary basis and it hasn't worked. Do you know of any organization which could set up and monitor the sort of learning module you are suggesting.
<u>Witness 3</u>- I have no doubt DOHS has been trying. One of the things I still feel concerned about is there hasn't been an approach to the parents where the person intervening has understood the cognitive limitations the parents face. Both present quite well in certain circumstances. There may be assumptions on other people's parts that if you say something the parents will remember and be able to do it. What I'm suggesting is worth trying is an approach which takes into account the cognitive limitations."[194]

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[193] At pp.41-42 of my notes (emphasis mine). The last comment about "continuity of contact" and the undesirability "a slightly different approach" is exactly the problem identified by the father in his ironic comment about "20,000-30,000 people coming in and giving different explanations": see section 17.1 above.
[194] At p.33 of my notes.

19. ATTACHMENT+BONDING OF CHILDREN+PARENTS

The only professional indication of concern about MD's attachment is from witness 17 who raised the question in November 2006 whether MD had a "reactive attachment disorder" and recommended an assessment for attachment related problems.[195] No subsequent assessment has found any such disorder.

There does not seem to be any evidence of any problem identified by the parents in respect of their attachment to MD or AD. The parents did identify problems they felt in their bonding with ND when she was very young.[196] However, as I have noted, witness 3 did not see any problems: "ND looked a very settled, happy baby when I saw her and there were no signs the parents didn't respond to her and vice versa."[197] It was witness 3's view in April 2007 that: "The children are attached to their parents although they are also attached to their [paternal] grandmother and she provides safety and security for them."[198]

Although the access supervisors had reported no concerns about the reaction of SD to his parents or them to him, I considered it prudent to seek a Clinic assessment of the attachment + bonding between the parents and both SD & ND. Witness 18 did that assessment on 15/08/2008 at the Children's Court Clinic. It was her opinion that:

> **"All of the children appear bonded to their parents and their parents seemed warm and appropriate with them. ND was seen to initiate communication, and seek comfort from her mother. She accepted comfort from her father but did not seek it when she was distressed. ND was accepting of attention from both of her parents and seemed comforted and familiar with lolling on both of her parents' bodies, while sucking on her bottle. This suggests to [me] that ND seeks physical comfort via cuddles and via sucking to meet her emotional needs and that both parents seem accepting of this in her and they seem interested in talking and playing with her, which would further promote a stronger attachment if she was returned."[199]**

There is no doubt that the father is very strongly bonded to MD. One could sense that strongly from the tone of his *viva voce* evidence, especially from his answer to

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[195] Take Two report of witness 17 dated 30/11/2006 at p.8.
[196] See report of witness 10 dated 05/12/2006 at pp.4-5 & 12-15.
[197] See p.39 of my notes and section 18.3 above.
[198] At p.9 of witness 3's Children's Court Clinic report. Witness 16 also agreed that the father was attached to his children and vice versa: see her evidence in cross-examination at pp.149-150 of my notes.
[199] At p.17 of witness 18's amended Children's Court Clinic report.

the question: "You want all the children back?" when he said with great enthusiasm:

> **"Yes. MD is very much a daddy's boy because I delivered him when he was born because there was not enough time to get to hospital. I'd finished my security guard training. 000 helped me deliver MD. The paramedics said 'You did a better job than some of the doctors could. We are quite surprised.'"[200]**

He also presented that way to witness 16 to whom he said of MD-

> **"MD is a funny, friendly, outgoing, little boy, being inquisitive, wants to know what's going on, playing cars. I have nothing negative to say about him."[201]**

It also seems clear that MD is close to his father. There were a number of pieces of evidence to support this. One was observed by witness 18:

> **"The father then went over and read ND a book on his knee and AD wandered over to join them. A bit later AD picked up a black texta and said 'This is a good colour.' MD began to cry in his bean bag. His father came over and looked extremely concerned and asked him what was wrong. The mother also came over. MD whispered something. The father reported that MD said that AD had told him to 'shut up'. The father said 'That is not very nice'. And left it at that. The father invited MD to sit on his lap and passed ND to the mother who read her a book.**
>
> **MD then began to read a book to the father, sitting on his knee. He often guessed at the last word of a sentence such as 'This is a …'. He seemed to be using picture cues but none the less, looked proud of his reading and his father looked proud and pleased with him."[202]**

Writing in July 2008 witness 16 said:

> **"MD, ND & AD have a strong connection to each other."[203]**
>
> **"The children have twice weekly access with their parents and this has allowed them to maintain a strong relationship with them and a strong identity as a family."[204]**

SD has never been in his parents' care. Their access has been limited to a few hours per week supervised contact in DOHS' offices. Understandably both parents expressed bewilderment to witness 18 about how they were meant to bond with SD

[200] At pp.202-203 of my notes. See also p.33 of witness 18's Children's Court Clinic report.
[201] Report of witness 16 dated July 2008 at p.10. Witness 16 goes on to note (at pp.10-11) that the father found it more difficult to come up with words describing AD (eventually described as "Barbie, girly girl because she's got bears and Barbie; daddy's girl while MD is daddy's boy, always happy considering her health problem, one kidney and asthmatic, also helpful, same as MD, and she's also cheeky") and ND (after a long time described as "cheeky, helpful, funny, sharing and noisy"). However, in my view one should treat this sort of "Thesaurus test" with considerable caution.
[202] At p.16 of witness 18's Children's Court Clinic report.
[203] Report of witness 16 dated July 2008 at p.4.
[204] *Op.cit.*, p.5.

in those circumstances, saying several times to her "How can we bond if he is not in our care?"[205] I agree with witness 18's lack of concern about this:

> **"They said they didn't feel bonded. I think that was an honest answer. The father said there was "something of a bond but not as much as we would like". They were clear that the conditions of access were impacting on their bonding."[206]**
>
> **"Neither parent says they are currently bonded with [SD] but based on the father's past bonding with his children, [I] would expect that, as SD settled and bonded with the mother, the father and SD would also be able to bond with each other."[207]**

It was witness 18's opinion that the mother was "more attuned to the children" than the father "but not much more".[208]

20. OPINIONS OF WITNESS 18 ON REUNIFICATION

It appears from her *viva voce* evidence – read in combination with her report - that witness 18's professional opinion was that it was likely that 3 of the children could be reunified successfully with the parents but it was unlikely that all 4 could be:

> **<u>Mrs Weinberg</u>- "You have said at p.29 of your report that 'Developmentally the mother and the father are unlikely to show a major change in their emotional maturity nor their capacity to take responsibility because these personality issues usually get sorted out when people are in their second decade of life and moreover services provision that has provided opportunities to learn and do things differently have been offered, it appears, over about a five year period or more already with little change apparent.' How secure are you in sending the children home?**
> **<u>Witness 18</u>- In relation to what's 'good enough' parenting and what will allow the children to develop, my recommendation is I have a measure of security in allowing a reunification plan to occur…These four children will be difficult. Three is probably manageable but I think four is unlikely.**
> **<u>Mrs Weinberg</u>- Who is going to make Sophie's Choice? [209]**
> **<u>Witness 18</u>- I believe the Court will in the end. MD's high needs make him close to two [children] which is really the equivalent of 5 children.**
> **<u>Mrs Weinberg</u>- It is not in the best interests of all 4 children to be in the parents' care?**
> **<u>Witness 18</u>- I said it is unlikely.**
> **<u>Mrs Weinberg</u>- If MD isn't returned home first because he is the most bonded child, he will be the most traumatized?**
> **<u>Witness 18</u>- That was my opinion. Emotionally distressed perhaps more than traumatized.**
> **<u>Mrs Weinberg</u>- If the girls are returned before MD that will distress him too, because they are his security. He will be without his sisters.**
> **<u>Witness 18</u>- I wasn't in complete agreement with the maternal grandmother on this issue.[210] In relation to how distressed he would be by being separated from his sisters in**

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[205] At p.19 of witness 18's Children's Court Clinic report.
[206] Evidence of witness 18 in cross-examination by counsel for DOHS at p.162 of my notes.
[207] At p.30 of witness 18's Children's Court Clinic report.
[208] Evidence of witness 18 in cross-examination by counsel for DOHS at p.164 of my notes.
[209] This is a reference to a novel by William Styron (1979), subsequently filmed by Spielberg, whose plot involved a choice between two unbearable options.
[210] See the maternal grandmother's opinion in section 22 below.

the short term, I thought he was looking more to adults for attention than to his siblings. I didn't consider that a major issue.
Mrs Weinberg- The maternal grandmother seemed to think that AD plays with MD the most. She looks to MD the most.
Witness 18- Clinically MD was interacting most with JB or his parents. I saw little evidence MD sought out either of his sisters.
Mrs Weinberg- If the girls are reunified [do you say] that won't impact too badly on MD?
Witness 18- In terms of the delay I didn't think the short-term break would have a significant effect in relation to his absence but him perceiving he is not first would be detrimental in my opinion.
Mrs Weinberg- How detrimental would it be if SD is first?
Witness 18- The most dangerous possibility is if it means he [MD] is never going to be reunified, leaving him to last.
Mrs Weinberg- The best case scenario is SD home first, settled, routined, then the girls or do you get the girls home first and then SD?
Witness 18- It depends on what outcome you are looking for. Make a decision at the beginning how likely it is that all four children can go back and proceed accordingly. I have concerns that all four children can be managed despite the clear love and attachment the parents have for all of the children and it seemed to me a worse outcome for attempted reunification of any of these children to proceed and then fail."[211]

I interpose to say that I disagree with this approach. On the evidence I have heard, it seems to me at this stage to be a worse outcome for reunification not to proceed at all. That is not to say that I disregard the risks associated with a failed reunification. However, for the reasons stated by witness 18, one cannot properly assess the risks without knowing what the alternative care arrangements would be:

"[If reunification of the children doesn't work] it will be another experience of grief and loss they will need to go through and adjust to. How it will impact on them will be partly determined by what alternative care arrangements can be made for the children. I've spoken about the relationship with the maternal grandmother and paternal grandmother which would buffer the impact. The paternal grandmother is seeing the children once a month. There is a commitment from the paternal grandmother for that to continue. My understanding something similar will be offered by the maternal grandmother even after the reunification has occurred."[212]

While I do not think that witness 18 will necessarily prove to be wrong in her view that it is likely that three could be reunified but unlikely that all four could be, I strongly believe that it is simply not possible at this stage to make a decision how likely it is that reunification of all four children can be successfully achieved. In my view one must proceed step by step, child by child, and assess how each child's reunification goes. One ought not make a global decision now for to do so is to engage in decision-making in a partial vacuum. The cross-examination continued:

[211] At pp.168-169 of my notes.
[212] Evidence of witness 18 in cross-examination by counsel for DOHS at p.173 of my notes.

Mrs Weinberg- "What criteria would you use to select the child not to be reunified, your criteria who should live and who should die, to use a biblical term?
Witness 18- I've thought a lot about that question and I find myself thinking about the dilemma 'Do no harm' as an ethical principle. On that basis my experience tells me MD should be reunified first because delay for him will be more detrimental. Delay for SD will reduce the opportunity for him to form a secure attachment with his parents but he doesn't lose something he never had. It is potential loss in that it reduces the risk of him having a relationship with his parents in future. Both girls seem less high need in relation to parenting and protective factors so in their rights to be brought up by their parents AD could be easily and successfully reunified with her parents. Also ND because she is younger and with a reunification plan she could be second. But the flipside is they are also bonded to their maternal grandparents and in relation to avoiding poor outcome they could manage in the maternal grandmother's care for a longer period potentially."[213]

In the end witness 18 appeared to be recommending that MD be reunified first, followed – by the start of 2009 - by ND & AD together.[214] Her observations and opinions leading to this recommendation are as follows:

- **MD[215]: While witness 18 agrees with witness 3 that MD has the highest level of need of the older three children, she does not necessarily agree with the view that MD therefore should be left till last in any re-unification plan. This is because he is the most deeply bonded to his parents and they, particularly his father, appear very strongly bonded to him. Further, he is clearly the most currently distressed by the separation from his parents.**

  Witness 18 had absolutely no concerns about MD being reunified with his parents in terms of attachment issues. But he is a child who will require monitoring and structure to help him reduce his risk factors of poor self-regulation and poor educational outcomes due to his intellectual disability. The right school is now a potentially protective factor for him. Nonetheless, MD is highly likely to remain a high maintenance child who will continue to demand attention and is likely also to have the least capacity to contribute to sibling relationships in a positive way.

  There is no doubt that MD will be adversely impacted if he sees a replacement son going home to his parents before him and if he sees that his sisters go home before him. He is a sensitive, emotional child who already over-reacts to mild negative feedback and who is already giving signals 'I hate you' to his parents because he fears the separation from them means that they do not love him. It is not in his best interests for his sisters to go home before him for two reasons: it will distress him and it could lead to the outcome that he may never go home because his parents will be unable to cope with more than three children. Leaving him to last and then deciding it will not work after a trial would be the worst outcome of all for him, yet that is a strong possibility if he is left to last.

- **ND[216]: Witness 18 considers that ND is interested in socially communicating with others and is able to seek out attention from adults. Her cute, appealing style and her responsiveness to attention from others and her emergent ability to be on her own in the presence of adults and just occupy herself all bode well for her future positive development.**

  At the moment ND seems bonded to her parents and her maternal grandparents and to be very familiar with her paternal grandmother in a friendly way. But she seems more

[213] At p.169 of my notes.
[214] See witness 18's report at pp.33-34. She also discussed a number of other possible permutations.
[215] These observations/opinions are taken from pp.33-34 of witness 18's Children's Court Clinic report.
[216] These observations/opinions are taken from pp.31-32 of witness 18's Children's Court Clinic report.

bonded to her maternal grandmother which is hardly surprising given that she has been in her care since she was about 17 months old. Mr M seems particularly warmly bonded to her as does JB. She showed a number of attachment behaviours to the father but she seemed to initiate more attachment behaviours to her mother and this is consistent with reports read that indicate that ND often sat on her mother's knee during many accesses while the father plays with the other two children. Her experience in her young life of child care from a young age coupled with a range of placements means that she has learned how to spread out her attachment behaviours to a range of adults. This is likely to remain her future pattern and may, if the parents need respite, be a reasonably adaptive solution for her, particularly if she maintains her current strong bond with her maternal grandparents.

- **AD[217]: AD has already learned how to disconcert her father[218] but equally wants to please him.**

  AD is an assertive child who can be somewhat provocative but she also wants to please her parents. She makes few demands but can make clear and positive demands for attention when she needs it and there appears to be a benign cycle where both parents feel they can meet her needs. She appears to be compliant with instruction, and her balance of independent functioning, good self-regulation, helping behaviour, good social skills, good looks and ability to give very clear messages about what she wants and to give effective messages to engage her parents in a positive manner means that she is the child of all who could be reunited most easily and most successfully.

  AD's protective good social skills, good self-regulation and interest in mastery will support her to function well in the kindergarten and school setting, which will also contribute to those settings being supportive to her development and well-being. She is highly likely to be a child who will be well liked by her teachers and her peers. Witness 18 was not surprised to hear that AD had lots of friends at child care and the long list of her protective factors are all the more remarkable given that her language skills are delayed.

  While AD appears well bonded to both of her parents, AD is likely to be flexible enough to manage to be parented by other family members as well.

The big loser in witness 18's recommendations is SD. Witness 18 sees no real issue *per se* in SD being reunified. The problem she sees is the competing needs of the other children:

> **"[I[am confident that the mother has the parenting skills and a positive orientation towards SD that would allow her to reunify with SD successfully as this child's primary caregiver. Given the planned return of the father to fulltime work, this is what seems important here. If there was just one child involved it would be a simple matter. Neither parent says they are currently bonded with [SD] but based on the father's past bonding with his children, [I] would expect that, as SD settled and bonded with the mother, the father and SD would also be able to bond with each other.**
>
> **[I] agree with witness 3 that SD would manage with a full return to his parents' care though he might show some unsettled behaviour. Currently both parents are showing fluctuating readiness for a full return of SD to their care in that both report they are not currently bonded with him and both parents are**

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[217] *Ibid.*

[218] This was a reference to an conversation overheard by witness 18 about Mr B's house: see her report at p.22 Counsel for DOHS made a lot of this in cross-examination but it seemed of little significance to me.

currently bonded with their three older children. It is difficult for them to find a place for him in their minds when three other children are already in there, when he has never really been in their care, when his removal was traumatic and when his current care is acting as a further impediment to reunification…

The major barrier to the reunification of SD with his parents is the competing needs of the other children who already have an attachment to these parents, particularly AD and MD…This [is because] these parents are unlikely to be able to manage these four children in a 'good enough' fashion. SD has no significant attachment to his parents now, so he will not suffer by losing an attachment he does not have, but he will lose the best possibility of a future secure attachment with them if he does not get re-unified very soon."[219]

In her extremely thorough report witness 18 also set out proposed reunification plans for the children.[220] Because I have not adopted witness 18's sequence, I have not adopted any of these plans verbatim but I have used a technique of gradually increasing access for AD and unsupervised access for all of the children which derive from witness 18's plan.

21. OPINIONS OF WITNESS 16 ON REUNIFICATION

Sometimes when the Court is faced with conflicting opinions in reports written by Children's Court clinicians and professionals commissioned by DOHS, it will prefer the Children's Court clinicians on the basis that their reports are totally independent of the parties to the case and hence potentially more objectively based. However this is not how I have regarded the opinions of witness 16 and of witness 17, both of whom were commissioned by DOHS to provide it with professional opinions for the purposes of planning in this case. Both witness 16 & witness 17 presented to me as objective professional witnesses. But although I have given significant weight to the observations of witness 16 and regard her reports as well written, I have not come anywhere near accepting her recommendations on permanent care or on ongoing supervision of parental access.

In her final report witness 16 summarized the strengths and weaknesses of the parents as follows[221]:

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[219] At pp.30-31 of witness 18's Children's Court Clinic report.

[220] The plan for MD is at p.34 and for AD & ND at pp.32-33 of her report. Her comments about the reunification of SD are at pp.30-31 of her report. I said to witness 18 at the end of her evidence – and I repeat it now - that whether I accepted all of her opinions, some of them or none of them, I was extremely grateful to her for her professional approach to this case and for addressing all of the matters I had raised in a very complex referral in such a professional and timely manner.

[221] Report of witness 16 dated July 2008 at pp.13-14.

STRENGTHS:

1. **Parents have been willing to participate in the assessment process.**
2. **Parents remain focused and motivated to have the children returned to their care.**
3. **Parents expressed their love and commitment to the children.**
4. **Children appear to enjoy spending time with the parents and sought their attention.**
5. **Parents are willing to engage with support services.**
6. **The father has linked in with a counsellor.**
7. **The mother is willing to attend counselling and has sought medical assistance for possible post natal depression.**
8. **Parents are concerned about the children's wellbeing since they have been out of their care.**
9. **Parents are concerned that care is having a negative impact on the children's wellbeing.**

WEAKNESSES:

1. **Parents continue to deny any responsibility for the children's removal.**
2. **The father denies having ever had any feelings of anger or frustration with his children.**
3. **The father was unable to discuss anger management strategies as he denies having anger management issues.**
4. **The mother has not been attending counselling and admits that she finds it hard to talk to people and trust them to help her with feelings that have been suppressed for a long time.**
5. **Parents are relying on government benefits for income and often need financial assistance from the maternal grandmother. This could indicate a difficulty to manage financially if the children are returned to their care.**
6. **The parents' relationship is unstable and there is potential for relationship breakdown in the future.**
7. **The current home environment is inadequate for the children to return to.**
8. **The mother acknowledges that she is emotionally shut off as a result of her past experiences.**
9. **All three children have special needs that will need a high standard of care in order to fulfil their potential.**
10. **Parents seem to be quite socially isolated and this limits the avenues of support available to them should they need it.**
11. **Parents have a strong dislike to DOHS and don't agree with the demands placed on them from DOHS. This means that they are unlikely to be able to work with DOHS in a cooperative manner to address the protective concerns.**

I agree with witness 16's categorization of the parents' strengths. I do not give significant weight to most of her so-called "weaknesses":

- **Weakness #1 has been effectively negated by witness 3.[222]**
- **Weaknesses #2 & #3 do not put the children at any risk of physical harm from the father as a result of anger on his part.[223]**
- **Weakness #5 is a "weakness" suffered by all poor parents in our community.**
- **Weakness #7 has been a significant problem in the past but is not a problem at present.[224] Time will tell if it returns.**
- **Weakness #9 appears to be overstated in relation to AD & ND and does not purport to relate to SD at all.**

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[222] See section 18.5 above.
[223] See section 10.4 above.
[224] See section 25 below.

- **Weakness #10 does not properly take into account the very valuable emotional support provided to both the parents and the children by the maternal grandmother and the paternal grandmother.**

In the course of her assessment witness 16 had administered part of an American attachment tool - the so-called Zeanah, Benoit & Barton test (1993) – on the father.[225] This tool is designed to establish the level of emotional attachment between parents and children by asking a large number of questions of the tested parent. Although witness 16 had not administered the Zeanah test on the mother she did observe her on one occasion with the children. She agreed with counsel that the mother had been "relatively proactive with the care of the children" and that she had observed "a positive interaction between [the mother] and the children".[226]

The recommendations which witness 16 reached in her final report included-

- **Parents continue to have regular supervised contact with the children.**
- **Permanent placement options are explored for the children.**
- **All efforts should be made to keep all three children together to maintain the strong bond between the siblings.[227]**

In what proved to be an effective, short passage of cross-examination counsel for the father demolished the basis of the first & second of these recommendations-

> **Mr Thomas- "The results of your test[228] don't show that the father is not attached to his children?**
> **Witness 16- No [MEANING AGREE].**
> **Mr Thomas- And his children are attached to him?**
> **Witness 16- Yes.**
> **Mr Thomas- At p.11 of your second report you say- 'The fact that DHS have not deemed it appropriate for the father & the mother to have unsupervised access at this point of time means that the writer is not in a position to ascertain how well they would cope with the children on their own.' Do you still stand by that?**
> **Witness 16- Yes.**
> **Mr Thomas- How can you then say that permanent care options should be explored?**
> **Witness 16- Because I believe it is in the best interests of the children to have a permanent placement.**
> **Mr Thomas- What about a permanent placement with the parents?**
> **Witness 16- I have concerns about that.**
> **Mr Thomas- What about?**
> **Witness 16- My belief is I am not recommending [reunification] at this point of time.**
> **Mr Thomas- Why?**
> **Witness 16- I refer to vulnerabilities and strengths and that gets narrowed down to a conclusion which leads to my recommendations."[229]**

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[225] See her evidence at pp.145 & 149 of my notes.
[226] In cross-examination by counsel for the mother at p.154 of my notes.
[227] Report of witness 16 dated July 2008 at p.15.
[228] This is a reference to the Zeanah test.
[229] At pp.149-150 of my notes.

The first part of witness 16's assessment was quite properly curtailed by the birth of SD and the parents' distress at having him removed from their care.[230] At DOHS' urging, the second part of witness 16's assessment was done in a hurry so that her report would be ready for this court hearing which commenced on 21/07/2008. As a result she had to cut short her observations of the family. Though this was not her fault, I cannot possibly give any significant weight to her permanent care recommendations in the face of her evidence that she was "not in a position to ascertain how well the parents would cope with the children on their own"[231]. That admission utterly destroys her permanent placement recommendation.

Further, I have the strong view that the strengths identified by witness 16 far outweigh what is left of the "weaknesses". If I had any doubt about that, it would have been resolved by witness 16's own summary of some parental strengths:

> **"The father and the mother are totally committed to having their children returned to their care and are prepared to fight for them in the Supreme Court if necessary. They clearly love their children and have tried their absolute hardest to raise their children as well as they know how to. They have tried to adhere to the conditions placed on them by DOHS and have made some changes."[232]**

It is also significant that DOHS' amended position in this hearing[233] gives no weight to witness 16's recommendations so far as they relate to AD & ND.

22. OPINIONS OF THE MATERNAL GRANDMOTHER ON REUNIFICATION

The maternal grandmother had no doubt that all of the children could safely be reunified with their parents:

> **Ms Green- "Do you have a view as to whether or not SD ought to be reunified with the parents or how that might work out?**
> **The maternal grandmother- I think SD should be reunified with his parents.**
> **Ms Green- Have you seen ther mother with SD?**
> **The maternal grandmother- I haven't seen the mother with SD at any time since she was in hospital.**
> **Ms Green- Have you seen her parent her older children?**
> **The maternal grandmother- Yes.**
> **Ms Green- And when they were babies?**
> **The maternal grandmother- Yes.**

[230] See her evidence at pp.153-154 of my notes.
[231] See the above extract of cross-examination of witness 16 by Mr Thomas at p.150 of my notes.
[232] Report of witness 16 dated July 2008 at pp.14-15.
[233] See section 5.3 above.

Ms Green- What is the level of care you have observed of the mother in caring for MD, AD & ND?
The maternal grandmother- I think the mother is a very caring mother. I think she looks after them quite well. I think she needs help but she is a very caring, loving mother.
Ms Green- What sort of assistance?
The maternal grandmother- I think she needs help to her financial system so that you make sure you pay your bills, buy the food etc.
Ms Green- What about the actual care of the children?
The maternal grandmother- She is very good, very good at bathing and feeding and dressing them.
…
Ms Green- Knowing the children and your daughter and the father, have you formed a view yourself about how reunification might occur, a lay person's view?
The maternal grandmother- Yes. I suppose I have…I think possibly at this time SD would go back first and that because he hasn't been with the parents it could take quite some time. With the other three I don't think it really matters. Probably they could all go back together because they are a very tight unit in sense but they are a very settled unit. MD is very settled at location 3 North Primary. The girls love going to ABC. AD is always talking about going there and so and so being there." [234]

In cross-examination about her daughter's capacity to look after 4 children, she reiterated her view that all 4 could be reunified. She again conceded that SD might be reunified first but was particularly strong in her view that it would be difficult for MD if he was separated from the girls:

Mrs Weinberg- Your evidence is that it would be difficult for MD if he was separated from the girls.
The maternal grandmother- I think my exact words were 'You might as well dig a hole and bury him.'
Mrs Weinberg- How would the girls feel?
The maternal grandmother- Hard [to say] but I think very, very upset.
Mrs Weinberg- SD and then the other 3 children?
The maternal grandmother- In due course.
Mrs Weinberg- Why in due course if you see no problems.
The maternal grandmother- It doesn't have to be but I'm quite sure DOHS wouldn't allow that. It is DOHS I've been dealing with and perhaps under the circumstances the parents – mainly because [SD is] a young child – the parents need unification with SD to get acquainted with all his ways and all his problems of which I believe there are quite a number.
Mrs Weinberg- Have you spoken to your daughter-in-law about SD's problems?
The maternal grandmother- To my son. Shocking reflux. A hernia operation. He has juvenile asthma. He has had urinary tract infections. He has been in hospital on a couple of occasions to my knowledge.
Mrs Weinberg- What do you mean by 'get to know SD'.
The maternal grandmother- I think it would be very difficult because it's not like a normal family where you have a baby and bring it home into the family. Because of the circumstances here I think it changes. Because DOHS took SD away a couple of hours after he was born…If I had a week I could explain JB's situation but JB's father was the problem. The mother looked after JB until he was 5 months old and looked after MD, AD & ND and I think she has done a reasonable job. I think she can look after SD without any problems at all.
Mrs Weinberg- Why wait [to reunify the other 3]?
The maternal grandmother- It's up to the Court's discretion but it wouldn't worry me at all. If the Court feels all four should be returned together, no one would be more delighted than myself.

[234] At pp.183-184 of my notes.

<u>Mrs Weinberg</u>- Do you believe the parents can look after all 4 children?
<u>The maternal grandmother</u>- Certainly…I think they can parent quite adequately."[235]

Although she has been a registered nurse for 34 years, I do not accept the maternal grandmother's lay opinions that all 4 or the 3 older children could safely all go back <u>together</u> to their parents' care in light of the contrary view of the clinicians. However, I do accept her opinion about reunification of SD first. And her strongly expressed view about excluding MD has given me considerable food for thought.

23. DOHS' INDIFFERENT HANDLING OF THIS CASE

I have no criticism of the way in which DOHS handled the children's cases up until the time that Magistrate Levine placed the children on custody to Secretary orders on 24/04/2007. But since then these children's files have been indifferently handled by DOHS in a number of respects. In the first place DOHS failed to hold a statutory caseplan meeting after the orders were made on 24/04/2007 notwithstanding its statutory obligation under s.167(1) of the *CYFA* to do so within 6 weeks.[236] Then, rudderless and without any formal plan, the case drifted under what might loosely be termed the aegis of unknown protective workers who produced no written reports and who were not called to give evidence in this hearing.[237] During that time the children's placement with their paternal grandmother ended on 19/10/2007. No *viva voce* evidence was called to explain why. Someone named Ms McC, who described herself as a Senior Child Protection Worker, wrote a report dated 16/01/2008 which was co-signed and ultimately introduced into evidence by a then Unit Manager, witness 1. I was given no explanation as to what Ms McCs role had been and witness 1 didn't seem to know:

> **"I can speculate. CH was acting team leader for a period. It may have been allocated to her as DC left. I'm assuming Ms McC was asked to do a report because CH may well have been on leave but I can't say that was the case."[238]**

Witness 1 also said that "Ms McC was unable to come to court today to give evidence".[239] No one asked why or what her role was or whether she had any direct

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[235] At p.194 of my notes. The emphasis is mine.
[236] See evidence of witness 1 in answer to a question by me at p.3 of my notes.
[237] There is some evidence that someone named Mr (name removed) was the allocated protective worker during the latter part of 2007 but I know nothing else about him and he seems to have written no reports: see p.10 of my notes.
[238] Evidence of witness 1 in answer to a question by me at p.10 of my notes.
[239] Evidence in chief of witness 1 at p.1 of my notes.

knowledge of the case at all. Her report, largely a regurgitation of historical information from other sources, was very light on contemporary fact and was quite unhelpful. She said of the children's removal from their paternal grandmother:

> **"During [the children's] placement with her, the paternal grandmother had experienced health problems that required periods of hospitalization. Due to the paternal grandmother's health issues and concerns that were expressed in relation to her ability to positively parent the children, a decision was made that they be placed in foster care. Initially they had to be placed in separate placements due to the limited placement options available. AD and ND were placed together and MD on his own. Recognizing the need for the children to be together every effort was made to identify a placement for all three children. Subsequently the three children were placed together."[240]**

When DOHS eventually realized that the custody to Secretary orders were running out, that it had not held a case planning meeting and that there had been no progress towards reunification, it got around to holding what – with sweet irony – it described as a "best interests plan" meeting. This was held on 12/11/2007 at DOHS' office at location 7 and was chaired by the redoubtable witness 1 who happened to be passing by. As she said: "I was never a supervising officer for this case and had been asked to chair the review meeting because the unit manager was unavailable."[241] She produced an unsigned and undated document called a "Best Interests Plan" which put a slightly different spin on the reason why the placement with the paternal grandmother had ended:

> **"[The paternal grandmother] had had periods of ill health requiring the children to be placed in respite care. Following a further period of ill health and allegations that she had been verbally abusive to the children it was decided to end the placement."[242]**

So, for whatever reason, the children were moved from the familiar care of their paternal grandmother to strangers and the girls were separated from their brother. What must these vulnerable children have felt was happening to their world? And yet if the father is right, the paternal grandmother apparently still remains involved with Anglicare as a foster carer so the allegations of "abuse in care" could not have amounted to much:

> **"She has been doing work for Anglicare for probably the last 5-6 years. She gets foster children in, maybe teenagers. I've met a few of the kids in her care. They were very polite, very nice to her. A couple of the kids had mental disabilities. At the moment she has a couple in her care she looks after. She is a**

[240] DOHS' Application & Disposition report of Ms McC dated 16/01/2008 at p.6.
[241] Evidence of witness 1 in cross-examination by counsel for at p.4 of my notes.
[242] Witness 1's "Best Interests Plan" at pp.4-5.

foster carer but more like a loving grandmother to them, a 'home away from home' for kids with abusive parents…She worked at Mont Park psychiatric unit for children with mental disabilities for over 17 years."[243]

This period of foster care lasted for 2 months. If the children had to be moved, why was the move not planned in such a way that they could be transferred from their paternal grandmother straight to their maternal grandmother? I do not know and no explanation was given. The maternal grandmother had certainly put her hand up for the children at the meeting on 12/11/2007 if not before.[244] The Department led no evidence which explained its apparently gross failure to give proper weight to its obligations under ss.10(3)(h) & 10(3)(q) of the *CYFA*. Eventually on 21/12/2007 all three children were placed in the care of their maternal grandmother and her friend Mr M where they have since remained. At the end of her second report witness 16 spoke of the need to "help repair the damage caused by [the children's] traumatic history"[245]. What she meant by this became clear – starkly and terribly clear - in cross-examination:

Mr Thomas- "By 'traumatic history' do you mean removal from their parents and being shuffled around from placement to placement?
Witness 16- Correct."[246]

What was the overall plan decided by witness 1 at the meeting on 12/11/2007? That too was unclear. In one place in her "Plan" what is described as "the overall plan for MD" states "Return to family within 4 month/s".[247] In another place "the current overall plan" is described differently:

"The current overall plan is for reunification but if the conditions of the custody to Secretary order are not met and if the parents are not able to demonstrate over the next four months they can provide a safe and stable environment for the children then a permanent care case plan needs to be considered."[248]

Return to family within 4 months seems very different to me from setting up a four month period as a pre-condition to determining whether a plan should be reunification or permanent care. The former contemplates completion of a plan within 4 months. The latter contemplates commencement of a plan after 4 months. I tried to ascertain from witness 1 which of these two alternatives she had had in mind. It was hard going but she eventually nominated the latter:

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243 Evidence of the father at p.206 of my notes.
244 Report of witness 16 dated July 2008 at p.15.
245 Witness 1's "Best Interests Plan" at p.6.
246 At p.151 of my notes.
247 Witness 1's "Best Interests Plan" at p.6.

"We needed to see whether the parents had progressed within 4 months and if they hadn't to give consideration to permanent case planning for the children. I can see what you are saying. It was never the case that the plan was for the children to be reunified within 4 months."[249]

It is not even clear that the nominated period actually was 4 months even though that's what her report states. In *viva voce* evidence witness 1 said: "I might have said 3 months but 4 months seemed more reasonable. I wasn't implying it be reviewed in 4 months."[250] What was she implying? Goodness knows.

To set this arbitrary time limit in the light of DOHS' own inaction seems to me to be about as far removed from the best interests of these particular children as it is possible to get. Witness 1 did not even realize a Children's Court Clinic report had been prepared by witness 3 in April 2007, let alone take into account any of its recommendations.[251] And how did DOHS go about administering this difficult case during those critical 4 months or 3 months as the case may be? It left the case largely unallocated for the next 2½ months:

Ms Green- "From November to January there was no allocated worker. It states in the chronology that DC was the allocated worker from 22/06/2007 to 10/12/2007?
Witness 1- I believe so.
Ms Green- 10/12/2007 to 29/01/2008? From November to January the mother wasn't seen by the worker at all!
Witness 1- I know during that period the maternal grandmother had applied she wanted the children for Christmas and wanted the children in her care. There was work done in visiting her and assisting her financially for the children to move down there. I can't comment on work done with the father or the mother."[252]

And when it finally got around to allocating a protective worker, was it an experienced worker as befitted this very difficult case at this very critical time in its glacial progress? No. It was the protective worker who had completed her 2 year full-time Diploma of Community Welfare at the end of 2007 and had first been employed by DOHS shortly thereafter. When the case was allocated to her on 29/01/2008, it was one of her first cases.[253]

In the end the Department adjudged that the mother & the father had failed its little "test". It is clear that it is not even right on that. It is certainly true that the mother

[248] *Op.cit.*, p.12.
[249] Evidence of witness 1 in answer to questions by me at p.4 of my notes.
[250] Evidence of witness 1 in cross-examination by counsel for the mother at p.6 of my notes.
[251] Evidence of witness 1 in cross-examination by counsel for the mother at p.9 of my notes.
[252] At p.10 of my notes.
[253] This is not a criticism of the protective worker. It is a criticism of those who were responsible for allocating a very new protective worker to this difficult case.

had not complied with the counselling condition on the orders and the parents had dragged their heels on attending neuropsychological assessments but how these sins by themselves could be thought to justify a permanent care case plan given the strength of the attachment between the children and the parents is impossible to guess. In cross-examination witness 1 was asked about what changes she had needed to see addressed. She said there were "3 prongs":

> **Ms Green- "What changes did you see needed to be addressed? What other concerns did the parents need to address?**
> **Witness 1- Three prongs. First, a stable relationship themselves. Second, to provide physical care which young children require including environmental issues. Third, an ability to demonstrate a capacity to deal with children's behaviour, meet their developmental needs including health needs for AD."[254]**

However, witness 1 was unable to point to any evidence of instability in the parental relationship during the time of the "test". There is no evidence at all that the historical environmental issues were a live concern at that time. Nor is there any evidence at that time that the parents were unable to deal with the children's behaviour and meet their developmental needs during their access with the children, most of which occurred at the maternal grandmother's home.

As at 25/03/2008 the Department's case plan was still reunification[255] but by 23/06/2008 the plan appears to have changed to permanent care.[256] That was confirmed at the commencement of this contest on 21/07/2008.[257] I simply do not understand this decision in the light of the evidence adduced in this hearing, evidence which appears ultimately to have led DOHS on the 7th day of this hearing to change its recommended case plans for AD & ND back to reunification.[258]

Because of all of the above matters, I have little faith in the Department's decision-making capacity in this case.

[254] At p.9 of my notes.
[255] DOHS' Addendum report of the protective worker dated 25/03/2008 at p.6.
[256] DOHS' Addendum report of the protective worker dated 23/06/2008 at p.8.
[257] See section 5.1 above.
[258] See section 5.3 above.

24. LONG-TERM OUT OF HOME CARE POSSIBILITIES

24.1 THE MYSTERIOUS ROSEBUD OPTION

At one point during the evidence of witness 3 counsel for DOHS said to me: "DOHS is looking for a place separately and has almost got a place for MD."[259] In the course of a subsequent discussion with me about the terms of the Clinic referral, counsel for DOHS referred obliquely to the Department's exploration of "a non kith-and-kin placement for MD at Rosebud, a kith-and-kin placement for AD & ND with their aunt."[260] No evidence was led about Rosebud and I heard nothing more about it.

24.2 MR & MRS B

Mr B is by profession a real estate agent. He advised witness 18 that he and his wife are putting on an extension on their home at location 4 so that there is an option of them taking on the care of all of the children.[261] At a time in the case when DOHS was still pressing permanent care for AD & ND, counsel said to witness 3 during cross-examination:

> **"The placement DOHS is thinking of is the children's aunt. The concept isn't for them to be taken out and given to a stranger. It is well and truly a kith & kin placement. The children are happy there."[262]**

Witness 18 was largely flattering but also mildly critical of Mr & Mrs B in her opinion about their role as foster parents for SD:

> **"These foster parents have attached to SD and are diligent and concerned in their care for him, but it seems to be care that is tinged with a high level of anxiety about his safety if he returns to his parents and the anxiety in both foster parents has now also transferred to concerns about his many health problems. Possible hyper-vigilance and a tendency to misread emotional distress as physical pain is likely when an infant is giving unclear signals about what is wrong. SD's current regime of medication and thickeners etcetera is contributing to side-effects such as constipation that in turn requires more intervention. SD's health problems may also be contributing to his foster-parents' anxiety which in turn makes it harder for them to feel relaxed and so find it easier to comfort him."[263]**

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[259] At p.31 of my notes. See also section 26.3 below.

[260] At p.73 of my notes. The father appeared to have been referring to this in his somewhat paranoid evidence (at p.216 of my notes) that he had been told by the maternal grandmother that the protective worker had said to Mr B: "It's all in the bag. We've got it wrapped up." However it must be noted that this alleged conversation was never put to either the maternal grandmother or the protective worker.

[261] At p.18 of witness 18's Children's Court Clinic report.

[262] At p.33 of my notes.

[263] At p.19 of witness 18's Children's Court Clinic report.

Witness 18 described Mr B as a quiet and caring man who appears to have a social standing of some status in his community and Mrs B as appearing consistently anxious at the Clinic but appearing attentive towards SD and relieved when he reappeared from the interview rooms back into her care.[264]

Mr & Mrs B are apparently not on good terms with the mother & the father. Witness 18 related a small incident at the Clinic which demonstrated this to her:

> **"The family was given a break for lunch and upon return to the waiting room, the maternal grandmother was seated in the direct line of sight of the father and the mother along with Mr B who held SD and Mrs B. The mother and the father walked straight out of the glass doors without acknowledging them or without greeting SD. They both appeared to have a smoke break."**[265]

I accept the evidence of the protective worker that "the mother and the maternal uncle don't enjoy a very good relationship"[266]**.**

The father was asked about his relationship with Mr & Mrs B and replied:

> **"I've never rang Mr & Mrs B. The mother made a phone call and got the number from her mum. I've never rung Mr B. We weren't allowed to. Mr B contacted the protective worker and said I was making threats to them."**[267]

A curious thing happened at the very end of the case. After I had announced my findings, orders and recommendations, counsel for the mother said she had been instructed to ask me if I would be able to order that her client be paid the baby bonus for SD which she was instructed had been paid to Mr & Mrs B. Although totally unexpected, this request did not come out of a completely blue sky for there had been two previous references to the baby bonus in *viva voce* evidence:

- **The case support worker (name removed) "witness 6" gave evidence that at an access on 03/06/2008 the father has asked him about the baby bonus and if he knew anything about that. He referred the father to the protective worker. The parents said they felt the protective worker was too young and incompetent for this case and she had no idea about what was going on.**[268]
- **In his *viva voce* evidence the father said "DOHS would have to get us back the full baby bonus. The protective worker had contacted Centacare and said Mr & Mrs B don't have the full-time care."**[269]

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[264] *Op.cit.*, p.8.
[265] *Op.cit.*, p.17.
[266] See pp.78-79 of my notes where when asked to explain her reasons for so asserting the protective worker said: "Both parties have told me their side of the story".
[267] Succession of answers in cross-examination by counsel for DOHS at p.216 of my notes.
[268] From evidence in chief of witness 6 at p.85 of my notes.
[269] Evidence in cross-examination by counsel for the mother at p.208 of my notes.

Needless to say I don't have any power to order Centacare or anyone else to make any particular payment of any particular bonus. I didn't have the opportunity to hear Mr & Mrs B's side of the story so I make no positive findings but it would surprise me if they have an entitlement to the full baby bonus because they have only ever been carers for SD pursuant to interim accommodation orders.

None of the evidence I have heard leads me to the view that Mr & Mrs B were anything but very loving and committed carers for SD or that they have not done a very good job in starting him in life. Despite the evidence of the poor relationship between the parents and the B's, I would be content to place any or all of the four children in the care of Mr & Mrs B if they were adjudged to be at unacceptable risk of harm in the care of their parents. It is important that Mr & Mrs B understand the basis of the law that I am required to apply in this Court. In returning SD to his parents' care I am not making a finding that the parents are or will be better carers than his aunt & uncle. Under ss.10(3)(a) & 10(3)(g) of the *CYFA* I am required by law to place a child in the care of a parent rather than a non-parent unless there is an unacceptable risk of harm to the child in the parents' care. The fact that a non-parent may prove to be a better carer is a factor of "slight, if any, weight".[270]

24.3 THE MATERNAL GRANDMOTHER & MR M

Initially when the three older children were placed in the care of the maternal grandmother & Mr M, the placement was time-limited. The maternal grandmother had told DOHS that it was for 12 months and it could not be extended.[271] In my view this was a very generous offer by the maternal grandmother & Mr M who live in a small three bedroom house in location 3 and who have the permanent care of the children's half-brother JB.[272] It is especially generous when one realizes that Mr M has moved out of the house into the garage in order to allow AD & ND to sleep in his room.[273] Witness 16 said:

> **"[I] gained the impression whilst observing access at the current placement that all three children are loved by the maternal grandmother but that their presence is being tolerated rather than welcomed."[274]**

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[270] See also the case of *F v C* [Supreme Court of Victoria, unreported, 28/01/1994] applying dicta of Latham CJ in *Storie v Storie* (1945) 80 CLR 597 at 603.
[271] Evidence of the protecvtive worker at p.77 of my notes.
[272] Report of witness 16 dated July 2008 at p.3.
[273] *Ibid.*
[274] *Ibid.*

I must say that during her evidence I didn't get that impression from the maternal grandmother at all. Witness 18 didn't get that impression either:

> **Mr Power- "Was there any discussion with you about how long the children could remain with the maternal grandmother?**
> **Witness 18- Mr M states that he would be prepared to care for the children for a longer period if it came down to it. I was interested that the paternal grandmother was also prepared to make that statement so I suppose in my mind there was a possibility until the family was relocated to location 3 of one child remaining with the maternal grandparents.[275]**
> **Mrs Weinberg- When Mr M said he wouldn't mind having the children, the maternal grandmother was silent?**
> **Witness 18- That was the case. I didn't draw anything from that except it required more thought.**
> **Mrs Weinberg- The maternal grandmother has said she will keep them for a little bit longer. Next year. Is it your view that one of the 2 girls could stay with the maternal grandmother and one go back to the parents?**
> **Witness 18- There are a number of possibilities. In my mind I thought ND who seemed especially well bonded to JB, Mr M and the maternal grandmother would have her needs well met by remaining there longer and having plentiful access with her parents until she reached almost school age, based on evidence of her attachment patterns."[276]**

The maternal grandmother had an opportunity to express her views on this in the course of her evidence and did so in her characteristically forthright manner. I unequivocally accept the truth of what she said:

> **Ms Green- "There is some evidence of a time limited placement, that you would have them to…**
> **The maternal grandmother- After Christmas.**
> **Ms Green- Is that still your view in relation to the care of the children?**
> **The maternal grandmother- Well. [LONG PAUSE] Yes. On the assumption that MD, AD & ND will remain together at all costs. If that's not possible, then we would like them to remain with us."[277]**

I would have no problems about placing any or all of the children in the care of the maternal grandmother & Mr M if they were adjudged to be at unacceptable risk of harm in the care of their parents and the grandparents were happy to have them.

25. THE FAMILY HOME – THEN, NOW & FUTURE

The most long-standing and significant protective concern raised by the Department in this case has been the parents' inability in 2005, 2006 and part of 2007 to keep the family home in (address removed) in a clean, hygienic and uncluttered state, in

[275] See section 25 about the possibility of the family relocating to (location removed).
[276] At p.170 of my notes. I do not agree that reunification of ND should be delayed in the way suggested by witness 18 in this particular permutation.
[277] At p.184 of my notes.

short a state which did not form an unacceptable environmental hazard for the children.

I have already referred to some of the evidence of professionals who considered the parents' Ministry house to pose a unacceptable risk to the welfare of the children: see for instance the observations of witness 14 on 15/03/2006 & 06/02/2007[278] and witness 11.[279] In her assessment in November 2006 witness 17 had significant concern about the poor state of the home:

> **"[I] observed the home to be extremely dirty, with furniture in poor conditions and scarce: a situation consistent across time. The family's flat is located in an environment [near (location removed) Canal] that does not allow the children safety to play unless carefully supervised."[280]**

In the DOHS' referral to the Together Again Program dated August/September 2007 the writer summarized the Department's historical concerns:

> **"The initial protective concerns for MD, AD & ND were due to the environmental issues surrounding the family home. The condition of the home was less than standard and was putrid smelling…The [(name removed)] day care also reported that the children were attending dirty and their clothes smelt of an odour. They have concerns about the children's hygiene…Although [the parents] have cleaned the home it is still unacceptable for young children especially ND to be living there. The parents have spoken about moving homes. DOHS has supported this by supplying referral letters to the Department of Housing."[281]**

At the start of his evidence the father conceded the past environmental concerns in graphic terms but spoke positively about the "makeover" which the units in the flats are now undergoing:

> **"Yes. We had some clutter. I won't deny that part. We had 3 young children at the time. When we first moved into the premises the carpets were in very poor condition. In MD's room at the door there had been water seepage from the bathroom which had seeped into the carpet which had frayed at the edge, giving a mouldy smell. I tried steam cleaning the carpet. No matter how many times I tried, I could never get rid of the smell. The walls needed painting. There was paint peeling off the ceiling and the walls. The fan in the bathroom was not working. I had informed the Ministry of Housing. There was a gas pipe running through AD's bedroom which had 5 pin holes in it. It was not appropriate to put the child in that room because she would have died from carbon monoxide poisoning. The carpets in the lounge room were in very poor condition because of major stains. I'd steam cleaned 7 times but I couldn't remove the stains. There were also stains in the bedrooms.**

[278] See section 14.1 above.
[279] See section 12 above.
[280] See Take Two report dated 30/11/2006 at p.8.
[281] DOHS' referral dated Aug/Sept 2007 at pp.6-7.

The premises were old. The kitchen was a 1970's style. The doors of the cupboards were there but not in good condition. A bracket in an electrical fitting was broken. There were not really any issues to do with plumbing. The vanity unit was in very poor condition. The doors on the vanity unit were falling off. The bath was leaking from underneath and under the bath was rotting. The windows in the house would open and close but at the time the bedroom window in MD's room could be lifted very easily and anyone could have opened the window even from outside."[282]

"There has been very, very major work done on every single flat in the estate. They would have started in say probably late July, early August. New carpet has been laid throughout. Brand new lino laid in the kitchen, brand new blinds. Next Tuesday or Thursday the architect is coming in to redesign the kitchen, new cupboards, new stove, bathroom remodeled. The plumbers will come in and fix the problems with the bathroom. The lino people will come back…Then the painters come in to finish their task which is to prep and paint the walls and the electrician will come. The woodworkers will come and put in new inbuilt wardrobes...We'll stipulate a latch on the front door which would disenable my son from even trying to get out of the flat because the security door is there. He is half my chest height so he is able to reach the door handle."[283]

Witness 7 attended the home on 8 occasions between 24/05/2008 & 19/07/2008:

"The house is very tidy, the floors look vacuumed, the kitchen looks clean. It's a fairly old place. The walls and floors are quite dirty actually but that's wear and tear in an old place."[284]

Witness 16 completed a home safety assessment in June 2008 and by doing so inspected the family home. The house she described was simple and somewhat child-focused but not unhygienic:

"One of the factors contributing to the removal of the children was the extremely poor standard of housing and home environment. The house was reported to be filthy and foul smelling. [I] completed a home safety assessment and by doing so inspect the family home. The home was sparsely but adequately furnished, with plenty of toys available for the children to play with on access visits. The children's art work was the main form of decoration in the living area of the house and the father and the mother expressed a great deal of pride in the artwork when showing it to [me]. There was a significant amount of scribble on many of the walls, particularly in the bedrooms and [I] was informed that the children like to draw on the walls, even though they've been told not to on numerous occasions. The house has quite a musty smell, similar to the smell of damp carpet. The odour could be at least partly explained by the poor condition of the building, which is currently being upgraded by the Department of Housing. The main living area also has a strong smell of cigarette smoke…

The father & the mother informed [me] that they have cleared away a lot of junk from their house, cleaned it up and also made the windows more secure in an effort to address the safety concerns raised by DOHS. They are unhappy where they are living and have requested a move down near location 3 so that they are closer to family supports and so that the children can remain

[282] Evidence in chief of the father at p.198 of my notes.
[283] *Op.cit.*, p.199.
[284] Evidence in chief of access supervisor witness 7 at p.87 of my notes. See also section 16.2 above.

connected to the community that they have now settled in to…They have been on the housing list since 2004 and are still to be allocated housing in the (location removed) area."[285]

The neuropsychologist witness 8 has also reported being told by the mother on 19/03/2008 that "she and her partner are considering moving to location 3 when the children are returned to their care, in order to be closer to family". The mother also said that her mother "is very supportive"[286]. Such a move would have a number of advantages for the family:

- **The parents would be close to the very good support the maternal grandmother can provide.**
- **They would be involved with a different region of DOHS which would give them the opportunity of a 'fresh start'.**
- **They would be able to access a different Maternal & Child Health service.**
- **They may be able to access a child care service & school which are within walking distance of their home.**
- **It would be easier to arrange sibling access for any child not in parental care.**

At my request, witness 18 tried to find out from the Ministry of Housing how likely it is that the parents would be able to access multi-bedroom Ministry accommodation in the location 3/location 6 area. It is fair to say that she got the old "Privacy Act run-around" from the Ministry.[287] I am inclined to agree with her view that "obtaining Ministry housing in location 3 is not imminent for this family".[288] The father gave evidence that he found out that very day that the parents had been removed from the waiting list but would be reinstated in tenth place if the mother completed and returned a form promptly.[289] I do not believe the private rental market - including the location 3 Caravan Park - is really a viable option.[290] However, a move from location 1 is less urgent than it was given the "makeover" of the flats about which I was previously unaware.

I have included a condition on the orders for each of the children: "Parents must ensure that their home is maintained in a clean and uncluttered state."

In my referral to the Clinic, I said:

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[285] Report of witness 16 dated July 2008 at p.8.
[286] See report of witness 8 at p.1.
[287] See witness 18's Children's Court Clinic report at pp.29 & 37.
[288] See evidence in chief of the father at p.202 of my notes.
[289] *Op.cit.*, pp.30 & 37.
[290] See witness 18's Children's Court Clinic report at pp.29-30.

> **"The most enduring protective concern is the long-standing inability of the parents to maintain the family home in a safe and hygienic condition. Can the Clinician suggest any strategies for helping the parents to overcome their difficulties in this vital regard?"[291]**

Witness 18 responded:

> **"[I] believe it would be of assistance to trial a period of providing a paid house cleaner for a period of three months. A house cleaner who is paid to provide two hours per week of cleaning for this family could trial whether this simple intervention acts to assist the family to maintain the home in-between the weekly visits."[292]**

Counsel for the mother asked me to include on the children's orders a condition to this effect, requiring DOHS to pay for a professional cleaner. I refused, saying that the parents were relatively young adults and I was not prepared to use taxpayer money to assist them to keep their house clean and tidy. I would probably have taken a different view if the location 1 flats were not currently being renovated for the evidence – especially of the father & witness 7 – suggested that the primary reason for the flat being in such poor condition was wear and tear rather than a failure to clean. But the fabric of the building can no longer be blamed.

26. REUNIFICATION AND THE SEQUENCE THEREOF

26.1 WITNESS 3 & WITNESS 18 PREFERRED TO WITNESS 16 & WITNESS 17

There is a great deal that is highly commendable about these parents and their love for and interactions with their children. As witness 16 remarked, they are totally committed to having their children returned to their care, they clearly love their children and have tried their hardest to raise their children as well as they can.[293] Most of the usual indicia of child protection cases are missing from this case. There is no live issue with alcohol, drugs or prescribed medication. The parents are not recovered or unrecovered addicts. There are no psychiatric issues. There is no physical domestic violence.[294] They are an intact couple. All four children have the same father. The attachment between the parents and the three oldest children is

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[291] See section 18.6 of my referral dated 05/08/2008.
[292] Witness 18's Children's Court Clinic report at p.35.
[293] Report of witness 16 dated July 2008 at p.14.
[294] See section 10.3 above.

strong and there is every reason to believe that the parents will also be able to develop a strong bond with SD once he is returned to their care.[295]

While I agree with witness 16 that "love and commitment alone is not enough"[296] **to ensure the safety of these children, it is a very good start to my analysis and in any event it is a necessary pre-condition to their psychological safety and wellbeing. The Department's amended position in this case (namely not to oppose a Clinic assessment which had an emphasis on the means of reunification of AD & ND with their parents) indicates an acceptance – however reluctant – by it that the parents offer more than love and commitment to the girls. For the reasons set out in earlier sections of this judgment, I strongly prefer the opinions of witness 3**[297] **& witness 18**[298] **that these parents have the capacity to parent at least some of their children in a 'good enough' fashion over the contrary opinions of witness 16**[299] **& witness 17**[300]**.**

26.2 THE SEQUENCE OF REUNIFICATION

This is the most difficult aspect of the case. In the first place I prefer the opinion of witness 3 – with which witness 18 broadly agreed - that there should be "some sort of gradual approach with respect to MD, AD & ND"[301] **over the contrary opinion of the maternal grandmother that there was no reason why the 3 oldest children could not be returned together**[302]**.**

At present I agree with witness 3's nominated sequence (including her option of AD before ND): 1. SD 2. AD 3. ND. I am satisfied that the parents are ready and willing to take on the task. However, it is important to proceed step by step, child by child and assess how each child's reunification goes. This means that it will probably prove to be necessary to hold off a decision on reunification or permanent care for MD until the outcome of each of the other three children is known. I do not mean by this that a failure of reunification of one child in the postulated sequence ought necessarily terminate the process of reunification for children further down

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[295] See section 19 above. See also p.30 of witness 18's Children's Court Clinic report.
[296] Report of witness 16 dated July 2008 at p.14.
[297] See section 18 above.
[298] See section 20 above.
[299] See section 21 above.
[300] See section 17.1 above.
[301] See section 18.7 above and p.41 of my notes.
[302] See section 22 above and p.184 of my notes.

the list. That will depend on the circumstances of any such failure. But it is my view that no formal decision on MD should be made at the moment. In deciding the sequence, I adopt the following evidence of witness 3:

> **"I would like to see the intervention with the parents and then assessing with the least challenging arrangement possible first…I'm not entirely sure whether AD & ND together or whether AD because it appeared she may be able to engage her parents more easily while the parents develop their skills but I know MD would be the more high-risk child… SD is 2 months old. It would make it stressful so it may be better to work on SD and the parents initially because a 2 month old baby would require 24 hour care basically so it would be stressful because they would be up at night and not getting normal sleep to feel calm and relaxed. It's not an easy question and I'd probably want to talk to the parents. I do think the issue of SD and his attachment is of very prime importance."[303]**

The "least challenging arrangement possible first" means AD before ND before MD. However, the reason that the issue of SD and his attachment is of prime importance is based on considerations of infant development and follows from the evidence of witness 18 (which is on all fours with witness 3's less detailed analysis):

> **Mr Thomas- "What is the latest that SD should be returned from an attachment perspective before he is placed back with his parents?**
> **Witness 18- I guess the times it becomes more risky when an infant begins to develop – at around 6 months – a selective attachment: object permanence, a cognitive capacity in the infant which allows them to know the teddy bear is the same bear and the mother is the same mother. Those sorts of cognitive events happen at about the same time as selective attachment is developed and becomes more specific and intense over time. We see stranger anxiety around 6-9 months in infants and around 18 months we see another exacerbation of that which is normal development and part of a tendency in an infant to look at normal attachment. [The answer is] the earlier the better. It doesn't mean it is unmanageable if it is later but a child from age 6 months will undergo some grief process from the loss of some recognized and permanent attachment they have started to make, some awareness this is someone who should come back and isn't. With good care transition will be easier but the child will nevertheless grieve somewhere between the ages of 6-9 months for the loss of that attachment."[304]**

I also agree with witness 3 that in relation to SD's emotional development there was no need for his reunification to be done in stages: "The baby would manage OK although there may be some unsettled behaviour."[305] Witness 18 also agreed.[306]

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[303] Answers to questions by counsel for DOHS at p.41. SD is now 4 months old and the issue of his attachment is of even more prime importance than when witness 3 gave evidence on 23/07/2008.

[304] At p.176 of my notes. In answer to questions by counsel for the mother (at p.38 of my notes) witness 3 said: "The urgency…is for the baby to identify their primary caregiver and the risk of leaving the baby out of the parents' care is some confusion over whom the baby will become attached to." She agreed that "in time the uncle and aunt will be seen as primary caregivers and it will be much, much harder to return SD to the care of the parents." She also agreed that "the urgency would be to return SD sooner than later".

[305] In answer to a question by me at p.38 of my notes.

[306] See p.30 of witness 18's Children's Court Clinic report and see section 20 above.

26.3 WHAT IF ONE OR MORE CHILDREN MISS OUT ON REUNIFICATION?

The foregoing analysis means that I disagree with witness 18's first preferred option of not reunifying SD with his parents at all because of a fear that might result in MD missing out altogether:

> **"I'm saying if SD goes back first it is unlikely that MD will reunify successfully…because MD has higher needs and the parents are unlikely to be able to parent the equivalent of 5 children in the longer term in a 'good enough' fashion, unlikely to."[307]**

Witness 18 found it very difficult to contemplate MD not being reunified with his family. She clearly considered that would be a tragic outcome for him and she seemed to me to be almost physically affected by the next questions that Mrs Weinberg asked her. Whether or not she regarded her very careful answers as some sort of betrayal of MD, they really involved a victory of professional reasoning and logic over emotion:

> **Mrs Weinberg- "If you were having to make a decision presumably it would be MD first?**
> **Witness 18- Um. [LONG PAUSE] To ensure he was reunified successfully, yes but the decision about which three for me becomes an ethical question.**
> **Mrs Weinberg- Because you assume that four is never a possibility because these children the way they are – they are really five – and the parents wouldn't be good enough for four?**
> **Witness 18- There are 4 children and based on my detailed assessment of SD and the two girls it seemed to me that family constellation was a viable one. There was a sense that could work. Even though SD has high needs as an infant, I assessed the mother has the capacity to develop the attachment with him and him with her. Both of the girls appeared to have what I'd consider an easy temperament in many ways. They are well regulated for their age and they were well disposed towards SD. Both girls showed helping behaviours and interest in him so I felt quite confident that group of three would work for a reunification plan. But as is indicated in my family assessment when MD came in his attention-seeking behaviour and a fairly consistent lack of interest in SD started to suggest to me this combination was going to be very difficult."**
> **…**
> **Mrs Weinberg- If this were the program to be adopted, MD wouldn't be number four because the parents are not good enough for four and MD would ruin it for the three.**
> **Witness 18- Based on my assessment it is unlikely to be successful. I wish it were otherwise. There is certainly a doubt and concern there." [308]**

Witness 3 had a similar difficulty with the concept of MD missing out:

> **Mrs Weinberg- "Could MD upset the [parents'] learning process with respect to the 2 little girls and SD?**
> **Witness 3- Yes – sadly – a terrible thing to think about. His demands are much higher and it would be harder to get all these routines in place when he is there.**
> **Mrs Weinberg- His demands are not the norm?**
> **Witness 3- Not from what I saw. He is very persistent."[309]**

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[307] Evidence of witness 18 in cross-examination by counsel for DOHS at p.170 of my notes.
[308] At pp.170 & 173 of my notes.

Understandably enough, everyone involved with this case previously seems to have treated the children as a 'job lot', that either they should all be reunified with their parents or none of them should be. From the time I first read a summary of witness 3's assessment highlighting the difficulties that MD's behaviour posed for the parents during her assessment on 16/04/2007, I wondered why no one had considered proceeding with reunification of the other children and then commencing a reintroduction of MD into the family group only if the parents were assessed as being able to manage MD as well as the other 3 children. I asked witness 3 about why everyone seemed to have treated reunification as "all or nothing". She replied:

> **"That's a really good question. Given the age of the children there's a tendency to do that. I remember ND being a very easy going smiley baby. Unfortunately it would be so easy to leave her because she looked so easy-going. AD seemed to occupy herself so well even though she was so young. It would be easy for them to be left and probably not attended to as frequently as ideally they should be. Taking MD out of the equation? Yes. I'm not sure. I'd have to look at that."[310]**

Counsel for DOHS then asked: "What would be the emotional impact on MD if the 3 siblings were reunified with the parents and he was one-out on a permanent care order?" Witness 3 replied:

> **"It is very difficult for me specifically to comment but in general you would have to worry about how he would feel in the future."[311]**

Witness 18 expressed a similar concern for MD in the converse situation of him being sent home and the reunification failing:

> **Mrs Weinberg- "If MD is sent home and the parents can't deal with him, how would the child deal with being sacrificed for the interests of the greater number?**
> **Witness 18- He is already a sensitive, emotional child and I think he will feel rejected. He is already feeling rejected by his parents because he is out of their care for whatever reason."[312]**

Witness 18 saw this Sophie's Choice as an ethical question. For me it is not either an ethical or a moral question, certainly not in the sense of the sorts of questions raised in cases like *R v Dudley & Stephens*.[313] It is a legal question. Which of the

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[309] At p.42 of my notes.
[310] At p.31 of my notes.
[311] *Ibid.*
[312] At p.173 of my notes.
[313] (1884) 14 QBD 73. This case concerned survival cannibalism following a shipwreck and is authority for the proposition that necessity is no defence t a charge of murder.

various permutations is in the best interests of the greatest number of the children?[314] My overriding concern is that if MD was first and failed, the other children might never get a chance depending on the circumstances of the failure. Section 10(3)(q) of the *CYFA* requires me – in determining the best interests of each child – to consider the desirability of siblings being placed together when they are placed in out of home care. It needs little imagination to understand the importance of this consideration. But I do not believe I am entitled in law to sacrifice the rights of any of the other children to a childhood in the care of their parents – as s.10(3)(a) of the *CYFA* contemplates - simply in order to keep them under the same roof as MD, sad as that may be for MD. In any event, as I understand DOHS' tentative plan for MD, he would be in a different out of home placement from the other children. In my view it is too early at the present time to commit to a decision one way or the other for MD notwithstanding that DOHS has been exploring a non kith-and-kin placement for him at Rosebud, a placement which has not yet been confirmed.

27. P.A. FOR SD PROVED & SUP'N ORDER MADE

The question of whether any of the grounds under s.162(1) of the *CYFA* are established is to be determined objectively - as opposed to deciding whether such risk or harm was intended by the parent(s)' actions - and is to be determined as at the time when the protection application was made.[315]

In *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)*[316] Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed) held that in the similar provision in s.31(2)(a) of the *Children Act 1989* (Eng):

> **"Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not…<u>[L]ikely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored</u> having regard to the nature and gravity of the feared harm in the particular case."[317]**

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[314] See the test I have enunciated in section 15 above.

[315] See *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002] per Judge Cohen at p.18 {An application for judicial review pursuant to O.56 was dismissed: *Mr & Mrs X v Secretary to DOHS* [2003] VSC 140 per Gillard J}.

[316] [1996] AC 563.

[317] At p.585. The emphasis is mine.

His Lordship went on to provide guidance on how likelihood of harm may be proved, noting that the section contains "the language of proof, not suspicion"[318]:

> **"A decision by the Court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom….[A] court's conclusion that the threshold conditions are satisfied must have a factual base, and…an alleged but unproved fact, serious or trivial, is not a fact for this purpose. Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened."[319]**
>
> **"The range of facts which may properly be taken into account is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed changes within the membership of a family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, when taken together may suffice to satisfy the court of the likelihood of future harm."[320]**

SD was apprehended by DOHS from Royal Women's Hospital within a couple of hours of being born and a protection application was taken out immediately. There is therefore no evidence that he has suffered any actual harm as a consequence of any action or inaction by his parents. However, the parents do not oppose the protection application being proved on the basis that SD was at risk of future harm.

I do not accept a number of the matters on which DOHS rely in order to ground the protection application.[321] However, I do accept that the following matters in combination gave rise on 27/05/2008 to a real possibility, a possibility that cannot sensibly be ignored, that SD would suffer significant future harm of the type referred to in ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *CYFA*. Those matters are:

- **The mother's failure to seek ante-natal care throughout her pregnancy.**
- **The parents' attempt to hide the pregnancy both from DOHS and generally.**
- **Concerns about the mother's suspected depression.**
- **The environment of the family home which often in the past had been so poor as to threaten the development and basic needs of the children.[322]**
- **The state – consistent with neglect – in which the three older children presented when they were apprehended at location 5 Motor Inn on 15/02/2007.[323]**

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[318] At p.590.
[319] At pp.590-591.
[320] At p.591.
[321] These matters are set out in DOHS' Application and Disposition report of the protective worker re SD dated 10/06/2008 at pp.8-9.
[322] See e.g. evidence of witness 11 in section 12 & witness 14 in section 14.1 above.

- **The difficulties experienced by the parents containing, supervising and parenting the three older children, primarily MD. This included MD's two escapes thus described by witness 10:**

> **"MD had escaped twice, was found on a busy road and taken to the police. The second time he escaped he took AD with him. She was 2 years old. The parents were unaware the children had left the unit."[324]**

- **The involvement of the parents with DOHS in relation to protective concerns for MD, AD & ND, a number of which had not been completely allayed.**

Accordingly, the protection application for SD AD3 is found proved on the likelihood limbs of the grounds set out in ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *CYFA*.

The protection application having been proved, the question is what (if any) protection order should be made.[325] I have no doubt that a significant role remains for the Department in SD's life and indeed the parents concede that a supervision order is appropriate.[326] The Department recommends a custody to Secretary order for 12 months. I agree with the parents' position on a supervision order and consider that its duration should be 12 months. Taking into account all of the evidence – and giving greatest weight to that of witness 3 & witness 18 – I am satisfied that at the present time:

- **A supervision order will adequately protect SD from harm, protect his rights and promote his development [s.10(2)];**
- **intervention into the relationship between SD and his parents to an extent greater than that provided by a supervision order is not necessary to ensure SD's safety and wellbeing [s.10(3)(a)];**
- **the need to strengthen, preserve and promote a positive relationship between SD and his parents and siblings is best achieved by returning the infant to his parents' care [s.10(3)(b)];**

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[323] See evidence of protective worker 2 detailed in section 14.2 above.
[324] Evidence of witness 10 at p.98 of my notes.
[325] See ss.274 & 275 of the *CYFA*.
[326] Section 280(1)(a) of the *CYFA* provides that "a supervision order gives the Secretary responsibility for the supervision of the child."

- **SD is not at unacceptable risk of harm if placed in his parents' care** [s.10(3)(g)];
- **it is desirable to plan SD's immediate reunification with his parents** [s.10(3)(i)]; **and**
- **the parents have the requisite capacity to provide for SD's needs** [s.10(3)(j)].

In my view the above matters deriving from s.10(2) and paragraphs (a), (b), (g), (i) & (j) of s.10(3) of the *CYFA* outweigh the matters in paragraphs (e) & (f) of s.10(3).

Giving weight to s.10(3)(k) of the *CYFA*, I must ensure that there is ongoing access between SD and Mr & Mrs B, the maternal grandmother & Mr M and the paternal grandmother. I have included conditions to this effect. The access involving the maternal grandmother & Mr M will also ensure access between SD and his siblings.

Other conditions include:

> **2. Each parent must accept and cooperate with support services as agreed with DOHS, must allow the child to be the recipient of services as agreed with DOHS and must allow reports to be given to DOHS. Such services may include – but are not restricted to – financial counselling services and/or services assessed as appropriate and/or provided by TakeTwo.**
>
> **9. Mother or father must take the child to a doctor and/or Maternal & Child Health Nurse for regular checkups as recommended by the doctor or MCHN and must allow reports to be given to DOHS.[327]**
>
> **16. Parents must enrol the child in childcare as soon as possible and ensure that the child attends childcare one or 2 days per week.**

28. EXTENSION OF CUSTODY ORDERS FOR 3 OLDEST

Section 295(2) of the *CYFA* requires the Court, in determining an application to extend a custody to Secretary order, to give due consideration to:

(a) the appropriateness of making a permanent care order in respect of the child; and
(b) the benefits of the child remaining in the custody of the Secretary.

Section 295(3) of the *CYFA* requires the Court, in determining an application to extend a custody to Secretary order, also to take into account:

(a) the nature of the relationship between the child and parent, including the nature of the access between the child and the parent during the period of the order; and
(b) 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
(c) any action taken by the parent to give effect to the goals set out in the case plan; and

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[327] In light of the matters discussed in section 11 above, it might not be practicable for the father to take SD to the (name removed) MCHN but I do not see any reason why the mother should not be able to.

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

(e) any other fact or circumstance that, in the opinion of the Court, should be taken into account in considering the best interests of the child.

Sections 295(2) & 295(3) do not oust the "best interest" principles set out in s.10 of the *CYFA*. On the contrary, it is clear from s.294 that they must be read subject to the provisions of ss.10(1), 10(2) & 10(3) of the *CYFA*.

As I have said above[328], I am satisfied that AD & ND should be case planned for reunification with their parents. Further, it is too early to make a decision as to whether or not MD should be case-planned for reunification or for permanent care. Given these findings, it follows that I am satisfied that ss.295(2)(a) & 297(1)(d) of the *CYFA* are not presently applicable and accordingly the direction referred to in s.297(1)(f) of the *CYFA* is also not applicable.

However, given that there would be an unacceptable risk of harm to each of the three oldest children if he or she was to be returned to the immediate care of the parents in an unplanned and unstructured way, it is in the best interests of MD, AD & ND to extend their custody to Secretary orders.[329] The matters in ss.295(2)(b), 295(3)(b), 295(3)(c) & 10(2) and in paragraphs (e), (f), (h), (i), (j) & (k) of s.10(3) of the *CYFA* outweigh those in ss.295(3)(a) & 295(3)(d) and in paragraphs (a), (b), (d) & (g) of s.10(3).

Given that the children are not legally represented, it may seem strange that I have referred to s.10(3)(d) of the *CYFA* which requires me to give consideration to the child's views and wishes and give them such weight as is appropriate. However, there is a mass of evidence – of which the three extracts below are instances – which leaves me in no doubt that I can imply that the wishes of MD, AD & ND are to live with their mum and dad:

> **Mrs Green- "When the parents left [the Clinic] it was clear that AD & MD were distressed and wanted to leave with the parents?**
> **Witness 3- Yes. I had no doubts MD was attached to both parents."[330]**
>
> **Mrs Weinberg- "Are the children happy to go [to access]?**
> **Witness 7- They are very excited, very excited…On most occasions when I arrive at the maternal grandmother's home they race out of the door screaming we are going to see mum & dad. They can't wait to get into the car.**

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[328] See section 26 above.
[329] See s.294 of the *CYFA*.
[330] At p.40 of my notes.

> …
> **<u>Mrs Weinberg</u>- Are the children distressed when they have to go home [after access]?**
> **<u>Witness 7</u>- On 2 occasions out of the 8, MD & AD cried quite a bit and were quite withdrawn on the drive home. They didn't want to leave mum and dad."[331]**

The custody to Secretary orders for the 3 children have been in force since 24/04/2007. Since s.297(1)(f) is not presently applicable the maximum period for which the orders may be extended is 2 years.[332] The Department is seeking an extension of 12 months.[333] Balancing all of the evidence I consider that an extension of 12 months is in the best interests of all 3 children and the custody to Secretary orders are extended accordingly.

29. REVOCATION APPLICATIONS ADJOURNED

From the point of view of the smooth operation of this Court, I would have much preferred to have completed these cases on 12/09/2008 rather than adjourning them for yet more hearing dates. However, given-

(i) the indifferent handling of this case by DOHS in a number of respects since 24/04/2007;[334]

(ii) the poisonous relationship between the father and DOHS, for which blame must be attributed to both sides although mainly to the father;[335] and

(iii) several periods of DOHS' inactivity during the past 17 months which seem to have been broken only by the fact that a court hearing date was pending-

it does not seem to me to be in the best interests of any of the 3 older children for the Court simply to withdraw at present and leave these unequally matched antagonistic parties alone to hold the key to the children's future. Hence I adjourned the revocation applications to 03/12/2008 for a continuation of this hearing [booked in for 2 more days]

This case was booked in for 8 days. It has already taken 13 days. I do not blame counsel for this. They like I are prisoners of the grossly wasteful processes of the adversarial system with their concomitant negative impact on the efficient, timely and economical disposition of proceedings in the Family Division of this Court.

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[331] At pp.86 & 88 of my notes.
[332] In these circumstances s.296(2)(b) of the *CYFA* prevails over s.297(1)(e).
[333] See section 4.1 above.
[334] As to which see section 23 above.
[335] See section 10.4 above.

The parents have achieved a fair measure of success in this case to date. Their case had and continues to have a great deal of merit. I trust that Victoria Legal Aid will extend their legal assistance for the adjourned dates. For the parents to be unrepresented for the balance of this hearing would be very hard on them and – more importantly – grossly unjust to the children.

30. INTERIM VARIATION OF CUSTODY ORDERS

Section 302(1) of the *CYFA* provides:

> **"On an application under s.300 in relation to [variation of] a custody to Secretary order, the Court may in exceptional circumstances vary any of the conditions included in the order or add or substitute a condition pending the final determination of the application."**

I am satisfied that it is overwhelmingly in the best interests of MD, AD & ND for their custody to Secretary orders to be varied on an interim basis now. I am usually very reluctant to vary the *status quo* until a contested hearing is completed but there are clearly quite exceptional circumstances in this case which justify interim variations under s.302(1).

In my view the best interests of AD & ND require that the commencement of the reunification process not be unduly delayed. At this stage it would not be right to treat MD differently from ND. As I have said[336], it is not in the best interests of any of the children for the parents' access to continue to be supervised. Nor is it in the children's interests to be transported from location 3 to location 1 for a 2 hour access each Saturday and then back to location 3. It is better for them and for their parents to have a longer period of access in location 3. The maternal grandmother appeared untroubled by this:

> **Mr Power- "If it was to be 2 overnights rather than 1 overnight, would that pose an unworkable problem from your point of view or Mr M's point of view?**
> **The maternal grandmother-I don't think so.**
> **Mr Power- If the Court were to return the children in a staged way with minimal interruption to crèche-kinder requirements, would you be prepared to fit in with a reunification plan no matter what it was?**
> **The maternal grandmother- Oh definitely, definitely."[337]**

I have therefore amended the parental access conditions to permit the parents to have unsupervised access with each child at the maternal grandmother's residence

[336] See section 16.3 above.

from Monday midday to Wednesday (other than any period at which the child is at school or child care), the times to be arranged between the parents and the maternal grandmother. I would have preferred to have made this from Sunday to Tuesday but public transport between Melbourne & location 3 would not have enabled the parents to arrive at location 3 before 8.45pm on a Sunday whereas they can arrive by about 12.30pm on a Monday and leave at about 12.45pm on a Wednesday. In addition, for AD I have permitted additional access at the parents' home from Sunday afternoon to Monday midday one weekend a month in September & October and every week from 02/11/2008. This is to enable a reunification plan for AD to be advanced. Once AD is back, I would not expect ND to be far behind. However, I have not - at this stage - included her in the Sunday accesses in order to try to prevent MD feeling too left-out. I have also added formal conditions for the children to have access with Mr & Mrs B and with the paternal grandmother.

31. FINDINGS, ORDERS & RECOMMENDATIONS

On 12/09/2008 I made the following findings, orders & recommendations:

31.1 SD

31.1.1 The protection application for SD AD3 is found proved on the likelihood limbs of the grounds set out in ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *CYFA*.

31.1.2 SD is placed on a supervision order in the care of his mother and his father for 12 months until 11/09/2009. This order contains the following 16 conditions:

1. **Each parent must accept visits from and cooperate with DOHS.**
2. **Each parent must accept and cooperate with support services as agreed with DOHS, must allow the child to be the recipient of services as agreed with DOHS and must allow reports to be given to DOHS. Such services may include – but are not restricted to – financial counselling services and/or services assessed as appropriate and/or provided by TakeTwo.**
3. **Father must continue to go to counselling with (name removed) Family Life for as long as the counsellor recommends and must allow reports about attendance to be given to DOHS.**
4. **Mother must go to counselling with a counsellor nominated by the maternal grandmother for as long as the counsellor recommends and must allow reports about attendance to be given to DOHS.**

[337] At p.40 of my notes.

5. **Mother must go to a medical professional for assessment and for any necessary treatment in relation to depression and iron deficiency, must take any prescribed medication and must allow reports to be given to DOHS.**
6. **Parents and child must attend family therapy as agreed with DOHS. Parents must allow reports about attendance and progress to be given to DOHS.**
7. **Father must not use insulting words to or about DOHS' staff.**
8. **Mother or father must take the child to a paediatrician for assessment and for any necessary treatment as directed by DOHS and must allow reports to be given to DOHS.**
9. **Mother or father must take the child to a doctor and/or Maternal & Child Health Nurse for regular checkups as recommended by the doctor or MCHN and must allow reports to be given to DOHS.**
10. **Parents must ensure that their home is maintained in a clean and uncluttered state.**
11. **Parents must tell DOHS at least 24 hours before changing the address of their home.**
12. **Unless otherwise authorized by DOHS, the parents must not allow the child to reside overnight in any location other than their home or the homes of the maternal grandmother, the paternal grandmother or Mr & Mrs B.**
13. **The maternal grandmother may have access with the child and/or provide respite for the child at times and places as agreed between herself and the parents.**
14. **The paternal grandmother may have access with the child from Friday afternoon to Sunday afternoon one weekend per month, the times to be arranged between herself, the parents & DOHS. DOHS or its nominee must facilitate such access in consultation with the parents and the paternal grandmother.**
15. **Mr & Mrs B may have access with the child from Saturday morning to Monday midday one weekend per month, the times to be arranged by DOHS. DOHS or its nominee must facilitate such access in consultation with the parents and Mr or Mrs B. In addition, Mr & Mrs B may provide respite for the child until the afternoon of Monday 15/09/2008.**
16. **Parents must enrol the child in childcare as soon as possible and ensure that the child attends childcare one or 2 days per week.**

31.2 AD

31.2.1 The DOHS' application AD1 dated 06/12/2007 to extend the custody to Secretary order for AD is granted. The custody to Secretary order first made on 24/04/2007 is extended for 12 months until 11/09/2009 pursuant to s.296(2)(b) of the *CYFA*.

31.2.2 The DOHS' application AD2 dated 08/07/2008 to vary the custody to Secretary order for AD is granted on an interim basis pursuant to s.302 of the *CYFA*. Until further order of the Court, that custody to Secretary order is varied by replacement of the previous conditions with the following 15 conditions:

1. **Each parent must accept visits from and cooperate with DOHS.**
2. **Each parent must accept and cooperate with support services as agreed with DOHS, must allow the child to be the recipient of services as agreed with DOHS**

and must allow reports to be given to DOHS. Such services may include – but are not restricted to – financial counselling services and/or services assessed as appropriate and/or provided by TakeTwo.

3. **Father must continue to go to counselling with (name removed) Family Life for as long as the counsellor recommends and must allow reports about attendance to be given to DOHS.**
4. **Mother must go to counselling with a counsellor arranged by the maternal grandmother for as long as the counsellor recommends and must allow reports about attendance to be given to DOHS.**
5. **Mother must go to a medical professional for assessment and for any necessary treatment in relation to depression and iron deficiency, must take any prescribed medication and must allow reports to be given to DOHS.**
6. **Parents and child must attend family therapy as agreed with DOHS. Parents must allow reports about attendance and progress to be given to DOHS.**
7. **Father must not use insulting words to or about DOHS' staff.**
8. **Each parent must allow the child to be taken to a paediatrician for assessment and for any necessary treatment as directed by DOHS and must allow reports to be given to DOHS.**
9. **Parents must ensure that their home is maintained in a clean and uncluttered state.**
10. **Parents must tell DOHS at least 24 hours before changing the address of their home.**
11. **Parents may have unsupervised access with the child at the residence of the maternal grandmother from Monday midday to Wednesday (other than any period at which the child is at child care), the times to be arranged between themselves and the maternal grandmother.**
12. **In addition to the access referred to in condition 11, the parents may have unsupervised access with the child at their home once per month from Sunday afternoon until Monday midday on any weekend the child has had access with the paternal grandmother. Starting on Sunday 02/11/2008 the parents may have unsupervised access with the child at their home every week from Sunday afternoon to Monday midday. DOHS or its nominee must facilitate the transfer of the child to the parents' home.**
13. **Parents and child may leave the parents' home or the carer's home during parental access but must stay overnight at the relevant home.**
14. **The paternal grandmother may have access with the child from Friday afternoon to Sunday afternoon one weekend per month, the times to be arranged between herself, the parents, the maternal grandmother & DOHS. DOHS or its nominee must facilitate such access in consultation with the parents, the maternal grandmother and the paternal grandmother.**
15. **Mr & Mrs B may have access with the child from Saturday morning to Sunday afternoon one weekend per month, the times to be arranged by DOHS. DOHS or its nominee must facilitate such access in consultation with the parents, the maternal grandmother and Mr or Mrs B.**

31.2.3 The DOHS' application AD2 dated 08/07/2008 to vary the custody to Secretary order for AD and the mother's application AM1 dated 18/06/2008 to revoke the custody to Secretary order for AD are adjourned to 03/12/2008 for a continuation of this hearing [booked in for 2 more days]. Any report upon which DOHS wishes to rely in the further hearing in this case must be filed and served no later than 27/11/2008.

31.2.4 The extension is made under s.296(2)(b) of the *CYFA*, not under s.297. It is the Court's strong view and recommendation that AD be case-planned for reunification with her parents, such process to be designed to ensure that she is the second child (after SD) to be returned to her parents' care.

31.2.5 The Court strongly recommends that AD be allowed to remain in the care of her maternal grandmother & Mr M until the hearing of all applications is completed unless she is reunified with her parents in the meantime.

31.3 ND & MD

31.3.1 The DOHS' applications AD1 dated 06/12/2007 to extend the custody to Secretary orders for ND & MD are granted. The custody to Secretary orders first made on 24/04/2007 are extended for 12 months until 11/09/2009 pursuant to s.296(2)(b) of the *CYFA*.

31.3.2 The DOHS' applications AD2 dated 08/07/2008 to vary the custody to Secretary orders for ND & MD are granted on an interim basis pursuant to s.302 of the *CYFA*. Until further order of the Court, those custody to Secretary orders are varied by replacement of the previous conditions with the following conditions:

1. **Each parent must accept visits from and cooperate with DOHS.**
2. **Each parent must accept and cooperate with support services as agreed with DOHS, must allow the child to be the recipient of services as agreed with DOHS and must allow reports to be given to DOHS. Such services may include – but are not restricted to – financial counselling services and/or services assessed as appropriate and/or provided by TakeTwo.**
3. **Father must continue to go to counselling with (name removed) Family Life for as long as the counsellor recommends and must allow reports about attendance to be given to DOHS.**
4. **Mother must go to counselling with a counsellor arranged by the maternal grandmother for as long as the counsellor recommends and must allow reports about attendance to be given to DOHS.**
5. **Mother must go to a medical professional for assessment and for any necessary treatment in relation to depression and iron deficiency, must take any prescribed medication and must allow reports to be given to DOHS.**
6. **Parents must attend family therapy as agreed with DOHS. Parents must allow reports about attendance and progress to be given to DOHS.**
7. **Father must not use insulting words to or about DOHS' staff.**
8. **Each parent must allow the child to be taken to a paediatrician for assessment and for any necessary treatment as directed by DOHS and must allow reports to be given to DOHS.**
9. **Parents must ensure that their home is maintained in a clean and uncluttered state.**
10. **Parents must tell DOHS at least 24 hours before changing the address of their home.**

11. **Parents may have unsupervised access with the child at the residence of the maternal grandmother from Monday midday to Wednesday (other than any period at which the child is at school/childcare), the times to be arranged between themselves and the maternal grandmother.**
12. **Parents and child may leave the carer's home during parental access but must stay overnight at the relevant home.**
13. **The paternal grandmother may have access with the child from Friday afternoon to Sunday afternoon one weekend per month, the times to be arranged between herself, the maternal grandmother & DOHS. DOHS or its nominee must facilitate such access in consultation with the maternal grandmother and the paternal grandmother.**
14. **Mr & Mrs B may have access with the child from Saturday morning to Sunday afternoon one weekend per month, the times to be arranged by DOHS. DOHS or its nominee must facilitate such access in consultation with the maternal grandmother and Mr or Mrs B.**
15. **[MD ONLY] DOHS must facilitate an autism assessment for the child. The parents must allow reports to be given to DOHS. DOHS is to forward to a legal representative of the mother and of the father a copy of any such report which it receives.**

31.3.3 The DOHS' applications AD2 dated 08/07/2008 to vary the custody to Secretary orders for ND & MD and the mother's applications AM1 dated 18/06/2008 to revoke the custody to Secretary orders for ND & MD are adjourned to 03/12/2008 for a continuation of this hearing [booked in for 2 more days]. Any report upon which DOHS wishes to rely in the further hearing in this case must be filed and served no later than 27/11/2008.

31.3.4 Both extensions are made under s.296(2)(b) of the *CYFA*, not under s.297.

31.3.5 It is the Court's strong view and recommendation that ND be case-planned for reunification with her parents, such process to be designed to ensure that she is the third child (after SD & AD) to be returned to her parents' care.

31.3.6 In the Court's view it is too early to make a decision as to whether or not MD should be case-planned for reunification or for permanent care. The Court recommends that no formal decision be made as to MD's long-term future placement until after the process of reunification of SD, AD & ND has been attempted and evaluated.

31.3.7 The Court strongly recommends that ND & MD be allowed to remain in the care of their maternal grandmother & Mr M at least until the completion of the next hearing in this case.

<u>PETER T. POWER</u>
Magistrate
Melbourne Children's Court