

CHILDREN'S COURT OF VICTORIA

Applicant: (Name removed) “the protective worker”
[Department of Human Services]

Children¹: LD [03/05/2003]
WDW [31/03/2006]
KD [08/08/2007]

<u>JUDICIAL OFFICER:</u>	PETER T. POWER
<u>WHERE HELD:</u>	MELBOURNE
<u>DATES OF HEARING:</u>	08-12/12/2008, 15-17/12/2008
<u>DATE OF ORDERS:</u>	07/01/2009
<u>DATE OF REASONS:</u>	07/01/2009
<u>CASE MAY BE CITED AS:</u>	DOHS v Mr D & Ms W
<u>MED. NTRL. CITATION:</u>	[2009] VChC 1

Child protection – Protection application – Children aged 5¾, 2¾ & 1½ – Protective concerns centred on mother’s mental health and use of cannabis & prescription medication as well as domestic violence in the relationship between the mother and father and environmental neglect while in mother’s care — Criticism of DOHS for its initial recommendation of custody to Secretary order when father was willing and able to parent the children and there were no identified protective concerns about him – Effect of mother’s failure to give evidence – Cumulative risk of harm – Protection application proved on likelihood of emotional harm – Whether in best interests of children to be placed on supervision order in care of the father or on supervision order in the care of the mother with assistance from a maternal aunt – Conditions relating to access of mother & maternal aunt – Relationship with orders under the *Family Law Act 1975* (Cth) – *Children, Youth and Families Act 2005*, ss.8, 10, 162(1)(c), 162(1)(e), 162(2), 280-282 – *F v C* [Supreme Court of Victoria, unreported, 28/01/1994]

Inconsistency between child protection order and family violence intervention order – Dangers inherent in *ex parte* orders – Father’s attendance at counselling – Variation of intervention order to remove inconsistency – *Family Violence Protection Act 2008*, s.173

PARTY	COUNSEL	SOLICITOR
Department of Human Services [Child Protection]²	Mr J Stevens	Court Advocacy Unit – Ms Armstrong
Mother [name removed “the mother”]	Mr M Teare	Gorman & Hannan
Father [name removed] “the father”	Mrs R Weinberg	Victoria Legal Aid
LD, WDW, KD	Unrepresented – Too young to give instructions	

¹ It seemed strange to me that WDW, the middle child, had a hyphenated surname involving the names of the father and mother, whereas the other two children had the surname of their father. In answer to my question about this, counsel for the mother told me that he was instructed “that was just how it happened on the birth certificate”.

² Hereinafter ‘DOHS’ or ‘the Department’.

INDEX

1. STRUCTURE OF FAMILY & EXTENDED FAMILY	3
1.1 THE CHILDREN & THE PARENTS.....	4
1.2 THE CHILDREN'S HALF-SIBLINGS ON MOTHER'S SIDE.....	5
1.3 THE CHILDREN'S HALF-SIBLINGS ON FATHER'S SIDE	5
1.4 THE MATERNAL EXTENDED FAMILY.....	6
2. CURRENT PROTECTION APPLICATIONS & ORDERS....	6
3. POSITIONS OF THE PARTIES IN THIS CONTEST	8
3.1 THE DEPARTMENT'S POSITION.....	8
3.2 THE FATHER'S POSITION	9
3.3 THE MOTHER'S POSITION.....	10
4. REPORTS & OTHER DOCUMENTS.....	10
5. WITNESSES.....	12
6. FAILURE OF MOTHER TO GIVE EVIDENCE	14
7. FEW FACTUAL MATTERS ACTUALLY IN ISSUE.....	16
8. PARENTS' HISTORY, WORK & INTELLECTUAL FUNCTIONING.....	17
8.1 THE MOTHER'S PERSONAL HISTORY	18
8.2 THE MOTHER'S INTELLECTUAL FUNCTIONING	19
8.3 THE MOTHER'S ASSESSMENT & COUNSELLING BY WITNESS 5.....	19
8.4 THE FATHER'S PERSONAL HISTORY, EDUCATION & WORK	21
8.5 THE FATHER'S HEALTH & MENTAL FUNCTIONING	22
9. MOTHER'S MENTAL HEALTH & DRUG USE.....	23
9.1 THE MOTHER'S MENTAL HEALTH UP TO JULY 2006	23
9.2 THE MOTHER'S MENTAL HEALTH SINCE JULY 2006.....	24
9.3 THE EFFECT OF THIS CASE ON THE MOTHER'S MENTAL HEALTH	28
9.4 THE MOTHER'S MENTAL HEALTH ASSESSED BY WITNESS 7.....	29
9.5 THE MOTHER'S USE OF ILLICIT DRUGS, ALCOHOL & CIGARETTES	30
10. FATHER'S DRUG HISTORY BUT CURRENT NON USE ..	32
11. MS M'S HISTORY, HEALTH, DRUG USE&WORK.....	34
12. PREVIOUS REPORTS RE CHILDREN & SIBLINGS	38
12.1 SUBSTANTIATED REPORTS RE LD & WDW	38
12.2 REPORTS & COURT ORDERS RE OLDER D CHILDREN.....	39
12.3 SUBSTANTIATED REPORTS RE THE L CHILDREN	41
12.4 CURRENT INVESTIGATION RE THE L SIBLINGS	41
13. THE TRIGGERING EVENTS IN FEBRUARY 2008.....	42
14. NO PROTECTIVE CONCERNS ABOUT FATHER.....	45
15. MOTHER'S INTERVENTION & FAMILY LAW ORDERS	47

15.1	A DANGER INHERENT IN <i>EXPARTE</i> ORDERS	47
15.2	INTERIM AND FINAL INTERVENTION ORDERS	48
15.3	FAMILY LAW ACT ORDERS DATED 27/02/2008	51
15.4	CRITICISM OF PARENTS RE NO PATERNAL CONTACT	52
16.	FATHER’S ATTENDANCE AT COUNSELLING	53
17.	ISSUE OF P.A. IN JUNE 2008 & LEAD-UP EVENTS.....	56
17.1	CONCERNING OBSERVATIONS/REPORTS ABOUT THE MOTHER’S HOUSEHOLD	56
17.2	THE “BEST INTERESTS” PLANNING MEETING ON 13/06/2008.....	58
17.3	APPREHENSION OF THE CHILDREN ON 13/06/2008	58
18.	DOHS’ DISGRACEFUL IGNORING OF THE FATHER.....	59
19.	THE CHILDREN’S CHARACTERISTICS & HEALTH.....	60
19.1	LD.....	61
19.2	WDW.....	62
19.3	KD	63
20.	SCHOOL, KINDER & CHILD CARE ARRANGEMENTS ..	64
21.	ACCESS BETWEEN THE CHILDREN & FATHER	66
22.	CHILDREN’S PROTECTION SOCIETY INVOLVEMENT	68
23.	DOHS’ PARENTING ASSESSMENT OF MOTHER.....	75
24.	MS M’S OPINIONS ON MOTHER’S PARENTING.....	78
25.	ONGOING PROTECTIVE CONCERNS RE MOTHER	81
26.	NO MAJOR PROTECTIVE CONCERNS RE MS M	84
27.	THE “BEST INTERESTS” PRINCIPLES	87
28.	P.A. IS PROVED FOR EACH CHILD	89
28.1	THE RELEVANT LEGAL PRINCIPLES	89
28.2	P.A. PROVED ON LIKELIHOOD UNDER s.162(1)(e)	89
28.3	NO FINDINGS OF SEXUAL ABUSE OF ANY CHILD	90
28.4	P.A. NOT PROVED UNDER s.162(1)(c)	91
28.5	THE MISUNDERSTOOD CONCEPT OF “CUMULATIVE HARM”	91
29.	SUPERVISION ORDER TO FATHER FOR EACH CHILD	93
29.1	WHY SPO TO FATHER RATHER THAN TO MOTHER	93
29.2	INTERIM PROTECTION ORDER CONSIDERED BUT REJECTED	98
30.	MOTHER’S ACCESS CONDITIONS	99
31.	OTHER CONDITIONS ON SUPERVISION ORDERS	102
32.	RELEVANCE OF DECISION TO L SIBLINGS.....	103
33.	ORDERS ON THE PROTECTION APPLICATIONS	104
34.	IVO VARIED TO AVOID INCONSISTENCY.....	106

1. STRUCTURE OF FAMILY & EXTENDED FAMILY

1.1 THE CHILDREN & THE PARENTS

The children the subject of this case are LD [5y8m, 03/05/2003], WDW [2y9m, 31/03/2006] & KD [1y5m, 08/08/2007]. Their parents are (name removed) “the mother” [37y] & (name removed) “the father” [46y].

The mother & the father commenced living together in 2003 when the mother was pregnant with LD. They had separated for a time in 2005 and in 2006.³ They moved to Sydney with the children in November 2006 because of the father’s work as supervisor for an industrial cleaning company. The father explained why:

“The mother and I had problems and living in Melbourne with the drug situation wasn’t good. I was offered a job interstate by the employer I was working at night time with. Initially it was to set up an office in Brisbane and run the state. It is an industrial cleaning company, cleaning ducts and fire systems etc. I went to Brisbane by myself in 2006 for a month. However, a company supervisor in NSW had been sacked and they asked me to take on NSW instead of Brisbane.”⁴

However, the mother and the children returned precipitately to Melbourne after four days. She had received a phone call from Mr (name removed) “Mr L”, the father of her oldest three children, making threats that he was going to have those children removed from her. At that time Mr L was having access but the mother was the custodial parent. Despite a number of promises over the next year, the mother did not return to Sydney. Although the parents communicated almost daily, the mother kept making excuses about the Family Court proceedings. She regularly said that she was packing but nothing transpired which led the father ultimately to believe that the mother was having an affair.⁵ Although the father remained living in Sydney until February 2008, he was able to arrange a trip to Melbourne every 4-6 weeks and would stay with the mother and the children from 2 to 7 days at a time.⁶

³ I infer the 2005 separation from a comment in Ms EF’s Discharge Summary dated July 2006 at p.3 and the 2006 separation (which appears to be in late 2006) from a statement on p.17 of DOHS’ Application & Disposition report that the parents were “considering resuming their relationship”.

⁴ Evidence of the father at p.127 of my notes.

⁵ Evidence of the father at pp.127 & 137 of my notes.

⁶ Evidence of the father at p.127 of my notes. See also evidence of the protective worker, relaying a conversation which protective worker Ms LC had with the father, at p.53 of my notes.

The mother and the father finally separated on 14/02/2008. They have not spoken since February 2008.⁷ Subsequently the mother had a boyfriend named Mr (name removed) “Mr B” but that brief relationship appears to have finished in about July 2008.⁸ Neither the mother nor the father is currently in any relationship.⁹

1.2 THE CHILDREN’S HALF-SIBLINGS ON MOTHER’S SIDE

The mother has three older children who currently live with their father, Mr L. They are (name removed) CL [13y5m, 21/07/1993], (name removed) “BL” [12y7m, 31/05/1996] and (name removed) “AL” [9y9m, 06/04/1999]. These three boys are living with their father as a consequence of orders made under the *Family Law Act 1975* (Cth).¹⁰ In November 2008 these three boys were the subject of a report to DOHS' Child Protection which is currently being investigated.¹¹

1.3 THE CHILDREN’S HALF-SIBLINGS ON FATHER’S SIDE

The father has five other children. They are (name removed) “MD” [23y] who has an intellectual disability, (name removed) “JD” [21y], (name removed) “ID” [20y], (name removed) “DD” [18y] and (name removed) “CD” [7y]. After he separated from the mother of the four oldest children, he obtained Family Court custody orders in about October 1991.¹² He is presently living with ID and her two year old child, (name removed) “V”. He said of his current relationship with his children:

“At the moment all pretty good except for my daughter CD whom I haven’t seen for about 5 years. The last time was just before her 2nd birthday. Her mother became very angry when the mother became pregnant with LD and swore that she would use her level best to ensure I never saw that daughter.”¹³

⁷ Evidence of the father at p.130 of my notes. The circumstances of their separation are set out in section 13 below. Arrangements for the father’s access are made between him and Ms M.

⁸ This information was obtained from the protective worker 2 in answer to questions by me. This Mr B was referred to in conditions 2, 4, 8 & 9 of the interim accommodation order made on 13/06/2008. Protective worker 2 said of Mr B: “I’ve never met him. During my first home visit on 16/07/2008 I discussed him with the mother and she said she was breaking it off with him.” Ms M said in her evidence (at p.120 of my notes) that the initial protective worker, the protective worker, was “scared of Mr B who had had a go at her over the phone and in person”.

⁹ The mother told witness 7 on 21/08/2008 that she did not intend to have another relationship: see p.2 of her report. I infer that the father is not presently in a relationship from the total lack of evidence on this subject either in his evidence or in witness 7’s report dated 10/09/2008.

¹⁰ DOHS’ Application & Disposition report of the protective worker at p.2.

¹¹ Evidence of protective worker 2 at p.6 of my notes. For more information see section 12.4 below.

¹² Evidence of the father in cross-examination by counsel for the mother at p.135 of my notes.

¹³ Evidence of the father at p.134 of my notes. The closeness of DD (aka ‘(name removed)’) to his father was demonstrated by his presence in court on most days in support of his father.

1.4 THE MATERNAL EXTENDED FAMILY

The mother is the second youngest of eight siblings & half-siblings. She has continuing contact with five of them but appears to be closest to her third oldest half-sibling, Ms (name removed) “Ms M”¹⁴, and to her younger sister (name removed) “W”¹⁵. At the request of the father, Ms M had moved in to the mother’s home during the week ending 14/02/2008 in order to support her sister in the care of the three children. She remains living there. On 13/06/2008 the Department assessed Ms M as a suitable person to care for the children and she has had interim legal custody of the children for the last 7 months. Although DOHS now appears to regret its decision, I consider that Ms M has been an appropriate suitable person.¹⁶

1.5 THE PATERNAL EXTENDED FAMILY

The father is the youngest of six siblings. He has no contact with his birth family. Asked about his brother, sisters and parents, he said: “I’ve lost contact for years now. I’m much younger than my other family members.”¹⁷

2. CURRENT PROTECTION APPLICATIONS & ORDERS

On 13/06/2008 DOHS apprehended the children and filed protection applications on the grounds set out in s.162(1)(c) & s.162(1)(e) of the *Children, Youth and Families Act 2005*.¹⁸ Each of those sections has two limbs, an actual harm limb and a likelihood of harm limb:

“(1) 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.”*

At Melbourne Children’s Court on 13/06/2008 the Department, the mother and the father were all legally represented. By consent Magistrate Macpherson placed each

¹⁴ Ms M is discussed in much more detail in sections 11, 24 & 26 below.

¹⁵ W is described in Ms EF’s Discharge Summary dated July 2006 as the mother’s next of kin.

¹⁶ My reasons for this are set out in detail in section 26 below.

¹⁷ Evidence of the father at p.134 of my notes.

child on an interim accommodation order in the care of a suitable person, the maternal aunt Ms M. Each IAO had the following 16 conditions:

- 1. Mother & father must accept visits from and cooperate with DOHS.**
- 2. Ms M & Mr B must accept visits from and cooperate with DOHS.**
- 3. Mother & father must accept support services as agreed with DOHS.**
- 4. Ms M & Mr B must accept support services as agreed with DOHS.**
- 5. Mother & LD must go to counselling as agreed with DOHS and must allow reports to be given to DOHS.**
- 6. Mother & father must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.**
- 7. Mother, father & Ms M must submit to random supervised alcohol and drug testing once per week or otherwise as agreed with DOHS and must allow the results to be given to DOHS.**
- 8. Mother, father, Ms M & Mr B must participate in assessment and/or treatment for drug dependence as directed by DOHS and must allow the results to be given to DOHS.**
- 9. Mother, father, Ms M & Mr B must not use illegal drugs when with the child and must not be affected by illegal drugs when with the child.**
- 10. Father must tell DOHS within 24 hours of changing address.**
- 11. Mother, father & Ms M must not hit or hurt the child for any reason.**
- 12. Mother & father must allow the child to be taken to the Maternal & Child Health Nurse as often as the nurse recommends.**
- 13. Father may have access with the child for a minimum of once 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.**
- 14. Child must go to childcare/kinder as agreed with DOHS.**
- 15. Child may go to respite as agreed with DOHS.**
- 16. Mother may reside in the family home with the children.**

The aunt's address was shown on the IAO as (address removed). That is in fact the mother's address, the aunt having generously moved from her own home in (location removed) to reside in the mother's unit to avoid the children having to be moved to a different suburb. The interim accommodation orders have since been extended every 3 weeks. They were varied by consent - after a dispute resolution conference on 23/09/2008 – to allow for unsupervised overnight access by the father to the children. In particular, condition 13 was varied to read:

- 13. Father may have access with the child for a minimum of once per week, including one overnight access per week, at times and places as agreed between the parties.**

¹⁸ Hereinafter 'the *CYFA*'.

3. POSITIONS OF THE PARTIES IN THIS CONTEST

3.1 THE DEPARTMENT'S POSITION

At the start of this hearing the Department sought that the protection applications be proved only on the likelihood limb of s.162(1)(e) of the *CYFA*. During Ms (name removed) "protective worker 2's" evidence in chief she appeared to alter this to include the actual harm limb of s.162(1)(e). I allowed counsel for DOHS to speak to protective worker 2 in a break during her evidence, after which counsel confirmed that DOHS' position was unchanged, that it was seeking proof of the protection applications only on the likelihood limb of s.162(1)(e).

In the event that the protection applications are proved, DOHS is seeking that each child be placed on a supervision order in the care of the father. Protective worker 2 nominated 15 conditions in her first report and 11 conditions in her second report.¹⁹ Both sets of conditions included an access condition for the mother. The first was a minimum of once per week supervised by DOHS unless DOHS assesses that supervision is not necessary. The second was a minimum of three times per week unsupervised. However, early in her evidence protective worker 2 said: "I haven't worded [access] correctly in that part of the report but I recommend she be supported."²⁰ I asked counsel for DOHS to file two sets of recommended conditions, one in the event that custody of the child was vested in the father, the other in event that custody was vested in the mother. At the end of the case all three counsel made submissions to me about these conditions and DOHS slightly amended its recommendations. In the event that I make an order to the father, DOHS ultimately recommended the following 15 conditions:

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. Mother must go to a psychologist and/or psychiatrist as agreed with DOHS for treatment and must allow reports to be given to DOHS.
6. Mother must participate in treatment for drug dependence and must allow reports to be given to DOHS.

¹⁹ See her report dated 22/09/2008 at p.4 and her report dated 18/11/2008 at p.4.

²⁰ Evidence in chief of protective worker 2 at p.7 of my notes.

7. Mother and father must not use illegal drugs when with the child and must not be affected by illegal drugs when with the child.
8. Father must make his best endeavour to find a suitable home.
9. Mother and father must not expose the child to physical or verbal violence.
10. Mother and father must not hit or hurt the child for any reason.
11. Father must take the child to the Maternal and Child Health Nurse as often as the nurse recommends.
12. Mother may have access with the child for a minimum of 3 times per week at times and places as agreed between parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.
13. Children must go to child care/kindergarten as agreed with DOHS.
14. Children must go to respite as agreed with DOHS.
15. LD must attend counselling/therapy as agreed with DOHS and must allow reports to be given to DOHS.

In the event that “there is a potential for overnight and unsupervised access” by the mother, DOHS seeks a further condition requiring her to undergo drug testing.²¹

3.2 THE FATHER’S POSITION

The father did not oppose proof of the protection application on the likelihood limb of s.162(1)(e) “on the basis that the children were not in his care during the period of neglect”²². He supported DOHS’ recommendation of supervision orders placing the children in his care although his counsel submitted that the father should not be included in recommended conditions 7 & 10. Counsel also sought a condition (with which both other counsel ultimately agreed) that the mother allow no contact between the children and Mr L.

In most respects the father’s position mirrored that of DOHS, although in cross-examination of the protective workers, counsel spent some time questioning why DOHS had not sought to have the children placed in the father’s care when it became concerned about the quality of care provided by the aunt. Counsel was also very critical – as am I²³ – of the Department largely ignoring the father during the lengthy investigation phase of this case between February & June 2008.

²¹ Submission by counsel for DOHS at p.138 of my notes.

²² Opening statement by counsel for the father at p.1 of my notes.

²³ See section 18 below.

3.3 THE MOTHER'S POSITION

The mother did not oppose proof of the protection application on the likelihood limb of s.162(1)(e). She wanted the factual *status quo* to continue, albeit on a legal basis, and indicated consent to supervision orders provided all 3 children were in her care.

On the question of conditions, her counsel made the following submissions:

- **Draft condition 5:** The mother is engaged with a support network and her mental health should continue to be treated by Dr (name removed) “witness 2” & Dr (name removed) “witness 5”. She should not be required to go to other professionals.
- **Draft condition 6:** Condition should reflect that the mother may seek to re-engage with Moreland Hall.
- **Draft condition 7:** On the evidence in this case such a condition is going to be breached by ongoing cannabis use by the mother.
- **Draft condition 12:** This condition is the mother’s main concern. Should the Court decide that the children are to reside with the father, the mother would like overnight and unsupervised access.
- **Draft condition 16:** Any drug screen requirement should be once per week or even less.²⁴

4. REPORTS & OTHER DOCUMENTS

I have read the following tendered reports and other documents:

	SHORT DESCRIPTION OF DOCUMENT	DATE
DOCUMENTS TENDERED BY DOHS		
D1	DOHS' first report by protective worker 2 ²⁵	22/09/2008
D2	DOHS' CRIS case note of protective worker 2 entitled “Parenting assessment of mother with children”	26/08/2008
D3	Drug & Alcohol assessment of the mother by Ms (name removed) “witness 7”	21/08/2008
D4	Drug & Alcohol assessment of the father by witness 7.	10/09/2008
D5	DOHS' second report by protective worker 2	18/11/2008
D6	Bundle of 4 drug & alcohol screen results for the father	25/08/2008 to 15/09/2008

²⁴ Submissions of counsel for the mother at p.138 of my notes.

²⁵ Wrongly headed “Application and Disposition Report”. It should have been headed “Addendum Report”.

D7	Bundle of 22 drug screen results for the mother	10/06/2008 to 25/11/2008
D8	Bundle of 22 Gas Chromatography/Mass Spectrometry (GCMS) confirmations for the screens provided by the mother	10/06/2008 to 25/11/2008
D9	Letter containing summary of paediatric assessment by Dr (name removed) "Dr SH" (Clinical Director Paediatrics – The (name removed) Hospital) of LD, WDW & KD ²⁶	10/11/2008
D10	Discharge Summary re the mother prepared by (name removed) "Ms EF" (Austin Health-Mental Health Service) ²⁷	July 2006
D11	Letter from witness 2 to Moreland Hall re admission of the mother for inpatient withdrawal from marijuana and valium	25/06/2008
D12	DOHS' Application & Disposition report written by the protective worker	02/07/2008
D13	Report of Ms (name removed) "witness 4" re Children's Protection Society's involvement with the family	02/06/2008
D14	Drug & Alcohol assessment of Ms M by witness 7	21/10/2008
D15	Alcohol and other Drugs Treatment Report re the mother prepared by Ms (name removed) "witness 11" (Manager Withdrawal Services Moreland Hall)	08/12/2008
DOCUMENTS TENDERED BY COUNSEL FOR THE MOTHER		
M1	Application and summons for an intervention order by the mother against the father on her own behalf and on behalf of LD, WDW & KD	26/02/2008
M2	Copy of ex parte final intervention order against the father, the protected persons being the mother, LD, WDW & KD	13/03/2008
M3	Undertaking signed by Ms M at request of DOHS	20/05/2008
M4	Summary of 21 drug screens results for Ms M	10/06/2008 to 25/11/2008
DOCUMENTS TENDERED BY COUNSEL FOR THE FATHER		
F1	Copy of interim <i>ex parte</i> order of Federal Magistrate Turner	27/02/2008

Of my own motion I have also read the following report and other documents²⁸:

	SHORT DESCRIPTION OF DOCUMENT	DATE
DOCUMENTS READ BY ME OF MY OWN MOTION		
C1	DOHS Proposed Witness List and Chronology	24/11/2008
C2	DOHS Proposed Witness List and Chronology	23/09/2008
C3	Bundle of fax documents comprising most of the documents on the (location removed) Magistrates' Court's intervention order file initiated by an application for an intervention order made by the mother against the father on her own behalf and on behalf of LD, WDW & KD ²⁹	File commenced 26/02/2008 at Melbourne Mag Ct

²⁶ Tendered by consent. Author was not required for cross-examination.

²⁷ Tendered by consent. Author was not required for cross-examination. The only disputed matter was on p.2 where the writer says "Was assaulted by step-son in 4th pregnancy". The mother instructs – and I accept – that this assault was during her 5th pregnancy.

²⁸ As I am entitled to do under s.215(1)(d) of the *CYFA*.

²⁹ This does not include some of the documents associated with the counselling order in relation to the father which I did not ask to be faxed to me.

5. WITNESSES

I heard evidence from the 12 witnesses detailed below. As LD's kindergarten teacher was not called as a witness, I am not prepared to give any weight to her opinions about the adverse impact of LD's home life as reported by protective worker 2.³⁰

THE FOLLOWING WITNESSES WERE CALLED BY DOHS		
	NAME	DESCRIPTION OF WITNESS
W1	(name removed) "protective worker 2"	DOHS' protective worker currently assigned to the children since 10/07/2008.
Adopted documents D1, D2, D5, D6, D7, D8 & D9 Documents M1, M2 & F1 tendered through her		
W2	Dr (name removed) "witness 2"	General Practitioner from (name removed) Community Health Centre who has seen the mother intermittently from 2001-2006 and very frequently thereafter.
Adopted documents D10 & D11		
W3	Ms (name removed) "the protective worker"	DOHS' protective worker who was allocated to the children's cases on 14/02/2008 and who remained as the allocated protective worker until 19/06/2008.
Adopted document D12		
W4	Ms (name removed) "witness 4"	Family support worker employed by the Children's Protection Society ³¹ who has worked with the mother and the children since 17/03/2008 and who also gave evidence of previous CPS' involvement with the family from 29/10/2001-06/02/2003 and 01/08/2004-01/12/2006.
Adopted document D13		
W5	Dr (name removed) "witness 5"	Psychologist employed at (name removed) Community Health Centre who has conducted 11 counselling sessions with the mother since 11/07/2008 and is in an ongoing counselling relationship with the mother.
W6	Ms (name removed) "witness 6"	Maternal and Child Health Nurse ³² employed at (name removed) Maternal and Child Health Centre who saw the children with Ms M on 25/06/2008 and who also gave evidence of a further assessment of KD by MCHN P on 21/10/2008.

³⁰ See the last paragraph on p.7 of protective worker 2's first report dated 22/09/2008.

³¹ Hereinafter 'CPS'.

³² Hereinafter 'MCHN'.

W7	Ms (name removed) “witness 7”	Registered psychiatric nurse with a Certificate IV in Drug & Alcohol studies and a Bachelor of Education who preformed Drug & Alcohol assessments of the mother on 21/08/2008, the father on 10/09/2008 & Ms M on 21/10/2008.
Adopted documents D3, D4 & D14		

W8	Ms (name removed) “witness 8”	Group facilitator in a Behavioural Change program run by Relationships Australia and attended by the father from May 2008..
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W9	Ms (name removed) “witness 9”	Scientist who has been employed by Melbourne Pathology in the area of analysis of drug screens since 2005. ³³
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W10	Ms (name removed “Ms M” ³⁴	Children’s maternal aunt.
Adopted documents M3 & M4		

W11	Ms (name removed) “witness 11”	Manager Withdrawal Services & Deputy CEO of Moreland Hall
Adopted document D15		

THE FOLLOWING WITNESS WAS CALLED BY THE FATHER		
	NAME	DESCRIPTION OF WITNESS
W12	Mr (name removed) “the father”	The children’s father.

³³ Although witness 9’s English was fluent, it was very heavily accented and this, in combination with the technical nature of her evidence, made her difficult to understand. Ultimately, after having failed to elicit from witness 9 any support for the Department’s proposition that the amount of cannabis indicated by the mother’s screens was “high”, Mr Stevens did not press on with evidence in chief and Mr Teare & Mrs Weinberg did not cross-examine witness 9 at all. See p.98 of my notes.

³⁴ At the outset I had a discussion with counsel about whether DOHS or the mother should call Ms M who, on any view, was a highly relevant witness. She has acted as interim custodian of LD, WDW & KD for nearly 7 months. 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 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: 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. 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: see paragraph 3.5.6 in Chapter 11 of the Research Materials on the Children’s Court website www.childrenscourt.vic.gov.au. Hence I considered that Ms M should be called by DOHS. Although Ms M was supportive of the mother – as I had expected – she could certainly not be categorized as a hostile witness. Nevertheless, when I had ruled that DOHS should call Ms M, I also ruled that all three parties could cross-examine her, relying on ss.215(1)(a) & 215(1)(b) of the *CYFA*. In the event, very little of Mr Stevens’ examination of Ms M turned out to be cross-examination.

Most of the witnesses were professionals. All gave their evidence honestly. There are aspects of the protective worker's conduct of the case of which I am highly critical³⁵ but I do not question her honesty or her integrity. The only two lay witnesses were the father and Ms M. The father was a very good witness. At the end of his evidence I wrote in my notes: "This fellow is a good honest witness, a thoughtful man, a concerned father, a reliable historian."³⁶ I found Ms M to be a fairly good witness.³⁷ However, I do not agree with her lay opinion – lay in the sense that she is not a qualified psychologist or child protection worker although she is a qualified carer and personal care attendant – that the children could safely be placed in their mother's full-time care.³⁸ In that respect I believe that her loyalty to her sister has impacted adversely on her objectivity. Accordingly - although there is little conflict between the evidence of Ms M & the father on any factual matter other than some detail of the incident that grounded the mother's application for an intervention order³⁹ - on balance I prefer the evidence of the father where there is conflict between them.

6. FAILURE OF MOTHER TO GIVE EVIDENCE

The mother did not give evidence in this case. Mr Teare had said to me on 15/12/2008:

"I am still debating whether or not to call my client. I will need to speak to [her counsellor] witness 5 to see whether she can be present in court while my client is giving evidence. I am leaning to calling her."⁴⁰

I replied: "I have no comment one way or the other."

On 16/12/2008 Mr Teare said:

"At this point I am proposing to call my client subject to her confirming that on the day. I had proposed to limit areas of examination in relation to the Discharge Summary [written by Ms EF in July 2006] and the effect of the assault by her brother. With [Ms M] you have material which indicates a similar event. Ms M will be able to provide evidence about her sister.

³⁵ See section 18 below.

³⁶ At p.138 of my notes.

³⁷ Ms M was in the witness box nearly all day on 16/12/2008. She was not very well. Late in the day it all got too much for her and during cross-examination by Mrs Weinberg she left the court precipitately, saying: "That's it. No more questions. I'm out of here. Sorry your Honour." I draw no inference against her for that. She came back on 17/12/2008 and her cross-examination was completed without further ado.

³⁸ See her evidence at p.104 of my notes and see section 24 below.

³⁹ As to which see section 15.2 below.

⁴⁰ See p.84 of my notes.

Clarifying, we are talking of two different events which caused my client to become immediately distressed again. I ask that you limit examination in relation to the cause of the fear of her brother, anything touching on my client's assault in 1995. I am asking the Court on (a) relevance; and (b) it is an area which is distressing my client. As previously admitted, she is undergoing treatment."⁴¹

Regarding this as an application on a quasi *voir dire* to limit cross-examination by Mr Stevens & Mrs Weinberg, I ruled against Mr Teare, holding *inter alia* that:

- The mother's mental health is a central issue in this case.
- Ms EF appears to attribute the commencement of the mother's depression and post-traumatic stress disorder⁴² to this assault by her brother in 1995.
- The incident is thus potentially highly relevant.
- The probative value of the evidence was greater than the distress which may be caused to the mother by being questioned about it.
- It was therefore in the interests of the children that counsel not be fettered in their cross-examination on this issue.

On 17/12/2008 Mr Teare said: "My client does not wish to give evidence in light of your ruling yesterday."⁴³

In *O'Donnell v Reichard*, after citing a number of authorities including *Jones v Dunkel*⁴⁴, 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."*⁴⁵

Counsel for the mother has given an explanation as to why his client was not called to give evidence. Given the undoubted ongoing fragility of the mother's mental health⁴⁶, I am satisfied that his explanation is sufficient to oust the legal inference that her evidence would not have helped her case. However, the practical effect of

⁴¹ At p.105 of my notes. In this submission Mr Teare had also initially relied on ss.39 & 40 of the *Evidence Act* 1958 as a basis for excluding the material in question but after discussion he did not press that point. Mr Teare had initially raised in closed court on 10/12/2008 his concerns about the impact this material had had on his client's mental health: see pp.20-21 of my notes.

⁴² Hereinafter 'PTSD'.

⁴³ At p.138 of my notes.

⁴⁴ (1959) 101 CLR 299.

⁴⁵ [1975] VR 916 at 920. The emphasis is mine.

⁴⁶ As to which see sections 9.1 to 9.4 below.

the mother's failure to give evidence is effectively the same because the bulk of the Department's evidence about her lack of capacity and capability to be a "good enough" full-time parent to the three children has not been directly addressed or answered by the mother. The situation is not quite as stark as Mrs Weinberg painted it when she said: "You have no evidence about the capacity and capability of the mother. She has been legally represented but hasn't given evidence."⁴⁷ There is some potential positive evidence of the mother's parenting capacity – for example Ms M's belief that the mother has changed in the last two months⁴⁸ and witness 4's admittedly luke-warm response to the proposition that the mother had changed in recent times⁴⁹. However, the weight of the evidence against the mother overall is so substantial that in fact her case is not helped at all by her silence.

7. FEW FACTUAL MATTERS ACTUALLY IN ISSUE

The primary function of the adversarial system, refined over centuries in the common law world, is to determine which of two or more conflicting issues of past fact is more likely to be correct. However, in the majority of Family Division proceedings, conflict of past fact is not the central issue. The contest is usually about the best future outcome for the child within the framework of either an uncontested or a very lightly contested factual matrix. The present case is no exception. There were very few factual matters actually in issue. The fact that the mother did not give evidence meant that a number of the matters which her counsel had put to other witnesses were not the subject of positive evidence by the mother.

The central issue - whether or not the mother presently has and will continue to have the capacity and capability to be a "good enough" full-time parent to the three children - primarily involves a balancing of conflicting opinions based on past facts most of which were not disputed. Likewise the subsidiary issue - whether or not the mother's access with the children should be supervised.

It is true that there were a few other factual matters in dispute. The only one of real substance was the suitability of Ms M as a carer or supervisor of the children. The dispute about the father's conduct in the early hours of 14/02/2008 that grounded

⁴⁷ This comment was made in the course of discussion during the first point of Mr Stevens' three-pronged final submissions. The emphasis is mine.

⁴⁸ See section 24 below.

⁴⁹ See section 22 below.

the mother's application for an intervention order⁵⁰ was of some minor relevance as was KD's feeding regime. The rest seemed to me to be largely inconsequential, especially the two that were the subject of most questioning. Was there ever a functioning lock on LD's bedroom door? Protective worker 2 says yes. Ms M says no. The protective worker said she didn't see one. The father said he didn't know.⁵¹ Was LD's bedroom window ever nailed shut? The Department says yes. Ms M says no. The father says yes and no.⁵² But whether LD's bedroom window was nailed shut or locked shut or both or neither scarcely matters at all. What is much more important is the undisputed reason why from time to time in the past LD has left his bedroom via the window:

"On 21/02/2008 a first home visit was conducted with the family, and DOHS workers, Ms (name removed) "Ms SH" and Acting Unit Manager Ms (name removed) "Ms LW". The protective concerns were outlined and discussed with Ms M and the mother...The mother advised that in relation to LD roaming the streets unsupervised, this was due to LD climbing out his window to chase after the father when he left for work. The mother stated that she has since nailed the window shut and LD has stopped climbing out."⁵³

In pursuing the largely non-consequential issue of nail or no nail, lock or no lock, it is ironic that counsel for the mother highlighted the fact that LD was so attached to his father that he got out of the window to follow him. For example:

Mr Teare- "LD would get out of the house to follow you when you left?"
The father- Yes. I've been told that.
Mr Teare- Through the window?
The father- Yes."⁵⁴

8. PARENTS' HISTORY, WORK & INTELLECTUAL FUNCTIONING

⁵⁰ As to which see section 15.2 below.

⁵¹ Protective worker 2 said (at p.6 of my notes): "I also witnessed a lock on the outside of the door and I questioned the mother and she said that has already been there and has brushed that off." Ms M said (at p.108): "There's no way of locking him into his room. The window is locked but the door only had a part hook on it." The protective worker said (at p.49 of my notes): "I knew the window was nailed but I never saw a lock on the door." The father said (at p.129): "I didn't see locks on the door of LD's room."

⁵² For the Department's position as reported by the protective worker see the previous footnote and the associated quote. Ms M said of the window (at p.108): "It's not nailed shut at all." The father said (at p.130): "The window was nailed down. The lock was broken, the latch. (name removed) and I changed the latch with the lounge room window lock so we changed the broken lock with the fixed lock."

⁵³ DOHS' Application & Disposition report of the protective worker at p.4.

⁵⁴ At p.137 of my notes. On this issue the protective worker agreed with Mrs Weinberg's proposition that "The mother said the reason she had to nail the window down was that [LD] ran after his father": see p.46 of my notes.

A registered psychiatric nurse, witness 7, performed drug and alcohol assessments of the mother on 21/08/2008 and of the father on 10/09/2008. Her very good reports contain much more information about the history and characteristics of both parents than do any other reports tendered in this case with the exception of the history set out in the mother's "Discharge Summary" that a social worker at (name removed) Area Mental Health Service, Ms EF, prepared for witness 2 in July 2006.

8.1 THE MOTHER'S PERSONAL HISTORY ⁵⁵

The mother is the seventh of eight siblings. Her mother had five daughters and a son to her first husband. He was killed in a car accident and she remarried. The mother and her younger sister (name removed) "W" were born from this union. The siblings were all raised together. The family lived in (location removed), (location removed) and (location removed).

The mother's mother, whom the mother described to Ms EF as "a supportive person who cared for everyone", died of cancer a number of years ago.⁵⁶ Her father, who was a council employed road grader, now lives in (location removed). The mother, who describes her father as an alcoholic who was largely absent from the family, has had little recent contact with him although in the past she had supported him with money and accommodation at his request. She has ongoing contact with all of her siblings except for her brother (name removed) "L" and her oldest sister (name removed) "M". She reports that L has been extremely violent towards her in the past. He assaulted her in 1995 causing significant injuries, including loss of consciousness and believes that she suffered a "brain injury" as a result of this assault. She has had intervention orders against L and remains frightened of him.

The mother reported to witness 7 that she was sexually abused as a child but did not disclose any details.

⁵⁵ The material in this section is taken from witness 7's report at p.2 & Ms EF's Discharge Summary at pp.1-2.

⁵⁶ Oddly there were widely different accounts of when the mother's mother died. Writing in August 2008 witness 7 said "nine years ago". In her Discharge Summary Ms EF said "in 2000". Mr Teare's instructions from his client were that her mother died "in about 1993 or 1996": see p.90 of my notes.

The mother has done some paid work, mainly fruit and vegetable picking in (location removed) & (location removed), but she has not been in paid employment for many years and has struggled to support her family on her Supporting Parents' Benefit.

8.2 THE MOTHER'S INTELLECTUAL FUNCTIONING⁵⁷

The mother presented to witness 7 as a small woman of slim build who "appeared intellectually dull". She had attended school until year 9 but had significant learning difficulties. Although she enjoyed going to school to see her friends, she did not want to do school work and had had special teachers. Her reading skills are very limited as are those of other members of her family.

Two of witness 7's three recommendations were:

- Clarify role of counsellor at (name removed) Community Health Services- Drug & Alcohol Counselling and grief counselling re mother's death.
- Formal review of Acquired Brain Injury and intelligence testing.⁵⁸

Explaining why she had made these recommendations, witness 7 said:

"The mother presented that she was going to drug & alcohol counselling there and I wanted that confirmed because I think she does need drug & alcohol counselling. She was telling me she was going to give up cannabis from that day. Her only strategy was taking up craftwork. She needed counselling for relapse prevention.

I recommended grief counselling because she spoke a lot about her mother's death. She found it a very difficult time and it caused a lot of tension in the family. Her mother died of cancer in the back and received palliative care at home and I think the sisters were involved with that.

I recommended a formal review of ABI etc because I found memory problems and she was reporting memory problems. She also reported being severely beaten at times by her brother L and receiving head injuries from that. Also her educational history was poor. She had special aides at school and left early and I thought that needed to be assessed."⁵⁹

8.3 THE MOTHER'S ASSESSMENT & COUNSELLING BY WITNESS 5

The mother has attended 11 sessions of counselling with witness 5 at (name removed) Community Health Service between 25/07/2008 & 28/11/2008. Although witness 5's service generally provides short term counselling, her manager has given

⁵⁷ The material in this section is taken from witness 7's report at p.2 & Ms EF's Discharge Summary at p.2

⁵⁸ Neither of these have as yet been performed.

⁵⁹ Evidence in chief of witness 7 at p.80 of my notes.

approval for the mother's counselling to continue on a weekly or fortnightly basis in 2009.⁶⁰

I found witness 5 a good, thoughtful and careful witness.⁶¹ In her first session witness 5 had conducted a brief assessment of the mother:

“Generally in community health we do a brief initial counselling assessment – 60 minutes – where we obtain background, pertinent issues, previous counselling and so on. During that session it was evident the mother did exhibit high stress levels and required further strategies for stress management. She was very co-operative during the session but her behaviour indicated she was agitated and restless with a facial tremor and jiggling of her leg. She said she had a lot of negative thoughts often associated with stress.”⁶²

The mother had been referred to witness 5 by an internal referral from witness 2 to develop cognitive behavioural strategies for stress management.⁶³ Accordingly, in her sessions to date witness 5 has focused on simple behavioural strategies: “Psycho-education to reduce stress by discussing what happens in the body and some strategies to reduce physical symptoms: breathing, relaxation and progressive muscle relaxation, distraction techniques (music & craft), sleep hygiene.”⁶⁴

Witness 5 believes that although the mother has engaged well in counselling, her progress has been adversely affected by her stress and anxiety about the outcome of this court case:

Mr Stevens- “Do you have any concern that the mother may have some difficulty taking instruction and following through?”

Witness 5- To date she has been very open to strategies and curious about what will help. She listens attentively to strategies and wants them written down for her to take away.

Mr Stevens- Do you see your role expanding? Are you making progress to move to other areas?”

Witness 5- When the stress levels come down the traumas she has experienced in her life would require treatment further on. I am supporting her through the process of this court case, giving her strategies for stress and dealing with negative thoughts and possible work in relation to past trauma.⁶⁵

...

Mrs Weinberg- “What, if any, progress have you seen?”

Witness 5- “Typically we see progress in 10-12 sessions. I'd say at this stage it is quite difficult given the directions hearing and the court case. It is obvious the stress levels are quite high because of these. I'd say the strategies work some of the time, not all of

⁶⁰ Evidence of witness 5 at p.76 of my notes.

⁶¹ The adversarial system is not very compatible with an ongoing confidential counselling relationship. I was keen to preserve as much confidentiality of content as I could. Counsel discussed with me issues which they considered relevant and by and large I allowed examination of witness 5 on those issues.

⁶² Evidence in chief of witness 5 at p.70 of my notes.

⁶³ *Op.cit.*, p.69.

⁶⁴ *Op.cit.*, p.70.

⁶⁵ At p.72 of my notes.

the time. I'd say it is always in the back of her mind, the directions hearing and the court cases.

Mrs Weinberg- There's been not much improvement?

Witness 5- I'd say my role has been supportive. She is utilizing strategies. It is not 100% effective. Nothing is. But at this stage she has a lot of stressors going on in her life which is quite different to a lot of other patients coming to the service.⁶⁶

...

Mr Teare- "Overall do you see an improvement with respect to her coping with anxiety and stress?"

Witness 5- It's hard to say. It varies from session to session depending on what is happening. I do think she is better able to identify what is happening in her body and implement appropriate behavioural techniques.⁶⁷

It is no criticism of witness 5 to say that she seems to be achieving little more than struggling to hold the line at the moment. Witness 5 clarified that her counselling had not encompassed drug & alcohol counselling but believed that the mother would benefit from such counselling because "The mother has been using cannabis for quite some time now. At this time she hasn't responded to strategies we discussed in sessions so I believe more specialized [drug & alcohol] counselling would be beneficial for the mother."⁶⁸ Witness 5 has liaised with a drug & alcohol counsellor but decided to try to provide the mother with some basic strategies before making a formal referral.⁶⁹

8.4 THE FATHER'S PERSONAL HISTORY, EDUCATION & WORK ⁷⁰

The father is the youngest of six siblings: three sisters, an older brother and a second brother who died at age six months. His father died of a heart attack in 1969 and the family moved from (location removed) to live in public housing in (location removed) and then in (location removed). He denied any history of childhood abuse. His mother died in 1983 as a result of an allergic reaction to contrast dye during a CAT scan. He reported there was no family history of substance abuse, forensic or psychiatric issues.

The father has had a wide range of employment including truck driving, running a cleaning business, factory work, builder's labourer, milkman and garbage man. He is currently employed on a casual basis as a labourer by an engineering company in

⁶⁶ *Op.cit.*, p.73.

⁶⁷ *Op.cit.*, p.76.

⁶⁸ Evidence in chief of witness 5 at p.70 of my notes.

⁶⁹ Evidence of witness 5 in cross-examination by counsel for the father at p.74 of my notes.

⁷⁰ Most of the material in this section is taken from witness 7's report at p.2. Details of the father's current employment are from his evidence in chief at p.126 of my notes.

(location removed) where he is involved in pressing, drilling and welding steel. He was asked whether he saw himself continuing in employment if the children were placed with him and he replied:

“Not for the next couple of years given the ages of WDW & KD. I’d probably do some sort of education. Last time I gained custody of the other children I was illiterate and went back to school to year 10.”⁷¹

The father had left school at age 15. He returned to school in 1991 (at the age of 29) and completed year 10 as he explained:

“I pretty much taught myself [to read and write] to primary level and in 1991 I went to a Metropolitan TAFE literacy course. I had left school in Form 3 (year 9). You didn’t have to read and write. It was an automatic pass through the system.”⁷²

8.5 THE FATHER’S HEALTH & MENTAL FUNCTIONING ⁷³

The father is a slim man of average height with short cut dark hair whose hygiene and grooming appeared good. He maintained good eye contact throughout witness 7’s assessment and his pupils were equal and reactive. He has no health concerns save for recent unexplained weight loss.⁷⁴ He is not currently taking any prescribed medication. Witness 7 noted no perceptual or movement disorders.

Unlike the mother, the father has no mental health problems. He presented to witness 7 with a reactive affect and reported that his mood and appetite were good, his energy levels had improved and he was sleeping well. He appeared euthymic. His speech was clear with normal rate and tone. He was orientated as to time, place and person although he reported confused thinking at times when he ruminates about the children, court appearances related to the children and the intervention order. There were no formal thought disorders evident.

There is no evidence that the father’s intellectual capacity is in any way degraded. His short term and long term memory appear intact. He presented to me as a competent witness with good comprehension skills. Witness 7 assessed: “Concentration good. Judgment good. Insight good.” That accords with how he

⁷¹ Evidence in chief of the father at p.132 of my notes.

⁷² *Op.cit.*, pp.132-133.

⁷³ The material in this section is largely taken from witness 7’s report.

⁷⁴ This led witness 7 to recommend a medical review: see p.3 of her report and her evidence in chief at p.81. However, I have no evidence that any such review has been completed and the father was not asked any questions about this either by counsel or me.

presented to me in the witness box and also with how he presented to Ms (name removed) “Ms PB”, the group facilitator of the Men’s Behaviour Change Group which the father has attended as an adjunct to the intervention order.⁷⁵

9. MOTHER’S MENTAL HEALTH & DRUG USE

9.1 THE MOTHER’S MENTAL HEALTH UP TO JULY 2006⁷⁶

The mother has had a long history of significant mental health problems. She told witness 7 that “she began to have mental health problems at the age of 10 years”.⁷⁷ In 1997 a provisional diagnosis was made that she was suffering from depression, anxiety and post traumatic stress disorder⁷⁸. Ms EF attributes the triggering incident to a serious assault by her brother L in 1995 which led, *inter alia*, to a loss of consciousness. She was subsequently seen by the (location removed) CMHS and was admitted to (location removed) Hospital a number of times, including for three days in 1999 as a result of a situational crisis. Following a referral by (name removed) Crisis Assessment & Treatment Service, the mother was admitted to Banksia House in 2001 for 2½ weeks for management of a six month depressive episode and associated suicidal ideas. Her ex-partner, Mr L, had returned home for two weeks at that time, following a history of domestic violence. She was diagnosed with adjustment disorder with depressive and anxiety features, PTSD and histrionic personality traits. She was discharged to (name removed) Area Mental Health Service⁷⁹ where she was seen for a year.

On 05/08/2004 the mother rang (name removed) Area Mental Health Service to refer herself following Mr L being hit by a car. She was not coping with demands on her to assume the role of his next of kin. She was experiencing suicidal ideation and was “blinking out” while driving. She presented as tearful, lacking appetite, having sleep disturbance, poor concentration and feelings of guilt. She was not coping with her four children, particularly with their fighting. She did not report her marijuana use until later. The mother had fortnightly contact with her case

⁷⁵ See section 16 below.

⁷⁶ The material in this section is largely taken from Ms EF’s Discharge Summary dated July 2006.

⁷⁷ Drug and Alcohol Assessment report of witness 7 at p.2.

⁷⁸ Hereinafter ‘PTSD’. This diagnosis was also referred to in witness 2’s evidence at p.20 of my notes.

⁷⁹ Hereinafter ‘xxAMHS’. xxAMHS is a unit of Austin Health.

manager and had regular contact with a psychiatry registrar until April 2006, after which she missed appointments. She was treated with Venlafaxine 75mg until April 2005. She tended to be non-compliant but was able to remember her medication when assisted with a routine. She did not take Diazepam as she was concerned that she was unable to wake to care for her children when she did take it.

Ms EF noted that “The mother’s life is characterized by regular crises, which she has difficulty coping with.” Case management by (name removed) Area Mental Health Service involved assisting the mother to manage her crises. Counselling has included grief counselling and encouraging her to explore appropriate courses of action, rather than assuming there is only one way to respond to crises. She was referred to (location removed) CHC for cognitive behavioural therapy but failed to attend. Practical assistance provided to the mother included:

- referrals to the Mental Illness Fellowship and Carer Links (name removed) for respite activities for the children and referral to holiday programs;
- liaison with the mother’s sisters and partners and supportive friends;
- financial assistance through the Carer Fund;
- provision of Parents and Kids Group multi-agency program for parents with mental illness and their children;
- referral to Mercy Ante-natal Service and to their psychiatric registrar;
- referral to CAMHS for counselling for the three older boys [CL, BL & AL], due to ongoing emotional and behaviour problems in the context of being victims and repeated witnessing of violence; they have agreed to provide secondary consultation to (name removed) Family Support Service.

However, by July 2006 the mother’s mental health had improved. Although she was still showing symptoms of anxiety and her crises were continuing, she was having more success organizing her day-to-day life. Because she was more stable and was off her medication, the mother was discharged by xxAMHS into the care of her G.P., witness 2, on 29/06/2006.⁸⁰

9.2 THE MOTHER’S MENTAL HEALTH SINCE JULY 2006

Witness 2 is a General Medical Practitioner from (name removed) Community Health Centre. She had seen the mother intermittently from 2001 to mid 2006,

⁸⁰ Evidence of witness 2 at p.20 of my notes.

frequently until the end of 2007 and very frequently since then.⁸¹ In addition to MBBS, she has a Diploma in Obstetrics and has completed Level 1 Mental Health training. She was a very impressive witness.

In the first half of 2007, during the mother's pregnancy with KD, her mental health was very good and she did not present to witness 2 with lowered mood, poor concentration, anxiety or any other mental health symptoms. She had been off medication since about 2005.⁸²

On 10/12/2007 the mother presented to witness 2 with depression. She was very stressed. She said to witness 2 that she was feeling anxious because of "ongoing stress at home"⁸³. Witness 2 started her back on Venlafaxine⁸⁴ 75mg for her depression.

On 14/02/2008 Ms (name removed) "Ms KA" from xxAMHS Triage rang the Department to advise that the mother had been sent to xxAMHS by her general practitioner because she was threatening to kill herself by drinking weed killer. Ms KA stated that the mother was presenting as clinically depressed with suicidal thoughts. She had advised Ms KA that she had been prescribed medication for depression in December 2007 but was not taking it due to the father telling her not to take it. This serious allegation was not put to the father in cross-examination. The mother did not give evidence of it. Ms KA was not called. I do not accept on balance that the father told the mother not to take her medication. It would be quite contrary to the concerns he expressed and the help he provided to the mother and the children when he returned so quickly from Sydney on 07/02/2008. The mother also said to Ms KA that she did not have energy to fight for her children who were now in the father's care and that she did not care what happened to the baby as she knew her sister would look after her if the mother died.⁸⁵

⁸¹ In answer to a question by counsel for the father, witness 2 said (at p.25) that she had seen the mother on 10/12/2007, 14/12/2007, 04/01/2008, 11/02/2008, 19/02/2008, 28/02/2008, 04/03/2008, 07/04/2008, 23/04/2008 [increasing medication level to 330mg], 05/05/2008, 07/05/2008, 14/05/2008, 26/05/2008, 03/06/2008, 10/06/2008, 16/06/2008, 13/06/2008, 30/06/2008, 10/07/2008, 22/08/2008, 29/08/2008, 05/09/2008, 19/09/2008, 24/09/2008, 09/10/2008, 17/10/2008, 24/10/2008, 06/11/2008 & 27/11/2008.

⁸² Evidence of witness 2 at p.22 of my notes.

⁸³ *Ibid.*

⁸⁴ Also known as "Effexor".

⁸⁵ DOHS' Application & Disposition report of the protective worker dated 02/07/2008 at p.4.

Shortly thereafter – on 22/02/2008 – witness 2 increased the mother’s Venlafaxine medication to 150mg. On 22/04/2008 she increased it again to 300mg, taken once per day in the morning. Witness 2 said:

“Initially [the mother] did express concerns about side effects but not in the recent past. She has been very compliant and takes her medication regularly and I think her depression is very well managed with that medication. She doesn’t have the classic symptoms: loss of appetite, poor sleep, lowered mood, loss of interest in things she would normally enjoy.”⁸⁶

On the advice of a psychiatrist at xxAMHS with whom the mother had had intermittent contact, witness 2 had also prescribed Valium on an “as needed basis”. When the mother found things difficult to manage, it was ½ tablet in the morning, ½ in the afternoon and 1 at night.⁸⁷

In June 2008 witness 2 and a psychiatric registrar both formed the view that the mother’s mood was still fluctuating and they didn’t think they “were completely on top of her anxiety”. The psychiatric registrar considered that the mother needed to stop using marijuana to see whether that was affecting her mood and her anxiety. The mother wanted to get off valium at the same time. Consequently, on 25/06/2008 witness 2 wrote a referral for the mother’s admission to Moreland Hall for inpatient detoxification:

“Thank you for seeing [the mother], age 35 yrs, for opinion and management of inpatient withdrawal. [The mother] has a long history of marijuana addiction, stress and depression with a background of abusive and difficult relationships. She is trying very hard to improve her life and has been seen by psych registrar at (name removed) Street clinic last week who has recommended that she attend you for an inpatient withdrawal initially as her excessive marijuana use is impacting on our ability to manage her other medical conditions.”⁸⁸

The mother participated positively in and completed the detoxification program between 02/07/2008 & 09/07/2008.⁸⁹ When witness 2 saw her on 10/07/2008 “she was in a very positive mood and quite happy and felt she had gained a lot from Moreland Hall”.⁹⁰ The mother has since remained abstinent from valium but she

⁸⁶ Evidence of witness 2 at p.22 of my notes.

⁸⁷ *Op.cit.*, p.23.

⁸⁸ This is the first paragraph of the referral. See also evidence of witness 2 at p.23 of my notes.

⁸⁹ DOHS’ second report of protective worker 2 dated 18/11/2008 at p.2. See also evidence of witness 11 at pp.123-124 of my notes.

⁹⁰ Evidence of witness 2 at p.29 of my notes.

quickly resumed her use of cannabis, all screens taken since 23/07/2008 being positive for cannabinoids.⁹¹

On 08/08/2008 – during a time when witness 2 was absent on leave – the mother presented for a counselling session with witness 5 in a crisis:

“[The mother] did present with some suicidal thoughts and she disclosed them to me during the session and she asked for her sister to be present as well. It was helpful because she could identify thoughts and was thinking ahead. I contacted the CAT team who case managed her over the weekend. I made a few phone calls to check. They discharged her over the weekend. I think she acted very responsibly.”⁹²

In my view Ms M should have advised DOHS of this very significant matter but she chose not to do so. I do not accept the validity of her explanation: “I didn’t think it was the Department’s problem. She was seeing the doctor.”⁹³ I asked witness 5 whether any of the mother’s suicidal thoughts involved the children. She replied: “No. Not at all.”⁹⁴ The suicidal ideation had passed by the time witness 7 did her risk assessment on 21/08/2008:

“[The mother] reports multiple suicide attempts by hanging and overdose of prescribed psychotropic medications. Says she was admitted once (Banksia House) but since then phones CATT for support. Says she doesn’t want her children to grow up with her problems and says she will either get well or kill herself. Denies any current suicidal plan or intent. Denies she has ever thought of killing her children as well as herself saying she is confident there are other good people in their lives who could look after them if she wasn’t around. Denies any history of deliberate self-harm.”⁹⁵

“I did a risk assessment to find out if she was currently suicidal and she said no. She denied adamantly any homicidal thoughts about her children: ‘Absolutely not.’”⁹⁶

Witness 2 did not consider the children to be at risk of physical harm from the mother:

Mr Teare- “If she became delusional would the children be at risk?

Witness 2- I have never known her to be delusional. The kids mean so much to her. She would never put them at risk. I think she would come in [to see me].

Mr Teare- Why do you say that?

Witness 2- They are her life. She adores them.”⁹⁷

⁹¹ See section 9.5 below.

⁹² Evidence of witness 5 at p.71 of my notes. See also her answers at p.76 of my notes.

⁹³ Evidence in chief of Ms M at p.105 of my notes.

⁹⁴ At p.71 of my notes.

⁹⁵ Drug and Alcohol Assessment report of witness 7 at p.3. See also *op.cit.*, p.2.

⁹⁶ Evidence in chief of witness 7 at p.80 of my notes.

⁹⁷ At p.30 of my notes.

I accept that the children are not at risk of physical harm from any intentional act by their mother but I am not as confident as witness 2 that they are at no risk at all of physical harm. For instance, it was only good fortune that KD was not injured when she was accidentally dropped by the mother on 05/05/2008.⁹⁸

Witness 2 believes that the mother's depression is under control but her anxiety isn't.⁹⁹

9.3 THE EFFECT OF THIS CASE ON THE MOTHER'S MENTAL HEALTH

Asked why the mother was off valium if her anxiety was not under control, witness 2 replied:

“[The mother] doesn't want to go back on valium. Her anxiety directly related to these proceedings under way. Managing that and talking about that is far better than putting her on medication.”¹⁰⁰

Witness 5 has the same view of these court proceedings. Asked about the current level of the mother's anxiety, witness 5 replied: “Quite high given the current court case and the chance the children may be taken off her. It is manifesting itself in physical symptoms: pounding heart, hyperventilation, feeling dizzy, all the typical ones.”¹⁰¹ Later she said: “I know [the mother] ruminates about what may happen to the children in this court case.”¹⁰² Asked what was the main stressor in the mother's life at the moment, she replied: “The fear of her children being taken away...If the children are taken away from [the mother] it will have a devastating impact but I'll be there to support her. At the moment things are in a state of flux. Sometimes it's hard for counselling to occur when that's the case.”¹⁰³

In a closed session at the end of witness 2's evidence I spoke to her about the impact of an adverse decision on the mother:

Mr Power- “My concern is that the children are her life and if the court takes them away from her she may suicide.

Witness 2- I agree.

Mr Power- What can be done to minimize the risk of that?

⁹⁸ See also sections 17.1 & 28.4 below.

⁹⁹ Answer of witness 2 in cross-examination by counsel for the father at p.25 of my notes.

¹⁰⁰ *Op.cit.*, p.26.

¹⁰¹ Evidence in chief of witness 5 at p.71 of my notes.

¹⁰² Evidence of witness 5 in cross-examination by counsel for the father at p.74 of my notes.

¹⁰³ Answer of witness 5 in cross-examination by counsel for the mother at pp.75-76 of my notes.

Witness 2- If you could let me know straight away. If it could be even arranged one of her workers could be here with her at the time and get her straight back to me so we can have a bit of a debrief and a chat so we can see how we manage.”¹⁰⁴

Though I would have preferred to have handed down this decision between Christmas and New Year, I decided to hold off until 07/01/2009. I understand that witness 5 will be present to support the mother on that day.¹⁰⁵

9.4 THE MOTHER’S MENTAL HEALTH ASSESSED BY WITNESS 7¹⁰⁶

The mother attended a drug & alcohol assessment by witness 7 on 21/08/2008. Although she engaged reasonably well, she appeared to be evasive and vague at times – especially in relation to substance abuse - attributing this to poor memory. witness 7 summarized her mental state examination as follows:

- The mother denied any perceptual disorders and none were evident during the assessment.
- Her affect was restricted and she was slightly tearful when referring to the death of her second baby.
- The mother reported that her mood was low and described periods of feeling quite ‘high’, at which times as she puts on music and she and the children dance until they are exhausted.
- The mother reported several episodes of depression in the context of Post Trauma and her mother’s death. Her appetite fluctuates. She sleeps poorly at times with loud teeth grinding which disturbs others in the household. Ms M gave striking evidence about this:

“If her anxiety is really bad, she’ll grind her teeth most nights when her anxiety gets really bad. We had to move KD out of her room because the grinding was getting so bad and it would wake me up some nights as well.”¹⁰⁷

- The mother was orientated in time, place and person. However she complained of poor concentration which was evident during the assessment and also of poor memory.
- The mother’s insight was limited and her judgment was assessed as poor.

¹⁰⁴ At p.31 of my notes.

¹⁰⁵ See p.140 of my notes.

¹⁰⁶ Most of the material in this section is taken from witness 7’s report at p.1.

¹⁰⁷ Evidence in chief of Ms M at p.100 of my notes.

9.5 THE MOTHER'S USE OF ILLICIT DRUGS, ALCOHOL & CIGARETTES

The mother has been a very long-standing user of marijuana. She told witness 7 on 21/08/2008 that she had first used at the age of 22 years and had used regularly from the age of 30 years. She uses cannabis to cover up her feelings and smokes up to 5 bonges daily. Witness 7 considered her vague and evasive when questioned about maximum use. She said that she had “used cannabis daily over the past week but intends to cease all use from today. She plans to start craft work and use music as distractions from cannabis use.”¹⁰⁸

Witness 5 was asked whether she had discussed cannabis use with the mother. She replied:

“Yes. [The mother] disclosed she does use marijuana mainly as a means to relax and settle her mind and to achieve some timeout. Around the 3rd or 4th session she asked for practical strategies to help manage her use of marijuana.”¹⁰⁹

The mother has provided DOHS with 22 urine screens on a random “as directed” basis between 10/06/2008 & 25/11/2008. Analysis by Melbourne Pathology revealed the following results:

DATE	BENZO	OPIATES	COCAINE	METH	CANNAB	AMPHET
25/11/08	NEG	NEG	NEG	NEG	POS	NEG
18/11/08	NEG	NEG	NEG	NEG	POS	NEG
10/11/08	NEG	NEG	NEG	NEG	POS	NEG
07/11/08	NEG	NEG	NEG	NEG	POS	NEG
30/10/08	NEG	NEG	NEG	NEG	POS	NEG
29/10/08	NEG	NEG	NEG	NEG	POS	NEG
24/10/08	NEG	POS	NEG	NEG	POS	NEG
22/10/08	NEG	NEG	NEG	NEG	POS	NEG
20/10/08	NEG	NEG	NEG	NEG	POS	NEG
26/09/08	NEG	NEG	NEG	NEG	POS	NEG
25/09/08	NEG	NEG	NEG	NEG	POS	NEG
24/09/08	NEG	NEG	NEG	NEG	POS	NEG
18/09/08	NEG	NEG	NEG	NEG	POS	NEG
15/09/08	NEG	NEG	NEG	NEG	POS	NEG
02/09/08	NEG	NEG	NEG	NEG	POS	NEG
27/08/08	NEG	NEG	NEG	NEG	POS	NEG
25/08/08	NEG	NEG	NEG	NEG	POS	NEG

¹⁰⁸ Drug and Alcohol Assessment report of witness 7 at p.3.

¹⁰⁹ Evidence in chief of witness 5 at p.70 of my notes.

22/08/08	NEG	NEG	NEG	NEG	POS	NEG
15/08/08	NEG	NEG	NEG	NEG	POS	NEG
01/08/08	NEG	NEG	NEG	NEG	POS	NEG
23/07/08	NEG	NEG	NEG	NEG	POS	NEG
10/06/08	POS	NEG	NEG	NEG	POS	NEG

The Department also obtained and tendered a Gas Chromatography/Mass Spectrometry (GCMS) confirmation for each of these 22 screens. Protective worker 2 believed that these GCMS results “provided clear evidence of the high levels of illegal drugs in [the mother’s] system” and gave rise to “significant concerns that throughout the current intervention, the mother has attempted to dilute her drug screens to produce lower trace levels”.¹¹⁰ The Department called a scientist from Melbourne Pathology, witness 9, in an attempt to substantiate this proposition but witness 9’s evidence did not support it.¹¹¹ In the end all I can find is that the mother’s cannabis use has persisted throughout the 5½ months of the screens but I cannot find that it was at a high level – or for that matter at a low level - or that the urine creatinine levels demonstrate any – let alone any consistent – attempt by the mother to dilute her drug screens to produce lower trace levels.

When witness 7 saw the mother on 21/08/2008 she thought that “[The mother] also presented with signs of recent amphetamine use”¹¹². In her evidence she detailed the signs.¹¹³ I asked her: “Would the negative screen results for 23/07/2008, 01/08/2008, 15/08/2008 & 22/08/2008 change your mind?” She replied:

“Yes, of course. You have to go by urine drug screens. Otherwise I would have said that she had been using amphetamines at that time. That’s why I said she ‘presented’”.¹¹⁴

The Department does not assert that the mother has been using amphetamines and accepts that the positive for opiates on 24/10/2008 has an innocent medical explanation. Protective worker 2 said: “I haven’t made a claim she is using anything else than cannabis.”¹¹⁵

¹¹⁰ DOHS’ second report of protective worker 2 dated 18/11/2008 at p.3.

¹¹¹ See footnote 35 above.

¹¹² Drug and Alcohol Assessment report of witness 7 at p.3.

¹¹³ “When she walked in she had dilated pupils, pale complexion but facial flushing, mild acne around the hair line, sweating, unintelligible speech, teeth grinding at night, appetite fluctuation, not needing sleep”: see p.79 of my notes.

¹¹⁴ At p.80 of my notes.

¹¹⁵ In answer to a question by me at p.16 of my notes.

The negative results for benzodiazepans since 23/07/2008 demonstrate that the mother has not used valium since her detoxification at Moreland Hall.

The mother first used alcohol at the age of 20 years. She denied any abuse, saying that she is only a social drinker and only requires a few drinks to become intoxicated. She could not recall the last time she drank.¹¹⁶ Ms M's evidence corroborates this.¹¹⁷ I am satisfied that alcohol use is not an issue for the mother.

The mother first smoked in her late 20s when she was an inpatient at Banksia House. She has been a regular smoker of up to 50 cigarettes a day for the past 10 years.¹¹⁸

10. FATHER'S DRUG HISTORY BUT CURRENT NON USE

The father produced urine drug screens at DOHS' request on 25/08/2008, 27/08/2008, 01/09/2008 & 15/09/2008. They were negative for all substances tested, including cannabis. Consequently DOHS did not direct him to produce any further screens.

The father attended a drug & alcohol assessment by witness 7 on 10/09/2008. He presented as somewhat tense initially but engaged well and ultimately relaxed. There was nothing in his presentation to indicate current drug use.¹¹⁹ The father reported a long history of substance abuse, mainly involving cannabis and alcohol. He denied use, experimentation or abuse of any substances other than cannabis, alcohol, caffeine and tobacco. He said that he was currently abstinent and intends to remain so in order to care for his children and improve his fitness. He reported long periods of abstinence and said that he has been able to develop ways of giving

¹¹⁶ Drug and Alcohol Assessment report of witness 7 at p.3.

¹¹⁷ DOHS received a report on 03/06/2008 that "The mother & Ms M lock themselves in the bedroom and drink alcohol and smoke 'dope'": see DOHS' Application & Disposition report of the protective worker at p.8. When this allegation was put to Ms M, she denied it vehemently and scathingly: see p.102 of my notes. I accept Ms M's denial.

¹¹⁸ Drug and Alcohol Assessment report of witness 7 at p.3.

¹¹⁹ Evidence of witness 7 at p.81 of my notes.

up drugs and alcohol without professional assistance. I have no reason to doubt him on any of the above.¹²⁰

The father gave the following history to witness 7:¹²¹

- **Cannabis**: First used at age 13 years. Regular user from late 20s. Initially used as a bong. Eventually smoked joints. Last used 25/07/2008 and had been smoking 5-10 joints on one or two occasions weekly. Never smoked in the presence of the children. Able to stop all use of cannabis in the past, including a period of abstinence lasting 5 years.
- **Alcohol**: First used at age 21 years. Regular user of up to 6 stubbies of beer daily from late 20s to November 1995. Stopped drinking at that time following an ultimatum from his then wife and remained abstinent even after separation.
- **Caffeine**: First used at age 10 years. Regular consumption of up to 10 cups of coffee daily since then. Gradually switching to tea.
- **Tobacco**: First used at age 12 years. Has smoked 10-15 cigarettes daily since then.

Witness 7 made a number of recommendations in her report and explained them in the course of her evidence.¹²² I agree with some but not all of them. I agree that it would be wise for the father to reduce his caffeine intake. I do not consider it necessary – nor does the Department – that the father be required to undergo weekly supervised urine drug screens or to attend drug & alcohol counselling. Given the counselling that he has been attending and is continuing to attend with Relationships Australia¹²³, I do not consider it necessary to require him to attend grief counselling related to the death of his mother or his relationships with his children. It would be wise for the father to undertake a medical review related to his recent unexplained weight loss but that is a matter for him, not something to be addressed by a condition on a protection order.

Although involvement in cannabis abuse was one of the triggers for the father's decision to seek employment interstate¹²⁴, I am satisfied that drug & alcohol abuse are not a current protective concern so far as his children are concerned. He is

¹²⁰ Drug and Alcohol Assessment report of witness 7 at pp.1-2.

¹²¹ *Op.cit.*, pp.2-3.

¹²² See her Drug and Alcohol Assessment report at p.3 and her evidence at pp.80-81 of my notes.

¹²³ See section 16 below.

¹²⁴ See section 1.1 above.

abstinent and while he is responsible for the care of LD, WDW & KD I have no doubt that he will continue to be abstinent.

11. MS M'S HISTORY, HEALTH, DRUG USE & WORK¹²⁵

Prior to her evidence commencing in this case, I explained to Ms M that she could decline to answer any question on the ground that an answer might incriminate her in the commission of an indictable offence. There were two particular areas that I thought might prove to be relevant - possession/use of illegal drugs and physical abuse of the children – but Ms M only declined to answer direct questions about the use of illegal drugs when giving evidence in this case.¹²⁶

Ms M attended a drug & alcohol assessment by witness 7 on 21/10/2008. Because she had not been given a warning about self-incrimination prior to this assessment, I consider it would be unfair to use Ms M's admissions to witness 7 in relation to cannabis against her in any criminal proceedings.

Ms M is 48 years old, the third of six siblings from her parents' marriage. The mother is her younger half-sister. Ms M's history is even more deprived than the mother's. She reports that her grandfather and other men "gang raped" her between the ages of 4 to 8 years. She left school at age 12 years, lied about her age and started working as a pastry cook but left that job after eight months as her boss sexually harassed her. Over the years she has done factory work at Nabisco and Allens, has worked on a chicken farm and has done fruit picking. She became pregnant to (name removed) "B" – whom she subsequently divorced in 1983 - at age 15 and they had three children. The first, (name removed), died of Sudden Infant Death Syndrome at 5½ months of age. She has had no contact with her son (name removed) "P" [30y] for eight years but has regular contact with her son (name removed) "J" [27y] and his partner (name removed) "M" who live at (location removed). After she divorced B, Ms M had a brief relationship with (name removed) "G" and had a son (name removed) "S" [21y]. Two months after S's birth

¹²⁵ The material in this section is from witness 7's report and from Ms M's evidence.

¹²⁶ I believe that this was not so much for fear of prosecution as for the possible impact on employment.

Ms M left G after he had threatened P with a knife. S now lives in a house rented by Ms M at (location removed).

All three of her sons have been diagnosed with Attention Deficit Hyperactivity Disorder¹²⁷ and Ms M believes she also suffers from ADHD. In addition one son has been diagnosed with Asperger's Syndrome. Ms M denies that she has ever been prescribed or used dexamphetamine.

Ms M has provided DOHS with 21 urine screens on a random "as directed" basis between 10/06/2008 & 25/11/2008. Analysis by Melbourne Pathology revealed the following results:

DATE	BENZO	OPIATES	COCAINE	METH	CANNAB	AMPHET
25/11/08	NEG	NEG	NEG	NEG	POS	NEG
18/11/08	NEG	NEG	NEG	NEG	POS	NEG
10/11/08	NEG	NEG	NEG	NEG	POS	NEG
07/11/08	NEG	NEG	NEG	NEG	POS	NEG
30/10/08	NEG	NEG	NEG	NEG	POS	NEG
29/10/08	NEG	NEG	NEG	NEG	POS	NEG
24/10/08	NEG	NEG	NEG	NEG	POS	NEG
20/10/08	NEG	NEG	NEG	NEG	POS	NEG
26/09/08	NEG	NEG	NEG	NEG	POS	NEG
25/09/08	NEG	NEG	NEG	NEG	POS	NEG
24/09/08	NEG	NEG	NEG	NEG	NEG	NEG
18/09/08	NEG	NEG	NEG	NEG	POS	NEG
15/09/08	NEG	POS	NEG	NEG	NEG	NEG
02/09/08	NEG	NEG	NEG	NEG	NEG	NEG
27/08/08	NEG	NEG	NEG	NEG	NEG	NEG
25/08/08	NEG	NEG	NEG	NEG	NEG	NEG
22/08/08	NEG	NEG	NEG	NEG	NEG	NEG
15/08/08	NEG	NEG	NEG	NEG	POS	POS
01/08/08	NEG	NEG	NEG	NEG	NEG	NEG
23/07/08	NEG	NEG	NEG	NEG	POS	NEG
10/06/08	NEG	NEG	NEG	NEG	POS	NEG

In contrast with the mother's screens, seven of Ms M's 21 screens are negative for cannabis. No issue was made of the positive result for opiates on 15/09/2008. There was some questioning about the positive for amphetamine on 15/08/2008 but the

¹²⁷ Hereinafter 'ADHD'. I had previously thought that ADHD was a juvenile syndrome but I accept witness 7's assurance (at p.89) that it is also an adult condition.

result is presumptive only, not having been confirmed, and I am not persuaded that Ms M has used amphetamine then or at any other time.

Ms M believes in ghosts. Though I find the belief unusual, I draw no inference from it either for her or against her. I accept that her belief is honest and has nothing to do with drug abuse:

Mrs Weinberg- “You reported seeing walls move on several occasions?

Ms M- In one of the houses I rented years and years ago. I do believe in ghosts. I have seen them. I believe my house is haunted. [The father] can tell you pictures fall off walls and everything else in the house we are in at the moment.

Mrs Weinberg- You reported feeling bugs crawling on your skin on 17/10/2008?

Ms M- To me that’s spirits.

Mrs Weinberg- You said 5 days sleep deprivation to witness 7?

Ms M- I said that once I hadn’t slept for 5 days: working, Christmas lunch, schooling, time got away. That was one time several years ago.

Mrs Weinberg- Was bugs crawling on you physical or spiritual?

Ms M- Spiritual.

Mrs Weinberg- Associated with stress?

Ms M- No. I get out of tune [with the spirits] when stressed.”¹²⁸

Ms M has a number of health problems. She suffers from asthma and hay fever. She is seeing a rheumatologist for arthritis. She suffers chronic pain from a spinal injury sustained in a motor car accident in 1986 which has left her with prolapsed and bulging discs. She has been the victim of multiple assaults by boarders over the years and has had a fractured nose on several occasions. She also fractured her nose accidentally while using an electric drill. She reported nocturnal teeth grinding with jaw pain in the morning. She has also had gall bladder surgery.

Ms M has also had significant mental health problems in the past. She has attempted suicide several times in the context of feeling overwhelmed by her children’s problems and her mother’s terminal illness. She reported having deliberately driven her car into a brick wall about ten years ago but denied any other history of deliberate self-harm. Although she described several depressive episodes and said that she “had been depressed on and off for years”, she attributed this to complex family problems. Given her extremely kind and generous nature¹²⁹, it is not out of character for her to take the problems of the family on to her own shoulders. She first used Diazepam at age 23 at the time of her first separation and

¹²⁸ At pp.121-122 of my notes.

¹²⁹ As to which see section 26 below.

again 3 years ago when she became depressed but has not used it since. She denied any current suicidal ideation or that she was any risk to others.

Despite this history and in contrast with her parlous physical state, I consider that Ms M's current mental health and mental functioning raise no significant concerns as to her ability to relate to and care for the children. In her assessment she denied any thought disorders and none was evident to witness 7. She was slightly tearful when referring to her sexual abuse as a child and her sons' medical problems but reported that her mood was currently good and she presented as euthymic. She did not report elevated moods or feelings of euphoria, periods of increased energy or racing thoughts. She was appropriately oriented in time, place and person. Although she reported impaired short term memory, she was able to recall three words at one, five and twenty minutes. No impairment to her long term memory was evident during assessment. Her concentration was assessed as good and her judgment and insight were also good. Witness 7 said:

“There were no abnormalities noted. She kept up with me the whole time and never lost track. Her judgment and insight were good in that, as with the father, she could discuss consequences and understood the need for moderation, treatment, etc.”¹³⁰

It is clear from her drug screens that Ms M is a fairly regular user of cannabis. She reported to witness 7 that this was to help her cope with chronic pain from her spinal injuries sustained in 1986. She said on 21/10/2008 that she was currently smoking one or two pipes a night when the children are not in the house, i.e. when they are having access with their father. She denies addiction, saying she switches to prescribed Endone (oxycodone) when she starts to need more than two pipes for pain relief. There is no suggestion that alcohol is an issue. Apart from the fact that use of cannabis is illegal, witness 7 has identified a particular potential problem with Ms M using cannabis:

“She referred several times to the fact that she had ADHD. A psychiatrist had offered her an appointment but she thought it was diagnosis by a G.P. or a self-diagnosis. Use of cannabis by persons with ADHD is quite risky...[I recommended] a proper diagnosis to see whether or not she has this quite serious illness. I can't explain the underlying physiology but we know people with ADHD are contraindicated for central nervous system depressants [CND].

¹³⁰ Second part of evidence in chief of witness 7 at p.88 of my notes.

They respond better to drugs which stimulate them which is why dexamphetamine is prescribed. Cannabis does depress.”¹³¹

While I do not disagree with witness 7’s recommendation that Ms M have a formal psychiatric assessment to clarify a diagnosis of ADHD and to advise re appropriate management, I believe that is a matter for her, not something to be addressed by a condition on a protection order which does not place the children in her care.

Witness 7 also recommended that Ms M continue random supervised urine drug screens twice weekly. Asked why, she said she felt Ms M “wasn’t being completely open about her drug & alcohol history. Guarded behaviour. She would answer questions very briefly and not be prepared to elaborate.”¹³² I did not get that impression of her in the witness-box. In neither set of its draft conditions does DOHS seek a condition requiring Ms M to continue drug screens and for my part I do not consider it necessary either.

12. PREVIOUS REPORTS RE CHILDREN & SIBLINGS

The Department has received a significant number of previous reports [notifications] in relation to LD, to the mother’s other children and to the father’s other children. However, apart from the current investigation involving the L children – about which I have heard some evidence from Ms M - I am not prepared to give any significant weight to such reports unless they have been investigated and substantiated or are the subject of court orders.

12.1 SUBSTANTIATED REPORTS RE LD & WDW¹³³

Prior to its current involvement, which commenced in February 2008, the Department had received five previous reports regarding LD and one regarding WDW. None of these reports had resulted in protection applications. Only one was substantiated. It dates from 10/02/2006 and resulted in non-statutory DOHS’ intervention until 02/11/2006. The report focuses on concerns about the mother’s mental health and general chaotic lifestyle. In contrast with the usual case involving

¹³¹ *Ibid.*

¹³² *Op.cit.*, p.87.

¹³³ The information in this section is taken from DOHS’ Application & Disposition report dated 02/07/2008 at pp.17-18.

allegations of domestic violence, DOHS considered it appropriate to close the case when the father came back on the scene. The details of the report are as follows:

“Concerns were raised regarding the mother’s mental health and that there were several teenagers living in the home who regularly smoked ‘bongs’ and drank alcohol in front of LD. The investigation found concerns regarding domestic violence between the mother & the father, the mother’s general lack of attendance at antenatal appointments, the mother’s mental health and having a general chaotic lifestyle. During intervention by the Department, WDW was born. The case was closed due to changes made during DOHS’ involvement. In the past, the mother’s living circumstances were chaotic. The mother and the father were considering resuming their relationship, and had identified the factors that were contributing to conflict in the past. The MCHN and paediatrician had no concerns about the safety or wellbeing of WDW. The mother’s mental health was stable. The mother & the father were not using marijuana and the family planned to move to Queensland in the near future.”¹³⁴

12.2 REPORTS & COURT ORDERS RE OLDER D CHILDREN

12.2.1 ID¹³⁵

The Department received a notification on 27/02/2001 expressing concerns that ID had a large number of absences from school, was shoplifting from (name removed) Plaza and was selling her stolen items at school. ID was described as looking unkempt, pale and dirty and not having eaten properly. It was believed that she was acting as a parent to the other siblings. ID did not want to live with her mother and the father did not want her in his care. Consequently she was placed on a 12 month custody to Secretary order on 26/02/2002. She missed her siblings and family and moved back to live with the father. Over the next few years ID continued to be transient in her placements, moving out of the father’s home, staying with different friends and finding her own carers to live with. The father oscillated between having regular contact with ID and refusing to speak to her at all. ID eventually returned to the custody of her father in March 2006 and DOHS made a decision to allow the custody to Secretary order to lapse on expiry on 07/04/2006 given that ID was 17 years of age and was living back at home with her father.

¹³⁴ DOHS’ Application & Disposition report dated 02/07/2008 at p.17. In relation to the “concerns regarding domestic violence” I note and accept the accuracy of the disclosure at p.3 of witness 7’s report dated 21/08/2008 that the mother “denies any history of aggression apart from verbal abuse”.

¹³⁵ *Op.cit.*, p.20.

12.2.2 DD

The Department received a notification on 07/03/2003 that DD had left the family home, had not been attending school and his whereabouts were unknown. When DD was located, he was returned to his father's care. However, as a result of DD refusing to go to school father and son had significant conflict which resulted in the father saying he could no longer care for DD. A custody to Secretary order was made on 30/04/2003 which was allowed to expire at term on 29/10/2005. In late 2004 DD started to have increasing contact with his father. After reporting that he and his father "were getting along really well", DD returned to the father's full-time care in October 2004.¹³⁶ The father said of this period of DD's life:

"DD wouldn't go to school. I had discussions with the school and they involved DOHS because I couldn't keep him at school. He was 15 years old and I was walking him to school. He ran away from school at lunch time. DD and I agreed we couldn't communicate and couldn't live together. He soon decided he wanted to live with me. Since he has been back in Melbourne he has had two jobs labouring and is enrolled to start an auto apprenticeship next year."¹³⁷

On a number of occasions in his evidence the father used the words "DD and I" with what sounded to me like very positive feeling.¹³⁸ That was reciprocated by DD in that he was present in court most days apparently in support of his father.

12.2.3 MD

MD has an intellectual disability. The Department received a notification on 27/07/2001 that MD had a large number of unexplained absences from school. On 26/02/2002 he was placed on a custody to Secretary order. On this order he resided in a placement supported by Berry Street Victoria, had access with his father and was supported by Disability Client services. The case closed on 30/09/2003 when he turned 18. Thereafter Disability Services case managed him, reporting that MD was "doing well and moving into long term housing".¹³⁹

¹³⁶ *Op.cit.*, p.19.

¹³⁷ Evidence in chief of the father at p.132 of my notes.

¹³⁸ See e.g. pp.127, 128, 130 & 132 of my notes. Witness 8 said in her evidence at p.97 of my notes.: "I'm aware he has a close relationship with his son DD."

¹³⁹ DOHS' Application & Disposition report dated 02/07/2008 at p.21.

12.3 SUBSTANTIATED REPORTS RE THE L CHILDREN¹⁴⁰

A report dated 16/02/2005 about concerns in relation to Mr L resulted in non-statutory DOHS' intervention until 08/09/2005.

A report dated 06/07/2002 raised concerns about the maternal grandfather hitting all three children with a belt and pulling CL's legs and slapping him. Maternal grandfather and the mother gave DOHS an undertaking they would not hit the children again. Case was closed as the family was working with (name removed) Family Support Service and there were plans for a referral to Austin CAMHS.

A report dated 22/03/2001 expressed concerns in relation to the mother's depression and her admission to Banksia House following a suicide attempt. Mr L cared for the children while the mother was in hospital. The case was closed on 22/10/2001 as Families First were engaging and working with the mother, she was compliant with medication and her mental health issues had improved.

12.4 CURRENT INVESTIGATION RE THE L SIBLINGS

On 07/11/2008 the Department received a report that CL, BL & AL were spending longer periods of time at their mother's home due to their father's alcohol addiction. It was also reported that one of these children had an injury to his face and the mother had reported that the child disclosed that Mr L was responsible.¹⁴¹ The report is currently under investigation.¹⁴²

In her evidence in this case Ms M painted a very bleak picture of Mr L and his impact on CL, BL & AL:

Mr Teare- "Was there an occasion this year when you drove the mother to Mr L's house?"

Ms M- Yes.

Mr Teare- To collect LD?

Ms M- No, BL & AL. If Mr L gets drunk and starts yelling at the kids they ring up the mother and tell her 'Dad's drunk. Can you come and get us?' Either BL and AL or BL depending on who is being yelled at at the time.

Mr Teare- Was there a phone call made?

Ms M- Yes. I handed the phone to the mother and BL talked to his mum and when she got off the phone she goes 'I'm going to get the kids, Mr L is drunk.' Sometimes we go

¹⁴⁰ The information in this section is from DOHS' Application & Disposition report dated 02/07/2008 at p.22.

¹⁴¹ DOHS' second report of protective worker 2 dated 18/11/2008 at p.3.

¹⁴² Evidence of protective worker 2 at p.6 of my notes.

by train, sometimes by car, depending on whether or not we have all the kids. I go and bring the bags. The mother would keep them overnight and give them back to Mr L when he is sober. Occasionally BL would want to stay and go to school from the mother's place.

Mr Teare- Did you take LD, WDW & KD to Mr L's house?

Ms M- We did take the children to visit. If he was affected by alcohol the kids stayed with me or watched TV while Mr L was outside talking with the mother. A lot of times the mother would go by train if the kids were in bed. 90% of the time she went over there to Mr L's alone. She wouldn't take a child unless I was with her. Most of the time she went to the police station and took the police around to collect the [L] children. There was no risk to LD, WDW & KD. I would sit out in the car with them if Mr L was affected by alcohol. If I had the kids WDW, LD & KD I'd be in the car and once the bags were in the car I'd leave and she'd catch the train home with the older kids. I'd take the younger kids back with me but they were never left with Mr L.

Mr Teare- How often has the mother had to go over to Mr L's to pick up her other children?

Ms M- Quite frequently and nine times out of 10 I stay over with the kids.

Mr Teare- What do you understand is the problem with Mr L?

Ms M- Because he is drunk. The children make loud noises. They play. He can't watch TV. If he gets physically violent we remove the children.

Mr Teare- Have you raised that with DOHS?

Ms M- I've rung them and complained about one episode. Nothing got done. The mother had rung them on several occasions and nothing got done. She is just an 'overzealous mother'.¹⁴³

On the basis of the above evidence, I intend to include a condition on each child's order that the mother must ensure that there is no contact between Mr L and LD, WDW or KD.

13. THE TRIGGERING EVENTS IN FEBRUARY 2008

Although the protection applications in relation to LD, WDW & KD were not taken out until 13/06/2008, the triggering reports to DOHS' Child Protection occurred in February 2008. On 07/02/2008 the Department received a report expressing concerns that LD presented as generally neglected as he looked dirty and unkempt and was playing on the road and roaming the streets at night unsupervised. The home presented as dirty and smelling of a strong foul odour.¹⁴⁴ Victoria Police had attended the family home the day before to do a "welfare check"¹⁴⁵.

¹⁴³ At p.109.

¹⁴⁴ DOHS' Application & Disposition report dated 02/07/2008 at p.4.

¹⁴⁵ Evidence of the protective worker at p.43 of my notes.

The father immediately came back to Melbourne after receiving a phone call from the mother on 06/02/2008 saying that the police were in the house and she didn't know why. She had also told him that the house was very dirty and he had to come and help her clean it before "Welfare" came for the children.¹⁴⁶

In his evidence the father painted a bleak picture of the mother and the family home after his arrival on 07/02/2008 on the overnight train from Sydney:

"DD and I arrived. It was drizzling rain. For six months before that he was working with me in Sydney. Just after 8.30am The mother was outside cleaning windows. I've never seen her do that before. It made me realize there was something wrong with her. Then I realized she was on some sort of drug. She was shaking impulsively. She couldn't sit still. Her jaw was shaking, quivering. She couldn't focus. WDW was in a pram sleeping in the lounge room and LD was also in the lounge asleep. In my opinion the house wasn't liveable. There were clothes, scraps, dog faeces in the bedroom. The children didn't have a floor to play on. The only available space was to walk."¹⁴⁷

The father explained that he had earlier asked Ms M to help the mother:

Mrs Weinberg- When did you call Ms M to help?

The father- The mother & I had a discussion at Christmas 2007 when I came down. She wasn't coping too well. There were problems with Mr L annoying her. He makes phone calls or sends the children around to ask for cigarettes or marijuana. He lives in the next suburb [location removed], a 3 minute train ride. It was distressing the mother.

Mrs Weinberg- Why did you ask Ms M to help?

The father- Because I knew the mother couldn't return to Sydney because of court issues and I knew she couldn't cope by herself. When I returned at Christmas the house was bad. Not as bad as later. She said it was her way and the children would have to get used to it. I thought of quitting work to take over management of the house. The children were my main concern."¹⁴⁸

On 14/02/2008 Ms M advised the Department that she had arrived at the mother's home over the previous weekend due to the father contacting her to help the mother care for the children. She said that she intended on staying in the home for approximately 3 months to assist the mother to "get back on to her feet". At that time the mother was asleep as she had taken valium that the CAT team had prescribed for her.¹⁴⁹

¹⁴⁶ Evidence in chief of the father at p.127 of my notes. See also DOHS' Application & Disposition report dated 02/07/2008 at p.4.

¹⁴⁷ Evidence in chief of the father at p.127 of my notes.

¹⁴⁸ *Op.cit.*, p.128. The emphasis is mine.

¹⁴⁹ DOHS' Application & Disposition report dated 02/07/2008 at p.4. The father believes that Ms M had not fully moved in to the mother's house by 14/02/2008: see his evidence at p.128 of my notes. However, in my view, nothing turns on this discrepancy.

On 14/02/2008 Ms KA from xxAMHS Triage rang the Department to advise that the mother had been sent to xxAMHS by her general practitioner because she was threatening to kill herself by drinking weed killer. The mother told Ms KA that she did not have energy to fight for LD & WDW and that she did not care what happened to KD as she knew her sister would look after her if the mother died.¹⁵⁰

The previous evening there had been an argument between the father and the mother which ultimately led to the mother seeking an intervention order on her own behalf and on behalf of the children.¹⁵¹ This argument was “the point of no return” so far as the father was concerned. He decided on 14/02/2008 that his children were not safe in the mother’s house. In my view his decision was absolutely right at that time. When the mother, Ms M & KD were out he collected LD from kindergarten, removed some of LD’s & WDW’s clothes, some nappies and his suitcase from the house and took LD & WDW to his daughter-in-law’s home in (location removed).¹⁵² It was also right that he did this covertly. Had he given the mother advance notice of his intentions, it is inevitable that the children would have been exposed to a monumental fuss. The father explained what happened on 14/02/2008:

“After we had all woken, no one was talking. We could see the mother & Ms M were getting ready to go somewhere. Ms M told me she was going to the doctors with the mother and was going to take KD. WDW was asleep. DD and I remained in the house with WDW. LD went to school. I realized the argument the night before had reached the point of no return. After WDW woke up we left the house and walked towards the kinder and I rang DOHS to say I didn’t want my children in the house any more and I was going to take the children and where I was going to take them.”¹⁵³

On 22/02/2008 Dr (name removed) “Dr G” from xxAMHS advised DOHS that the mother had presented for an appointment and appeared “reasonably stable”. Dr G said that the mother denied any self-harming or suicidal thoughts, had no psychotic

¹⁵⁰ See DOHS’ Application & Disposition report dated 02/07/2008 at p.4 and see also section 9.2 above.

¹⁵¹ As to which see section 15.2 below.

¹⁵² Evidence of Ms M at pp.107-108 of my notes. Ms M also gave evidence that LD had later told her that the father had asked him to put his hand in, open a window, climb in and open the door. At first blush this sounded rather sinister but then I heard that at that time all of the keys to the house had been lost and the mother herself used to leave a lounge room window open so that she could get in and out of the house and could lock the door from the inside.

¹⁵³ Evidence in chief of the father at p.128 of my notes. The father’s phone call to DOHS was corroborated by a DOHS’ case note which stated that (name removed) “Ms MF” had spoken on the phone to the father at 2.45pm on 14/02/2008.

symptoms and would be referred back to witness 2. That day DOHS purchased and delivered to the mother a cot for KD.¹⁵⁴

In an interview with protective worker Ms (name removed) “Ms LC” on 26/02/2008 The father provided the following information:¹⁵⁵

- He came back to Victoria overnight on the train when he heard the children were not being cared for.
- On his return to the family home he had found it dirty with dog faeces in the children’s beds and the mother was “off her head”. She had been smoking bongs and “popping pills”. The children had not eaten a decent meal for days and as the mother is scared of meat she refused to cook meat for the children.
- He believed the children were not sleeping in their beds but they were sleeping in their prams or on the couch and WDW had a lump in her back as a result.
- He was attempting to potty train WDW as the mother had not attempted to do so. WDW’s speech had improved since residing with him.
- He did not plan to have the children in his care. However, the reported concerns to Child Protection regarding the mother’s substance use, mental health, lack of supervision and ongoing neglect of the children were correct and concerned him. He would not return LD & WDW until these concerns had been addressed.

14. NO PROTECTIVE CONCERNS ABOUT FATHER

On 14/02/2008 Ms M advised DOHS that the father runs out of patience with the children and punished them by hitting them and often verbally abused them.¹⁵⁶ However in sworn evidence on 16/12/2008 Ms M acknowledged that she had no concerns whatsoever about any of the children spending time with the father.¹⁵⁷

¹⁵⁴ DOHS’ Application & Disposition report dated 02/07/2008 at p.5.

¹⁵⁵ *Ibid.* See also evidence of the protective worker at p.41 of my notes, evidence of witness 8 at pp.95-96 and the first report of protective worker 2 dated 22/09/2008 at p.9. See also section 14 below.

¹⁵⁶ See DOHS’ Application & Disposition report dated 02/07/2008 at p.4.

¹⁵⁷ Evidence of Ms M in cross-examination by counsel for the mother at p.113 of my notes.

In a conversation with protective worker Ms SH and Acting Unit Manager Ms LW on 21/02/2008, the mother “raised concerns about the children in the father’s care. [She] stated that on one occasion the father forgot to look after WDW and she drank shampoo.”¹⁵⁸ The Department does not accept these concerns and - after seeing the father in the witness box and hearing his evidence – nor do I. Asked whether she had asked the father about these allegations, the protective worker said: “I didn’t. I believe Ms LC discussed most of this in the conversation she had with the father.”¹⁵⁹

On 26/02/2008 Ms LC visited the father at his daughter-in-law’s home in (location removed) and conducted a protective assessment of him.¹⁶⁰ She raised no concerns about the father’s ability to care for the children although she did consider that the house was small and would not be suitable for the children on a long-term basis.¹⁶¹ It should be noted that that house was the father’s daughter-in-law’s house. It is not the house of his daughter ID where he is currently living and where he proposes that LD, WDW & KD reside.

Writing on 22/09/2008 the current protective worker, protective worker 2, also had no protective concerns about the father:

“The father has presented as a caring and nurturing father who is committed to his children’s safety and wellbeing. The father has been assessed by Child Protection as being the most appropriate parent to care for the children and has requested that they be placed in his full time care. The father has requested that the mother have regular contact with the children as he acknowledges the importance of the children continuing to have a relationship with their mother.”¹⁶²

¹⁵⁸ See DOHS’ Application & Disposition report dated 02/07/2008 at p.4.

¹⁵⁹ Evidence of the protective worker in cross-examination by counsel for the father at p.41 of my notes.

¹⁶⁰ Ms LC was not called as a witness. Counsel for the father – supported by counsel for DOHS – sought to tender a lengthy case note which Ms LC had written after this visit. Counsel for the mother objected on the grounds of (i) relevance; and (ii) hearsay. I upheld counsel’s objection on the second ground. Although s.215(1)(d) of the *CYFA* empowers the Family Division of the Children’s Court to “inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”, the section has recently been held by the Court of Appeal to be subject to a requirement to accord procedural fairness: see *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 at [28]-[29] per Maxwell P (with whom Neave & Weinberg JJA agreed). In the circumstances I was not persuaded that it would be fair to the mother to allow this case note into evidence in the absence of Ms LC since it apparently “encompassed far more than merely what was recorded by protective worker 2 in her first report dated 22/09/2008 at p.9”.

¹⁶¹ Evidence of the protective worker at pp.39 & 41 of my notes.

¹⁶² See first report of protective worker 2 dated 22/09/2008 at p.9.

I found protective worker 2 a generally impressive witness. The totality of the evidence strongly supports her opinion about the father. It is true that several of his older children – MD, ID & DD – have been on child protection orders but each was a teenager at the time the protective concerns arose.¹⁶³ These concerns – mainly school refusal and absconding – did not involve allegations that the father lacked parenting capacity. The father believes that he would keep the conditions of any order and that he could “look after the children 24/7”, saying: “Yes I do. For the next 15-20 years. Yes.”¹⁶⁴ For my part, I also believe it.

15. MOTHER’S INTERVENTION & FAMILY LAW ORDERS

15.1 A DANGER INHERENT IN *EXPARTE* ORDERS

On 26/02/2008 the mother went off to the Melbourne Magistrates’ Court seeking an intervention order against the father on her own behalf and on behalf of the three children. On 27/02/2008 she went to the Federal Magistrates’ Court in Melbourne seeking a recovery order for LD & WDW who had been in the father’s care since 14/02/2008.

Both applications were made without notice to the father and the respective orders were made *ex parte*. In this enterprise the mother was assisted by Ms M.¹⁶⁵ Protective worker 2 believes that “The mother was assisted by a community worker to obtain a recovery order through the Family Court and she sought an intervention order at that time as well.”¹⁶⁶ There was a suggestion in the evidence of the protective worker that two other protective workers may earlier have discussed the mother’s options with her but I make no finding on this one way or the other.¹⁶⁷ DOHS did not attend either court hearing.

¹⁶³ For details see section 12.2 above.

¹⁶⁴ Evidence in chief of the father at p.132 of my notes.

¹⁶⁵ Evidence of Ms M in answer to a question by me at p.115 of my notes.

¹⁶⁶ Evidence of protective worker 2 in cross-examination by counsel for the mother at pp.18-19 of my notes.

¹⁶⁷ Evidence of the protective worker in cross-examination by counsel for the father at p.43 of my notes. I subsequently advised counsel that I would make no finding on this issue to avoid the necessity to call one of those protective workers, given that a finding on this issue would not affect the outcome in this case in any way.

There is no mention in the mother's complaint of her having had suicidal ideation and having been so anxious and distressed on 14/02/2008 that witness 2 had called in the CAT team¹⁶⁸, nor of her being triaged on that day by the (name removed) Area Mental Health Service.¹⁶⁹ Nor is there any mention of DOHS' ongoing involvement with the children since 07/02/2008. I have not been provided with any affidavit material in support of the mother's application in the Federal Magistrates' Court. However, it is a fair inference that none of the judicial officers who made *ex parte* orders in late February and early March 2008 were aware of the mother's problematic mental health or of the ongoing DOHS' involvement with the children.¹⁷⁰ It is no criticism of those judicial officers to say that on the evidence I have heard in this case I would not have made an intervention order against the father in relation to the children, nor would I have ordered that any of the three children live with the mother. What this case clearly and eloquently demonstrates is the well-known danger of *ex parte* orders based on only one side of the story, especially when that side comes from a person who has had very serious and long-standing mental health issues which had peaked only 12 days before.

15.2 INTERIM AND FINAL INTERVENTION ORDERS

In her complaint made on 26/02/2008 the mother said:

"[The father] has been verbally and emotionally abusive throughout our relationship. The most recent incident occurred on 13/02/2008. [He] began yelling at me in the lounge room. Then he followed me into the hallway. He was making accusations stating that I was taking speed and sleeping around. He called me 'Nothing but a druggo'. This resulted in [him] placing his fist in my face, threatening to hit me. He also made threats to kill me. He told me and my sister to leave my home. I went to bed. At about 4am [he] came in and began yelling at me to get up and clean. This incident really frightened me. [He] has never been physically abusive before. The night before on 12/02/2008 the defendant put our 2 year old daughter in bed without feeding her. About 3 or 4 years ago when we were living together [he] came home at 5.30am and started smashing dishes his older children had left in the sink. I had cleaned up before I went to bed. I have seen the defendant nearly throw his older son DD at the wall. He has also punched a hole in a door with his fist when he was angry with his older daughter ID. The defendant has taken our two oldest children without my consent and he refuses to give them back. A recovery order application will be heard tomorrow. The defendant yells, swears and degrades me almost daily. [He] continually tries to control me through his

¹⁶⁸ Evidence of witness 2 in cross-examination by counsel for the mother at p.28 of my notes.

¹⁶⁹ Evidence of protective worker 2 in cross-examination by counsel for the father at p.18 of my notes.

¹⁷⁰ The mother's decision not to give evidence meant she was unable to defeat such an inference.

behaviour. I fear for my safety as I believe the defendant will physically hurt me. The defendant has broken into my house before.”¹⁷¹

On the basis of this complaint, and presumably after hearing evidence to this effect from the mother, Magistrate Lamble made an interim intervention order on 26/02/2008 at Melbourne Magistrates’ Court. This interim order was in substantially the same terms as the ultimate final order save that it contained no counselling orders.

On 13/03/2008 Magistrate Crowe, sitting in the Magistrates’ Court Family Violence Division at (location removed), made a final intervention order in which the persons protected by the order were the mother, LD, WDW & KD and whose terms were as follows:

The Court ordered that the defendant the father be prohibited from:

1. assaulting, harassing, threatening, intimidating or behaving in an offensive manner towards the protected persons at any time;
2. approaching, telephoning or contacting the protected persons in any manner (including in writing, text message, e-mail, other electronic communication or through another person) except-
 - (a) to participate in counselling, mediation or family dispute resolution; or
 - (b) by order of any court, or by prior agreement with the mother; or
 - (c) pursuant to a court order; or
 - (d) through a lawyer; or
 - (e) in the company of a police officer;
3. knowingly being at or within 200 metres of any address or any premises where the protected persons live, work, attend school or childcare except by order of any court or by prior agreement in writing with the mother;
4. damaging, threatening to damage or interfering with any property of the protected persons. This includes property situated at the premises in which the protected persons live or work and property of any other person being used by the protected person;
5. causing another person to engage in any of the behaviour prohibited by this intervention order on the defendant’s behalf or at the defendant’s request, direction or instigation;
6. possessing, carrying or using any firearm. If the defendant has a firearms licence, permit or authority it is revoked and the defendant is disqualified from obtaining another during the course of this order and for any other period provided in the *Firearms Act 1996*. Any firearms in the defendant’s possession are forfeited to the Crown to be disposed under the *Firearms Act 1996*;
7. causing or allowing the children named in this order to hear or witness any of the behaviour prohibited by this order.

The Magistrate also directed that the father attend eligibility assessment regarding participation in court directed counselling [pursuant to s.8C(1) of the *Crimes (Family Violence) Act 1987*].

¹⁷¹ This is the version of the mother’s allegations against the father which has been typed up by court staff on 26/02/2008. The handwritten version prepared by the mother on that day is a little more detailed but not substantially so.

Unfortunately for the children and for himself, the father did not attend court on 13/03/2008 and the intervention order was made without the presiding Magistrate having the benefit of hearing the father's side of the story. I had that benefit:

"My version? I think we'd been niggling and arguing all day. The claim that it was in the kitchen was impossible. There's no room. The mother threw a CD [compact disc] and the plastic cover shattered and hit me. I followed her to the hallway where she opened the cupboard door. There is no way known Ms M could see behind the living room door. The mother always comes and sticks in your face when she is angry. She was yelling and saying 'I'm not scared to hit you.' And I said 'I'm not scared to hit you either.' and I raised my open hand to her. This was about 1am. I never made a threat to kill the mother. The argument ended by me saying to Ms M to get her out of my face. She [the mother] was spitting and screaming in my face. LD was asleep on his bed. We had cleaned his room. I slept in the lounge room. WDW remained in her cot. Her bed was hardly ever used. The mother slept in her room."¹⁷²

Ms M's version was a little different:

"The mother & the father had started arguing. The father was accusing her of sleeping around. She was in bed in the early hours of the morning when the father woke her up and told her to clean up. It was on for young and old and I reckon if I wasn't there he would have hit her. I told the mother the next day: 'Something's got to be done. You've got to get yourself sorted out.' and we made an appointment to see the doctor. I heard what was being said and the father had his hand – clenched fist – this far from my sister's face [indicating very close]. He saw me and backed off. I heard him say 'If you don't clean up, I'm going to hit you' and at one stage he did threaten to kill her. He said: 'You were sleeping around' and she said she wasn't. He said 'You're a liar' and his hand came up."¹⁷³

However in cross-examination she was not as convincing about this incident:

Mrs Weinberg- "When the father said she was sleeping around, he might have had a bit of knowledge on that?"

Ms M- I don't believe so.

Mrs Weinberg- You saw a raised fist?

Ms M-Yes, I did.

Mrs Weinberg- Where did it take place?

Ms M- In the hallway near the kitchen and linen cupboard.

Mrs Weinberg- I suggest the linen cupboard was open, preventing you from seeing.

Ms M- No. It wasn't open.

Mrs Weinberg- I suggest that at no stage did he threaten to kill your sister.

Ms M- Oh, didn't he? [Laughing ironically]

Mrs Weinberg- I suggest he went to speak to your sister and she said 'There's nothing to stop me hitting you.' and he said 'There's nothing to stop me hitting you.' And he had his hand up but not with a clenched fist.

Ms M- You didn't see it!

Mrs Weinberg- Why didn't you call 000?

Ms M- I had the phone in my hand and he seen me and backed off.

Mrs Weinberg- Waving his fist and to call your sister?

¹⁷² Evidence in chief of the father at p.128 of my notes.

¹⁷³ Evidence of Ms M in cross-examination by counsel for the mother at p.107 of my notes.

Ms M- I'm not answering no more questions."¹⁷⁴

Where there is conflict between them, on balance I prefer the father's version of events.¹⁷⁵

15.3 FAMILY LAW ACT ORDERS DATED 27/02/2008

On 27/02/2008 Federal Magistrate Turner, sitting in the Federal Magistrates' Court at Melbourne, issued a Recovery Order for LD & WDW and made the following interim orders *ex parte*:

1. The mother and the father have equal shared parenting responsibility for the children of the relationship LD born 3 May 2003, WDW born 31 May 2006 and KD born 8 August 2007.
2. The children live with the mother until further order.
3. The father's time with the children, WDW, LD and KD, is reserved until further order.

The mother's application was fixed for final hearing on 26/08/2008. On 31/07/2008 Ms M told the current protective worker, protective worker 2, that she and the mother were going to the Family Court on 26/08/2008 and she will get custody of the children and take them back to (location removed).¹⁷⁶ However, it appears that the case did not proceed in the Federal Magistrates' Court on 26/08/2008. I assume this was because of the ongoing protection proceedings in the Children's Court.

The effect of the order reserving the father's time with the children was not entirely clear to me so I asked counsel for help. Two conflicting alternatives were raised. Mr Stevens said that the term is sometimes found in orders made with the consent of parties and enables the parties to work out access arrangements between themselves.¹⁷⁷ Mr Teare said that in practice in the Family Court when there is no order as to access there can be no access until the person goes back to court for an access order. Mrs Weinberg basically agreed: "Usually orders made *ex parte* have a return date and the party shut out comes on the return date and makes submissions."¹⁷⁸ I think that Mr Teare's explanation is more likely the correct one

¹⁷⁴ At p.117 of my notes. I have probably misrecorded Mrs Weinberg's last question in this exchange which does not read properly.

¹⁷⁵ See also section 5 above.

¹⁷⁶ Evidence of protective worker 2 at p.18 of my notes.

¹⁷⁷ Mr Stevens based this interpretation on a secondary source: p.219 of "Rights & Freedoms in Australia" by Jude Wallace & Tony Pagone [Federation Press].

¹⁷⁸ At p.39 of my notes.

and that the intention of Turner FM was that the father would have no access with LD, WDW or KD until further order.

The children were returned to the mother by Australian Federal Police executing the Recovery Order on 27/02/2008. The father said of this:

“The police bursting into the house didn’t frighten them much but when LD was removed from my arms he and WDW pretty much went hysterical.”¹⁷⁹

15.4 CRITICISM OF PARENTS RE NO PATERNAL CONTACT

After LD & WDW were removed from his care on 27/02/2008, the next time that the father had any contact with them or KD was his first DOHS’ supervised access on 01/07/2008. From the point of view of the children – especially of LD who clearly idolizes his father – this was and is appalling. All the adults are at fault – the mother, the father and the Department.¹⁸⁰ Nor did the intervention order or the orders of the Federal Magistrates’ Court properly take into account what I consider – with the wisdom of hindsight and at least two sides of the whole story – to be the best interests of the three children.

I am very critical of the mother for seeking and obtaining orders which prevented access between the children and their father. Once again, that was all about her. She was clearly putting her feelings about the father way above the interests of her children. It was not as if the protective worker had not raised the issue with her. The protective worker was asked: “Why did you not tell the mother the children had a right to see their father?” She replied: “I’m sure during the visits we discussed that.”¹⁸¹ She made a similar response when asked whether she had contemplated the children having respite with the father: “Whenever I brought up the father it was a ‘no go’. She just didn’t want to discuss that.”¹⁸² Again it is all about the mother. Never mind the children! The contrast with the father’s position – as described by protective worker 2 in September 2008 - is stark:

“The father has requested that the mother have regular contact with the children as he acknowledges the importance of the children continuing to have a relationship with their mother.”¹⁸³

¹⁷⁹ Evidence in chief of the father at p.130 of my notes.

¹⁸⁰ My criticism of the Department on this issue is detailed in section 18 below.

¹⁸¹ Evidence of the protective worker in cross-examination by counsel for the father at p.46 of my notes.

¹⁸² Evidence of the protective worker at p.51 of my notes.

¹⁸³ First report of protective worker 2 dated 22/09/2008 at p.9.

I am also critical of the father for not having attended the intervention order hearing at (location removed) Magistrates' Court on 13/03/2008 and for not seeking a variation to the Family Court orders so that he could at least have access. I accept that he felt disempowered and was inexplicably totally ignored by the Department. I also accept that the relationship between child protection activity, intervention orders and Family Law Act orders must seem quite Byzantine to a lay person. It seems Byzantine enough to me. Nevertheless that is not a sufficient excuse for throwing up his hands and doing nothing effective to see his children:

Mrs Weinberg- "From the time you saw Ms LC – before recovery by the Federal Police – did any social worker have any communication with you after the children were taken from your care?"

The father- I made many phone calls and no one would return my call. I rang the switchboard at DOHS (location removed). They always said they would get back to me. I was always given a name. I was calling to find out what was happening with the children.

Mrs Weinberg- Did you think of going to the Family Court?

The father- I was confused and had no idea of the legal situation or what was going on.

Mrs Weinberg- When did you next hear from DOHS?

The father- When given the protection application they called me. I was under the impression they were going to return the children to me. In the two hours it took me to get to court I was told they wanted Ms M to have the children. I think I was legally represented. I wanted the children back. I was living at...the home of my grandson and his mother."

Mrs Weinberg- When did you leave that house?

The father- End June, early July.

Mrs Weinberg- Why did you leave?

The father- It was discussed with DOHS. They didn't like the area for children in especially (location removed) and their recommendation was I wouldn't get the children because I lived in (location removed). There was no comment about the house at all.

Mrs Weinberg- Who said that to you?

The father- I think it may have been Ms KE. Just before my first access."¹⁸⁴

16. FATHER'S ATTENDANCE AT COUNSELLING¹⁸⁵

Pursuant to the order made on 13/03/2008, the father did attend (location removed) Magistrates' Court on 18/03/2008 for an eligibility assessment regarding participation in court directed counselling. That day the Court made a further order: "The Defendant is ordered to attend first counselling session on 20/03/2008 at 7pm."¹⁸⁶

¹⁸⁴ At pp.132-133 of my notes. Ms KE was the DOHS Team Leader who was responsible for the case as Team Leader in the xxMR Planned Investigation xx Team 1 from 18/02/2008 to 20/06/2008 when the case was transferred to the xxMR CYFE (name removed) Team 2.

¹⁸⁵ Most of the material in this section is taken from the evidence of witness 8 at pp.91-98 of my notes.

¹⁸⁶ It is curious that this order on its face only required the father to attend one session of counselling whereas it appears to be the understanding of the father and the group counselling convener witness 8 that he was to attend a course of counselling. I am sure their understanding is right.

Although on the evidence I have heard I would not have made a counselling order at all, in fact it appears that attendance at counselling has been a very positive experience for the father.

The counselling was conducted by Relationships Australia as part of a pilot program connected with the Family Violence Division of (location removed) Magistrates' Court. Witness 8 has been employed by that organization as a group facilitator of Men's Behaviour Change groups for 3 years. She was a very good witness whose work experience has included approximately 8 years in the mental health, drug & alcohol and disability fields and who also has a history of working with women in the domestic violence refuge system. Historically this sort of program has been called "anger management" but Relationships Australia has changed this name because its scope is bigger: "We look at relationship in general with self, family, partners, children. It has a self-development focus."¹⁸⁷

Before the course started on 13/05/2008 witness 8 saw the father on 18/03/2008 & 20/03/2008 for assessment. In the assessment the father had made disclosures of "yelling and heated discussion, not of physical abuse" with the mother and at least one earlier relationship. At the assessment the father said that although he had wanted to do some sort of anger management in the past, he felt forced to do the group but would nevertheless give it a go.

And give it a go he certainly did. He participated in 14 group sessions, missing only one due to illness. These were twice per week for first 2 weeks and then weekly.

Witness 8 spoke quite positively about the father's contribution:

"Initially he stood back and was an observer. He was sceptical that the program could do anything for him. He felt it was just another part of the system not supporting or working for him. However, I'd say by half way through or a bit before the father began speaking up more, giving his opinion, feeding back to other group members and becoming a member of the group and coming forward with his feelings about things, his opinions rather than being asked. He started to be proactively engaged on topics like the cycle of violence, how relationships continue to play out the same pattern and the ways an individual can challenge their own behaviour in breaking that pattern. The father participated in role play in issues around functional and dysfunctional communication. Also practical strategies for controlling emotions, how to take responsibility for one's behaviour and emotions and gaining insight into the

¹⁸⁷ Evidence of witness 8 at p.92 of my notes.

impact on others when self-responsibility fails to occur. He gave feedback to other men in the group...I remember the father saying he had implemented that with one of his adult children and rather than pushing the point he sat back and said my opinion is different and that's OK and he felt really good doing that."¹⁸⁸

As well as attending 14 sessions of group work, the father attended two sessions of one to one counselling with (name removed) "Ms RB". Extraordinarily, after the group sessions finished on 05/08/2008, the father himself initiated a voluntary peer support group which commenced on 12/08/2008. The group comprised himself and four other participants who wanted to continue. Witness 8 was the facilitator. Eventually all but the father and one other man dropped off. Thereafter the father attended five sessions of individual counselling with witness 8 on 23/10/2008, 04/11/2008, 11/11/2008, 25/11/2008 & 04/12/2008. Witness 8 gave evidence that during these sessions she and the father have spoken about his relationship with his children, mostly DD and the three younger children, KD, WDW & LD:

"He has talked to me about when he has had access what activities he has done with the children. I've asked him to explore his emotional relationship with the children and celebrate the good parts of it. He has talked a lot about his grief at not having time with them and we have looked at ways – strategies – to cope with his grief and sadness about the situation with the children and him wanting to have more time with them, ways of him managing those emotions when they come up for him and about his concerns about the children.

Sometimes when he got them he felt they hadn't been looked after properly. They were not clean. They were very hungry and tired. Also with LD talking about court cases and custody and he felt that language was inappropriate for LD. It really concerned him LD talking about these things rather than just being a kid.

He also discussed concerns about a person called Mr L whom he feared was hurting the children. He often felt very distraught about his desire to protect the children and not being able to do that.

We have had some discussion about the father managing his relationship with his ex-partner, about communication being about the children, trying to keep it about the children, trying different communication strategies. If he felt he was getting overwrought to come back later rather than it blowing into an argument."¹⁸⁹

Perhaps even more extraordinarily, the father has voluntarily enrolled in a new course of 15 group sessions commencing in early 2009. Witness 8 has never before known a participant to be so enthusiastic. In the evaluation session in August 2008 at the end of his first group program, the father said it had made a big difference to

¹⁸⁸ At pp.93-94 of my notes.

¹⁸⁹ Evidence of witness 8 at pp.94-95 of my notes.

him to know that he wasn't alone. He had benefited from connecting emotionally to other men and being part of a strong group. The father has mentioned several times that he was having new and positive experiences with other people in his life. Witness 8 was asked "Did you get the feeling with the father part of his connection [with the program] was because he saw it as a way of improving his relationships with his children?" She replied: "Oh, absolutely. That's what it was all about. It was all about the father wanting to improve his relationships with others."¹⁹⁰

17. ISSUE OF P.A. IN JUNE 2008 & LEAD-UP EVENTS

17.1 CONCERNING OBSERVATIONS/REPORTS ABOUT THE MOTHER'S HOUSEHOLD

In her Application & Disposition report dated 02/07/2008 the initial protective worker, listed a number of concerning observations & reports about the mother's household. These included¹⁹¹:

- On 28/03/2008 the CPS support worker witness 4 expressed concern that the mother could not cope with the children on her own as at times she did not want to be with the children and wanted to lock herself in her bedroom.
- On 24/04/2008 Ms M advised DOHS that she was providing the full time care of the children as the mother was sleeping all day and getting angry at the children constantly. Ms M said that she trying to get the children into a routine but the mother was making this difficult by not following through and giving in to the children.
- On 01/05/2008 the mother advised the protective worker that she was still feeling tired due to the increase in her medication and she was unable to decrease her valium intake because of the pain she suffers from grinding her teeth at night due to anxiety. She stated she was coping with the children because of the support she was receiving from Ms M.
- On 05/05/2008 Ms M contacted DOHS and advised that the mother had not taken her medication over the weekend and had dropped KD.¹⁹² Fortunately KD suffered no injuries.

¹⁹⁰ Evidence of witness 8 in cross-examination by counsel for the father at p.96 of my notes.

¹⁹¹ See DOHS' Application & Disposition report of the protective worker dated 02/07/2008 at pp.5-8.

¹⁹² See also sections 9.2 above & 28.4 below.

- On 15/05/2008 witness 4 advised DOHS that Ms M had told her that the mother had been in bed for several days due to being concerned about DOHS child protection interviewing LD re an alleged sexual assault.¹⁹³ Ms M had told witness 4 she was going to (location removed) for the weekend and was leaving the children with the mother but asked witness 4 not to inform DOHS about this.
- On 16/05/2008 Ms M advised DOHS that the mother was depressed and was not able to have the children alone for the weekend.
- On 20/05/2008 DOHS received a new report alleging inappropriate verbal abuse towards the children by a male and female within the home. This included yelling “Oh ya fucking little asshole”, “Get in your fucking room” and “Shut the fuck up”. It was also reported that on one occasion a little girl was put outside crying and after approximately 10 minutes was picked up by a male – whom I assume to be the mother’s then boyfriend Mr B – and told to “shut the fuck up”. In her evidence Ms M denied using the word “arsehole” but conceded that she did yell and swear at the children, attributing it to her accustomed patterns of speech:

“Half the time I don’t know I’m doing it. I’ve been doing it since I was a kid. We were brought up around it. Half the time I don’t know I’m doing it...We were brought up around that and with my mum every second word would be a swear word.”¹⁹⁴

Ms M also said to the protective worker that LD “drives me nuts” and that she was struggling to manage LD’s behaviour. Ms M signed an undertaking that she would not use inappropriate discipline towards the children, including verbal abuse and physical abuse.

- On 05/06/2008 the protective worker attended the family home to discuss a report which DOHS had received on 03/06/2008, *inter alia* about the mother’s mental health, about physical abuse and inadequate feeding of the children and about the mother & Ms M locking themselves in the bedroom and drinking alcohol and smoking ‘dope’. Ms M became emotional and teary when told about the report and spoke about her struggle in managing LD’s behaviour. She denied hitting the children since giving the undertaking on 20/05/2008.¹⁹⁵ After

¹⁹³ As to which see section 28.3 below.

¹⁹⁴ Evidence of Ms M at p.101 of my notes.

¹⁹⁵ On balance I accept Ms M’s denial of these allegations: see footnote 119 above & section 26 below.

a discussion about cannabis use, Ms M agreed not to use cannabis while being the primary carer of the children. She stated that the children were always fed.

- On 10/06/2008 Ms M said that she was getting no help from the mother in caring for the children and the mother had said to her that she didn't want the children any more. Ms M said that she does not have any time to herself and was about to walk out.

17.2 THE "BEST INTERESTS" PLANNING MEETING ON 13/06/2008

At a so-called "Best Interests Planning Meeting" held on 13/06/2008 and attended by Ms M, the mother, the protective worker and her team leader Ms KE, the mother & Ms M made the following frank disclosures:

- The mother & Ms M stated that they smoked marijuana in the home.
- The mother said that her children needed to "live with her and her mental illness" as her older children have done.
- The mother said that she was struggling with her medication and mental health and with caring for the children as she was constantly sleeping: she was in her "own little world"; she couldn't eat or sleep properly; she did not want to be around the children and just wanted to "crawl up in a corner and die". She acknowledged that at times when she held KD, KD could pick up on her shaking.
- In relation to lack of boundaries and routines for the children, the mother said that she struggled to discipline the children. She said that when the children cry it caused "yelling in her head". She added that at times she locked herself away in her room with her "head racing 100kph and shaking."¹⁹⁶

17.3 APPREHENSION OF THE CHILDREN ON 13/06/2008

After that meeting DOHS issued a protection application by apprehension for each of the children due to:

- the limited change in the mother's mental health;
- the recently identified concerns of inappropriate discipline and drug use in the home;
- Ms M acknowledging that she was struggling to care for the children and was getting no assistance from the mother; and

¹⁹⁶ See DOHS' Application & Disposition report of the protective worker dated 02/07/2008 at p.9.
DOHS v Mr D & Ms W: Judgment of Magistrate P. T. Power dated 07/01/2009 Page 58

- the need for long-term DOHS' involvement with the family.¹⁹⁷

18. DOHS' DISGRACEFUL IGNORING OF THE FATHER

Notwithstanding Ms LC's positive assessment of the father on 26/02/2008, the next time that a protective worker bothered to speak to him was on 09/06/2008 when he attended the Department's (location removed) office to meet with the protective worker. At that meeting the protective worker seems to have been focused on observations of sexualized behaviour demonstrated at some time in the past by LD & WDW.¹⁹⁸ For his part, the father was much more appropriately focused on the fact that the children had not had any contact with him since February 2008. He told the protective worker that although he did not then have a place to live, he was able to have the children in his care at any time and wanted to see them.¹⁹⁹ How many more times did he have to say it?

As I have said²⁰⁰, it is difficult to see how it could possibly be regarded as being in the best interests of LD, WDW & KD to have had no contact at all for 3½ to 4 months with a father about whom the Department held no protective concerns. Remember that LD is the little boy whose bedroom window has to be locked, nailed up or otherwise barricaded so that he does not chase after his father when he leaves the family home!

In making its decision not to involve itself with the father at all for most of the investigative phase of the case, the Department has failed miserably to comply with its obligations under s.8(2) of the *CYFA* to act in the best interests of each of the children. The protective worker and her team leader Ms KE have failed to give any apparent consideration to the principles set out in paragraphs (a), (b), (g), (i), (j), (k) & (p) of s.10(3) of the *CYFA*.²⁰¹ Counsel for the father asked the protective worker why she had ignored the father during this period. Her reply was fatuous: "Ms M was with the mother. We didn't want to uproot the children. Ms M said she was

¹⁹⁷ *Ibid.*

¹⁹⁸ As to which see section 28.3 below.

¹⁹⁹ DOHS' Application & Disposition report of the protective worker dated 02/07/2008 at p.8.

²⁰⁰ See section 15.4 above.

²⁰¹ These paragraphs are detailed in section 27 below.

going to assist as long as was needed.”²⁰² This of course begs the question why the Department hadn’t thought it appropriate to try to facilitate access between the children and their father. But it was not half as fatuous as the protective worker’s excuse for not inviting the father to the so-called “Best Interests Planning Meeting” on 13/06/2008. She simply ducked the question – without being brave enough to say that there was no proper answer – and said that the father was served with the protection application that day. How about that? Trumpeting compliance with the Department’s statutory obligation to give a copy of a protection application to both parents²⁰³ as if it was some sort of badge of honour!

It is also difficult – indeed impossible - to understand how the Department could possibly recommend a custody to Secretary order – as the protective worker did on 02/07/2008²⁰⁴ - when there was a parent on the scene - in the form of the father - about whom DOHS had no protective concerns and who was willing and able to parent all three children. It is as if the protective worker and her team leader Ms KE have never heard of ss.8 & 10 of the *CYFA*.

19. THE CHILDREN’S CHARACTERISTICS & HEALTH

All three children are in good physical health and their physical development is age appropriate. A paediatrician, Dr (name removed) “Dr SH”, saw the children in the Specialist Children’s Centre at the (name removed) Hospital on 27/10/2008. He reported that “the children presented as well cared for”. Maternal and Child Health Nurse, witness 6, saw the children on 25/06/2008 when they were brought to (name removed) Maternal and Child Health Centre for a developmental assessment by Ms M at the request of DOHS. MCHN witness 6 has not met either the mother or the father. All three children were recovering from colds when seen by MCHN witness 6 but I draw no adverse inference against either the mother or Ms M for that. The children were also brought to (name removed) Maternal and Child Health Centre on 21/10/2008 when KD was seen by MCHN (name removed) “Ms MP”. By that stage LD was too old for the service and WDW was not due again

²⁰² At p.42 of notes.

²⁰³ As to which see s.242(1)(a) of the *CYFA*.

²⁰⁴ DOHS’ Application & Disposition report of the protective worker dated 02/07/2008 at pp.3-4.

until she was 3½ to 4 years old.²⁰⁵ Dr SH intends to see KD again in February 2009 and WDW in May 2009.

19.1 LD

At the time of his assessment by the paediatrician, LD was nearly 5½ years old. Concerns had been raised regarding possible autism, perhaps as a consequence of five of the mother's siblings having children "with ADHD or autism"²⁰⁶. Dr SH said of him:

"LD attends kindergarten and there had been some concerns regarding speech and behaviour. LD was quite engaging and answered my questions appropriately and had average vocabulary for his age. He certainly had no features of autism."²⁰⁷

MCHN witness 6's assessment of LD was equally positive:

"He was noted to have good rapport with his aunt demonstrated by chatting to his aunt and myself during the consult. He was friendly, interested in looking around the environment. He was very chatty, engaging with me, making jokes...He met his developmental milestones. His weight and physical measurements were on par for his age. His aunt mentioned nothing about LD's behaviour. There was nothing at the time that showed me any problem."²⁰⁸

The "concerns regarding LD's speech and behaviour" referred to in Dr SH's report were not seen by MCHN witness 6 and were not raised with her by Ms M.²⁰⁹ I raised with MCHN witness 6 the mention of possible autism. She shared Dr SH's view, saying:

"I didn't see any features of autism. There was good eye contact. He was talking to me and playing during the consult. There was no evidence it was there at the time."²¹⁰

LD has been bed-wetting for a long time. I accept witness 2's opinion that there is nothing unusual about a 5 year old bed-wetting.²¹¹ The CPS worker, witness 4, said she had had lots of discussion with the mother about his bed-wetting and she had suggested taking him to see a paediatrician and a G.P., not making a fuss and helping him to get changed if needed.²¹² There is no reference to bed-wetting in

²⁰⁵ Evidence of MCHN witness 6 at p.78 of my notes.

²⁰⁶ See Discharge Summary of Ms EF dated July 2006 at p.2.

²⁰⁷ Report of Dr SH dated 10/11/2008.

²⁰⁸ Evidence of MCHN witness 6 at p.77 of my notes.

²⁰⁹ Evidence of MCHN witness 6 in cross-examination by counsel for the father at p.78 of my notes.

²¹⁰ *Op.cit.*, p.78.

²¹¹ Evidence of witness 2 at p.27 of my notes.

²¹² Evidence of witness 4 at p.57 of my notes.

Dr SH's brief report from which I infer that unfortunately he was probably not made aware of it. Ms M was asked about LD's bed-wetting and replied:

"Well, he wears pull-ups if he wets the bed and if he doesn't he doesn't get to wear pull-ups. We've tried a sticker chart so when he has dry nights he gets a sticker of his choice. He said he doesn't wet at dad's. I don't know why he does it at home. Every second or third night he wets the bed. If he wets the bed tonight, he has to wear pull-ups the next night. He gets out of them when he is ready. He puts them on and he gets them off."²¹³

LD attributes his bed-wetting to being "locked in his room every night" and says "he doesn't wear pull ups any more".²¹⁴ I prefer Ms M's contrary evidence. Although it is interesting that LD doesn't wet at his dad's, I cannot make a definitive finding as to cause of his bed-wetting in the absence of expert evidence.

19.2 WDW

WDW was 2y7m old when seen by Dr SH. He said of her:

"WDW presented because of slow growth. In particular her length and weight were below the 3rd percentile. I note that her birth weight was low. She seemed otherwise healthy and food intake was reasonable. Development was slightly delayed with regard to language although there had been improvement since attending day care and having contact with her father. I didn't feel any specific management was necessary although I plan to keep an eye on her growth."²¹⁵

MCHN witness 6 did not observe any slight developmental delay in WDW's language²¹⁶ and her assessment of WDW raised no concerns in her mind:

"WDW...met all her developmental milestones. She was very positive towards myself and her aunt as well. She was wandering around the consulting room exploring. We have toys etc. She was wandering around playing with everything, looking interested at what was around her. She is a small girl. Her weight is only 10.5kg, only in the 3rd to 5th percentile, but her length and her head were in proportion and her body mass index was on the 50th percentile. She met all her developmental milestones for her 2 year old review. She was 2y5m at the time. Her aunt mentioned that WDW tripped a lot and sometimes didn't put her heel on the ground but she was walking ably that day and it wasn't evident there was anything wrong with her gait at the time. She was walking quite well that day. Her aunt said that she was recently unsettled at night and she had no explanation so we discussed night settling. Apart from that there was nothing else significant."²¹⁷

²¹³ At p.114 of my notes.

²¹⁴ DOHS' second report of protective worker 2 dated 18/11/2008 at p.2.

²¹⁵ Report of Dr SH dated 10/11/2008.

²¹⁶ Evidence of MCHN witness 6 in cross-examination by counsel for the father at p.78 of my notes.

²¹⁷ Evidence of MCHN witness 6 at pp.77-78 of my notes.

19.3 KD

Dr SH made some recommendations about KD's diet:

“There was some concern regarding lactose intolerance. Although she drinks a large amount of milk she has no symptoms suggestive of the condition. She has an excessive intake of formula which is reflected in her growth and I recommended reducing formula intake and encouraging a balanced diet of solid foods.”²¹⁸

MCHN witness 6's assessment of KD raised no concerns in her mind or in mine:

“KD was 10m3w old. Her developmental assessment was for a 8m old. She seemed in good health but also had a runny nose and had recently recovered from a cold. Her growth was in proportion to her age. She was 9.9kg (75th percentile). Her length was 74cm (75th percentile). Her head circumference was 46cm (75th percentile) so she was growing in proportion. Her development was age appropriate. She was commando crawling around the room. Her immunization status was up to date at that age.”²¹⁹

On 21/10/2008 MCHN MP saw KD who was then 14m3w old. She referred KD to a paediatrician for a hip check as the creases on her legs were uneven. However MCHN MP noted that KD's development was age appropriate.²²⁰

MCHN witness 6 was cross-examined about KD's diet:

Mrs Weinberg- “Was there any discussion about KD's food intake?

Witness 6- In my assessment no. She was eating family foods age appropriately and having formula and there was no mention of it [in MCHN MP's notes] in October 2008.

Mrs Weinberg- With respect to KD there are some concerns in relation to lactose intolerance?

Witness 6- [Ms M] mentioned there was a family history of lactose intolerance and thus they were sticking to one particular formula and not introducing anything else at that time.

Mrs Weinberg- Are you aware of what constituted KD's diet – how much formula and how much family food?

Witness 6- At the time, no.

Mrs Weinberg- She might have looked like a bonny baby because she had been fed lots of formula and not a varied diet?

Witness 6- That's true, yes.”²²¹

Despite witness 6's appropriate concessions in cross-examination, I am not satisfied on balance that KD's diet is a significant protective concern.

²¹⁸ Report of Dr SH dated 10/11/2008.

²¹⁹ Evidence of witness 6 at p.78 of my notes.

²²⁰ *Ibid.*

²²¹ At p.78 of my notes.

20. SCHOOL, KINDER & CHILD CARE ARRANGEMENTS

When DOHS first became involved with the children in February 2008 LD was attending kindergarten but WDW & KD were not attending any sort of day care. The protective worker was asked: “Why not socialize the children in child care?” She replied: “I tried to talk to the mother about that but she was adamant that she didn’t want that.”²²² Eventually in June or July WDW & KD started attending child care.²²³ Ms M considers that has been a great success:

“They love it because they get to mix with other kids. WDW’s talking has been a lot better since then. She was previously very shy and didn’t talk much. They have picked up heaps since being in day care and being with other kids.”²²⁴

This was all so predictable it is difficult for me to understand why the mother was so resistant for so long if she had the children’s best interests at heart. I simply cannot understand the mother’s statement to the protective worker on 10/06/2008 that “she did not want her children in childcare as she was concerned for their safety [but] she was happy for a baby-sitting service to come into the home so that she could supervise them”.²²⁵

On discharge from Moreland Hall on 09/07/2008 the mother was referred to Moreland Hall’s Supported Playgroup. This Playgroup aims to increase parenting skills, link participants with community supports such as Maternal and Child Health and assist young children achieve important milestones in their development so that they can engage appropriately in kindergarten and at school. The mother attended four playgroup sessions with WDW, KD & LD and she engaged well with the program. She set modest but realistic goals: improving her parenting skills and reducing child protection involvement, increasing singing and reading to her children and ensuring that the children brushed their teeth twice a day. Unfortunately, although the family seemed to enjoy the Play Group, the mother discontinued after four sessions, stating that it had become too time consuming to attend while Child Protection was involved due to the various appointments she was

²²² Evidence of the protective worker in cross-examination by counsel for the father at p.50 of my notes.

²²³ Evidence of Ms M in cross-examination by counsel for the mother at p.111 of my notes.

²²⁴ *Op.cit.*, p.112.

²²⁵ DOHS’ Application & Disposition report of the protective worker at p.8.

required to attend, such as urine screens.²²⁶ I do not regard this explanation as valid.

Currently WDW & KD are at day care every Monday & Thursday from 7.30am to 4.30pm or 5pm.²²⁷ The day care is about 3km away from the mother's home so Ms M drives them there and picks them up. LD is at kindergarten on Tuesday 12.15pm-3.45pm and on Wednesday & Thursday 9am-12.30pm. After kindergarten on Thursday LD is taken to child care.²²⁸

It appears likely that LD will be in prep at primary school in 2009. The mother has booked him in to (location removed) Primary School for 2009. However, it is clear that she did not do this in an attempt to pre-empt my decision about where LD should live, as Ms M explained:

“The mother booked him in for that when she found out that kinder had said no matter what you have to book him into a school.”²²⁹

The father has largely been kept in the dark about LD's progress at kindergarten. Asked whether he has made contact with LD's school, he said:

“No. I've been asking DOHS my rights and what I could do. I think I had equal guardianship. How can children be booked into school without my knowledge?”²³⁰

That seems to me a very fair question. When asked whether he thought LD was ready to go to school, the father said:

“It's hard to tell without seeing his kinder work. I've thought a lot about that over the last few weeks. (Name removed) has told him he is not allowed to draw pictures for dad, only for mum. However he draws pictures for me – scribble type pictures – usually not in dark colours.”

LD turns six on 03/05/2009. Protective worker 2 has had discussions with LD's current kindergarten teacher who advised that she “would be concerned if he was going to school next year that he would struggle”.²³¹ However that teacher was not called to give evidence in this case. While I accept witness 4's opinion that it is not

²²⁶ See report of witness 11 dated 08/12/2008 at p.2. See also her evidence at p.124 of my notes.

²²⁷ Initially the child care days were Monday & Friday but the latter was changed to Thursday to fit in with the children having overnight access with the father: see evidence of Ms M at p.112 of my notes.

²²⁸ Evidence of Ms M at p.100 of my notes. During this case the children were placed in child care for a week so that the mother & Ms M could both attend court.

²²⁹ Evidence of Ms M at p.110 of my notes.

²³⁰ This and the following quote are from evidence in chief of the father at p.132 of my notes.

²³¹ Evidence of protective worker 2 at p.12 of my notes.

uncommon for a 5 year to be at kindergarten rather than in prep at school²³², it would be unusual for a child who will be 6y8m at the end of 2009 to still be at kindergarten. If a year has to be repeated it seems to me generally to be preferable that that year be prep rather than kinder.

The one area of the father's evidence with which I disagree is his view of day care. Asked about child care and kindergarten for the children, the father said: "LD would go. I don't agree with day care. I'd keep that down to no more than 2 days [a week] maximum."²³³ I do not entirely disagree with 2 days per week. I do disagree with his comment: "I don't agree with day care." The evidence of Ms M stated above shows clearly how beneficial day care has been for both girls since it was belatedly commenced in the middle of 2008. Given the father's lack of enthusiasm about day care I intend to include a condition on WDW's order and KD's order requiring the father to ensure they attend day care as agreed with DOHS.

21. ACCESS BETWEEN THE CHILDREN & FATHER

On 01/07/2008 the Department finally got around to arranging access between the father and the children. This occurred at DOHS' (location removed) office from 9.30-10.30am each Tuesday and was supervised by DOHS.²³⁴ The current protective worker, protective worker 2, has viewed about five of these accesses and has also read reports from other access supervisors which she regards as extremely positive:

"During all of the planned supervised access sessions the father presented on time, polite towards workers and excited to see his children. The father consistently played appropriately with the children and attended to all of their needs. The father provided food and drinks for the children and was confident in changing nappies and attending to LD's toileting needs. During a supervised access at a children's play centre, the father managed to supervise and play with each child with ease and attended appropriately to each of their needs. The father was not assisted in caring for the children during this time."²³⁵

Of her observations of the children's behaviour towards their father, protective worker 2 said:

²³² Evidence of witness 4 at p.63 of my notes.

²³³ At p.134 of my notes.

²³⁴ See first report of protective worker 2 dated 22/09/2008 at p.4.

“One thing LD said was he loves his daddy and was quite excited about being out with him. All the children presented as attached to him, wanting to see him and enjoy his company and the father was able to show that through his interactions with them.”²³⁶

An extraordinary puzzle remains unanswered. Why did the Department feel it necessary to have the father’s access supervised at all, given there were no protective concerns about him? Protective worker 2 did not know:

“I can’t understand how it was needed to be supervised in the first place so it was decided by DOHS – myself and my team leader – it didn’t need to be supervised. We made that decision because we had no protective concerns for the children in their father’s care.”²³⁷

“When the case was transferred to my department (long term) the supervised access had just started with the father. He was unclear why it was needed to be supervised. I was unclear why it needed to be supervised and through our investigations we couldn’t find any evidence why it needed to be supervised.”²³⁸

It seems to me – and it must have seemed to protective worker 2 – that she was working in a vacuum. I tried to work out how the two sections of DOHS involved – entitled in Sovietesque style “xxMR Planned Investigation (name removed) Team 1” and “xxMR CYFE (name removed) Team 2” – could have such poor communication with each other but I failed-

Mr Power- “Didn’t you ask the protective worker?”

Protective worker 2- No. We were still pretty confused about the Family Law orders. From the time I came on board I attempted to find out what was going on, also in consultation with the protective worker and to get a copy of the Family Court orders. My understanding was that we had taken out a protection application but it [the Family Court case] was still being heard.

Mr Power- Why was there a doubt in your mind about that fact?

Protective worker 2- There wasn’t a doubt. Our disposition had changed from the intake to the long-term phase [the former recommending custody to Secretary orders and the latter recommending supervision orders]. I attempted to work it out by asking every person I could to try to ascertain what that was about.”²³⁹

After a dispute resolution conference on 23/09/2008 the access condition on the children’s interim accommodation orders was varied to read:

13. Father may have access with the child for a minimum of once per week, including one overnight access per week, at times and places as agreed between the parties.

Pursuant to that condition, access between the children and their father has now progressed to 2 nights per week overnight, these being Friday & Saturday nights.

²³⁵ *Ibid.* See also evidence of protective worker 2 at pp.3 & 16 of my notes.

²³⁶ Evidence in chief of protective worker 2 at p.3 of my notes.

²³⁷ *Ibid.*

²³⁸ Evidence of protective worker 2 in cross-examination by counsel for the mother at p.33 of my notes.

The feedback to protective worker 2 has been very positive: “The father and children are enjoying it. The father and LD have given that feedback.”²⁴⁰ Ms M detailed for me the access changeover arrangements which she and the father have worked out and which seem to have worked well:

“Every Friday at 9.30am I take the kids to (location removed) station. The father gets off the train and takes the kids. I leave. He goes back by train. At 5pm on Sundays I’m back at the station to collect the children. If I’m not there I ring the father or if he’s not there (name removed) – sorry, DD – who takes them to my sister’s house. The father stays down the end of the street.”²⁴¹

22. CHILDREN’S PROTECTION SOCIETY INVOLVEMENT

The Children’s Protection Society²⁴² has had three long periods of involvement with the mother and her children. The first two periods were:²⁴³

- **29/10/2001-06/02/2003**: The referral issues were: [1] parenting problems; [2] the children fighting; [3] The mother’s difficulties with ex-partner Mr L. It was noted that the mother had difficulty setting boundaries for the family and DOHS was involved. The work done with the family included-
 - Referrals to family day care and respite care
 - Ideas and strategies for the mother to deal with stress
 - Families First was involved for approximately 3 months
 - The mother was linked in mental health services, attending fortnightly sessions with xxAMHS and attending a group for parents with mental illness
 - CAT team visited the mother for a short period of time
 - The mother had difficulty setting boundaries for the family and DOHS was involved.
- **01/08/2004-01/12/2006**: The referral issues were: [1] parenting support; [2] mental health and help with reducing anxiety; [3] financial issues; [4] drug use. The work done with the family included-
 - The mother was referred to Moreland Hall for substance abuse issues but did not attend
 - The mother was linked into mental health services and parents and kids group

²³⁹ At p.33 of my notes. I may not have done justice to protective worker 2’s answers. I am not very good at taking down the answers to questions which I ask.

²⁴⁰ Evidence in chief of protective worker 2 at p.7 of my notes.

²⁴¹ Evidence of Ms M in answer to a question by me at pp.108-109 of my notes. The father corroborated this: see p.134 of my notes.

²⁴² Hereinafter ‘CPS’.

²⁴³ The following information is taken from witness 4’s Report dated 02/06/2008 of CPS’ involvement with the family.

- CAT team visited the mother for a short period of time
- Families First involvement
- Behaviour strategies including reward systems, star charts, house rules and consequences were inconsistently implemented with no clear evidence of change.

Despite CPS' involvement for over 2 years during the second referral, there was very limited change or improvement noted. The files, summarized by witness 4 in her report, indicate that the mother was not taking her medication and had continued to use marijuana during her pregnancy with WDW. She had difficulty implementing strategies due to her ongoing instability and crises. Her mental health issues, including anxiety, were ongoing and she was not able to demonstrate coping strategies provided by mental health and CPS.

A third referral was made to CPS on 17/03/2008. This was made through Child First, a referral point, after discussion between the mother & witness 2.²⁴⁴ The presenting issues were disturbingly similar to those which had led to the earlier CPS' referrals in October 2001 and August 2004:

- The mother's ongoing mental health issues, including depression and anxiety
- The mother wanting help to establish routines with the children
- Ongoing crisis and instability in the mother's life and the children's lives
- Concerns that the mother's coping strategies for stress were inadequate.

Witness 4 is the current CPS family support worker. She has been assigned to the family since 17/03/2008. She usually sees the mother & Ms M weekly in the family home. LD is normally at school and since mid 2008 the girls are at day care. Her visits last between 1-1½ hours.²⁴⁵ She was not too bad a witness given that she was faced with walking a tightrope between giving honest and objective expert evidence and not damaging her ongoing professional relationship with the mother. She managed this difficult task tolerably well. However I do not accept her opinion that the mother could now safely parent the children on her own.²⁴⁶

Witness 4's role has been to offer the mother suggestions about how to regulate the children's behaviour, particularly that of LD some of which the mother has found

²⁴⁴ Evidence of witness 4 at p.56 of my notes.

²⁴⁵ *Ibid.*

²⁴⁶ See p. 76 below.

very challenging.²⁴⁷ A lot of witness 4's conversations with the mother "are about parent-child inter-related behaviour"²⁴⁸. Witness 4 believes that the mother has taken her suggestions on board and has had insight into the suggested strategies.²⁴⁹ Unfortunately the strategies do not yet appear to have been very successful for LD because at a home visit on 16/07/2008 protective worker 2 asked Ms M if LD was in time-out often and she said "most of the time"²⁵⁰.

Witness 4 has not observed any problems so far as the mother's general parenting skills – feeding, clothing, basic care – are concerned. She believes that both the mother & Ms M are doing the parenting. Witness 4's observation of the interaction between the mother and the children was that "they always seemed very appropriate". Asked for examples she said:

"I was there a couple of weeks ago and WDW was tired. WDW got a pillow and put it on the mother's lap and the mother stroked her hair. On other occasions when the children have brought toys to her and tried to engage her in conversation she has always responded to them."²⁵¹

However, on five occasions in the course of her involvement witness 4 has informed the Department of her significant concerns about the mother's ability to cope with the children:

[1] On 28/03/2008 she advised the protective worker that she "was concerned that the mother could not cope with the children on her own as at times the mother did not want to be with the children and wanted to lock herself in her bedroom".²⁵² Asked whether this was the only time the mother had suggested this was an issue, witness 4 said: "There may have been other times the mother spoke about going to her room for timeout but Ms M would have been there."²⁵³

[2] On 15/05/2008 witness 4 advised the protective worker that Ms M had told her that the mother had been in bed for several days due to being concerned about

²⁴⁷ Evidence in chief of witness 4 at p.57 of my notes.

²⁴⁸ Evidence of witness 4 in cross-examination by counsel for the father at p.61 of my notes.

²⁴⁹ Evidence in chief of witness 4 at p.57 of my notes. See also DOHS' Application & Disposition report of the protective worker dated 02/07/2008 at pp.7-8.

²⁵⁰ See first report of protective worker 2 dated 22/09/2008 at p.5.

²⁵¹ Evidence in chief of witness 4 at p.57 of my notes.

²⁵² DOHS' Application & Disposition report of the protective worker dated 02/07/2008 at p.5.

²⁵³ Evidence in chief of witness 4 at p.58 of my notes.

Child Protection interviewing LD about the alleged sexual assault.²⁵⁴ Witness 4 also said that Ms M had told her she was going to (location removed) for the weekend and was intending to leave the children with the mother but had asked witness 4 not to inform DOHS about this. Witness 4 was sufficiently concerned to advise DOHS immediately. Eventually it was agreed that Ms M would take the children to (location removed) with her. The mother was so unhappy about this that she told witness 4 not to attend the family home the following week for their scheduled appointment.²⁵⁵

- [3] On 13/08/2008 things had deteriorated to such an extent that witness 4 told the Department that CPS was unable to continue working with the mother & Ms M due to their inability to focus on the children's needs:

“Witness 4 said she spent two hours trying to refocus the conversation, however was unable to move the mother's attention on her own needs and wants. Witness 4 said this has occurred on several home visits where the mother was not able to focus on the children's needs or her parenting issues.”²⁵⁶

In the event CPS has not withdrawn and witness 4 said to me that CPS will continue to be involved with the family as needed.²⁵⁷ In her evidence witness 4 appeared to put a bit of a spin on her conversation of 13/08/2008: “We were considering potentially stopping for the time being.”²⁵⁸ Witness 4 explained the reason for the mother's lack of focus at that time:

“The court case was happening. The family was very focused on that and it was quite difficult to have a conversation about what was happening with the kids...The mother wanted to concentrate around the issues in relation to the children but because of stress and anxiety about the court case we were not able to do the work we wanted, the direct conversations about what was happening with the children or their behaviour...There was a lot of stress and anxiety and we were focusing a lot on DOHS at that time.”²⁵⁹

- [4] By 26/08/2008 things had not improved as protective worker 2 explained when relaying comments made to her in a phone call by witness 4:

²⁵⁴ As to which see section 28.3 below.

²⁵⁵ DOHS' Application & Disposition report of the protective worker dated 02/07/2008 at p.6. See also evidence of witness 4 and the reference to a DOHS' case note dated 15/05/2008 at 12.30pm at pp.62-63 of my notes.

²⁵⁶ First report of protective worker 2 dated 22/09/2008 at p.6.

²⁵⁷ Evidence in chief of witness 4 at p.59 of my notes.

²⁵⁸ Evidence in chief of witness 4 at p.58 of my notes.

²⁵⁹ *Ibid.*

“She said they’ll have to close with the family in the near future because the mother is a mess with anxiety and Ms M & the mother cannot focus on the children’s needs. (Name removed) said she was at the home for more than an hour and both women were continually swearing and cussing about DOHS. Ms M & the mother both agree they cannot focus on the children while all the court proceedings are going on. (Name removed) informed me that Ms M said she is going to get the kids when they go back to the Family Court and take them to (location removed) and plans to bring the children back to Melbourne to see the mother when they move to (location removed).”²⁶⁰

[5] As recently as 12/09/2008 – at a Care Team meeting with protective worker 2 & Ms (name removed) “Ms C” –witness 4 said that she was aware that the mother was unable to care for the children on her own and needs a lot of support from her sister. She also informed protective worker 2 that Ms M has been leaving the mother alone with the children at weekends and didn’t know this was not to occur.²⁶¹

Witness 4 was understandably quite critical of the lack of communication the Department has had with her. She pointed out that her role is neither an investigative one nor a monitoring one.²⁶² Consistent with this, in her home visits she has only been through the front door into the lounge.²⁶³ She has not been into other parts of the house. She would have liked to have had more contact and more professional meetings with DOHS and other service providers involved with the family. She has only had one formal meeting with DOHS, the Care Team meeting on 12/09/2008. She was not even invited to the Best Interests Planning Meeting on 13/06/2008.²⁶⁴ The Department has not given her a copy of the court orders. She was not even aware that Ms M had formal legal care of the children.²⁶⁵ Was this inefficiency on the part of the Department or was it privacy gone mad? I don’t know.

Witness 4 was asked: “Has your involvement been a success?” and she replied: “I don’t know how you measure success.” She was then asked: “Have you seen

²⁶⁰ Evidence of protective worker 2 at p.18 of my notes.

²⁶¹ Proposition put to witness 4 by counsel for DOHS at p.60 of my notes. Witness 4 did not disagree with it. See also the first report of protective worker 2 dated 22/09/2008 at p.6.

²⁶² Evidence of witness 4 in cross-examination by counsel for the father at p.63 of my notes.

²⁶³ Evidence of witness 4 in cross-examination by counsel for the mother at p.67 of my notes.

²⁶⁴ *Ibid.*

²⁶⁵ Evidence of witness 4 in cross-examination by counsel for the father at p.62 of my notes.

improvement or changes?” and she replied “I’ve seen some changes.”²⁶⁶ This answer was given in a very flat tone and without any spark or enthusiasm. I formed the strong view: “This witness is trying not to damage her working relationship with the mother but clearly considers that significant problems remain with the mother’s parenting capacity.”²⁶⁷

Counsel then turned to the issue of the mother’s ability to cope with the children. I got the impression that witness 4 ducked the first two questions. It was good that counsel persisted:

Mr Stevens- “What’s your current view?”

Witness 4- I believe from the conversation I have had with the mother she feels she is able to cope with the children.

Mr Stevens- What’s your belief?

Witness 4- She has come a long way from the initial referral in March.

Mr Stevens- What’s your belief of her ability to cope on her own at this time?

Witness 4- I think she can cope looking after the children with supports in place such as child care and potentially our ongoing family support.

Mr Stevens- Has Ms M ever told you she performs the bulk of the looking after of the children?

Witness 4- Not in as many words but my understanding is that Ms M was in the house initially to support the mother while the mother was stabilizing her health issues.

Mr Stevens- What has changed from March which would lead you to say the mother could look after the children on her own, albeit with resources?

Witness 4- Knowing that the mother is having regular support from her doctor, seeing a counsellor on a regular basis and at that time [March] we were only just involved with the family which is support the mother had sought. A number of months have passed since then.”²⁶⁸

The next day counsel returned to this central theme:

Mr Stevens- “You believe it is safe for the mother to parent the children on her own?”

Witness 4- Yes, as long as appropriate supports are in place.

...

Mr Stevens- It seems that in September 2008 you were of the view that she couldn’t care for the children on her own?

Witness 4- Correct. At that time the mother was needing a lot of support. After conversations with the mother & Ms M and taking into account their view, the mother is coping a lot better and she has looked after the children on her own on a number of occasions since then and seems to have coped reasonably well.”²⁶⁹

Later Mrs Weinberg zeroed in on this answer and obtained a frank answer which was very damaging to the mother’s case:

²⁶⁶ Evidence in chief of witness 4 at p.58 of my notes. Later (at p.68) counsel for the mother took the bull by the horns and tried to improve this answer by asking “Since your involvement has the mother improved or not?” He got the same non-committal answer: “I’ve seen some changes from the conversations we have had.”

²⁶⁷ I noted my impression at p.58 of my notes. I understand the witness’ dilemma.

²⁶⁸ At p.59 of my notes.

²⁶⁹ At p.60 of my notes.

Mrs Weinberg- Your measure of her competence is she says she is and her sister corroborates it. That's it, isn't it?
Witness 4- Probably."²⁷⁰

I simply do not understand how witness 4 could have come to the opinion that it is safe for the mother to parent the children on her own. It is such a quantum leap from the concerns – in my view entirely valid concerns - which she had expressed to DOHS on five occasions between 28/03/2008 and 12/09/2008. It is not even as if the mother's ability to work with witness 4 had been consistently good in recent times. It has been no better than patchy:

“There have been times when the mother has been able to focus and other times when most of the talk has been about DOHS and the court cases and the mother's anxiety...It has gone in waves. There were days I sensed it was very difficult for her to focus on the issues I raised and other days she was able to focus...We have had recent conversations where the mother has been able to focus.”²⁷¹

It is not good enough for witness 4 to say lamely: “A number of months have passed since then” especially when she is prepared to acknowledge “change” but not “improvement” and when the mother has chronic problems unresolved over 7 years. I do not accept witness 4's opinion on this central issue. At the present time I am not satisfied that the mother could safely cope with the children in her full-time care with or without appropriate supports in place. The only supports which witness 4 has nominated are child care, witness 2, witness 5 & CPS. It is no criticism of any of these persons or agencies that they were unable to prevent the mother's mental health crisis in August 2008 and in my view they are unlikely to be able to prevent a further crisis in the future. And without wanting to downgrade the value of her work in trying to improve the relationship between the mother and the children and being available as a support person to the mother, I note witness 4's honest answer to Mrs Weinberg's final question in cross-examination:

Mrs Weinberg- “If DOHS does the work, what role do you fulfill other than having a cup of tea for 90 minutes with the mother?”
Witness 4- Probably not a lot.”²⁷²

²⁷⁰ At p.64 of my notes.

²⁷¹ Evidence of witness 4 at pp.58 & 62 of my notes.

²⁷² At pp.58 & 62 of my notes.

23. DOHS' PARENTING ASSESSMENT OF MOTHER

On 26/08/2008 the current protective worker, conducted a parenting assessment of the mother with LD, WDW & KD at the mother's home. Protective worker 2 summarized her largely negative assessment as follows:²⁷³

- [1] The mother has a limited attention span towards the children and focuses on one child or one task at any one time.
- [2] The mother is unable to concentrate on each child's needs, which resulted in her inability to read the child's cues and respond appropriately.
- [3] The mother was not emotionally available to each child.
- [4] The mother was confused and anxious about actual time and time frames.
- [5] There was no positive reinforcement from the mother to the children.
- [6] The mother's parenting skills are limited with no attention to detail.
- [7] The mother's ability to play with the children consisted of tickling and cuddling.
- [8] The mother appropriately stopped the children from doing things such as throwing blocks but did not distract them with safe play options. The children did not follow instruction from the mother and they directed all the play and interactions with her.
- [9] Throughout the visit, the mother watched the clock continuously and appeared to be anxious. She constantly looked outside the front window and it appeared that she was waiting for somebody to arrive at the house.
- [10] The mother's interactions with the children appeared to be artificial and staged. However, the mother was noted to have feelings of affection for her children.
- [11] The mother lacked spontaneity and creativity during this assessment. She appeared to be highly anxious and not able to attend appropriately to the children's needs. She did not drink, smoke or eat during the 2 hour period of the assessment.
- [12] The children have an anxious attachment to the mother which includes behaviours such as yelling at her, punching her, kissing her, climbing on her. This suggests that the mother's usual patterns of behaviour were not congruent

during this time as the children appeared to be confused and anxious during play.

Protective worker 2's qualifications are a Diploma of Welfare Studies from Swinburne University in 2000 and a Post-graduate Diploma from Systems Coordinators Pty Ltd in 2006. The latter involves Family Therapy Training & Counselling.²⁷⁴ Her experience is diverse and extensive. She has 10 years' experience in the domestic violence sector and the Family Services Innovation Program. She has worked for Anglicare and Uniting Care. She has been a Group Facilitator of Men's & Women's Groups in domestic violence. She has also been a Positive Parenting Program facilitator and educator. She worked in several different women's refuges over about a 4 year period from 2000 and then moved into Family Services. She joined DOHS in January 2008 as a child protection worker.²⁷⁵

Despite her impressive qualifications and experience, I do not believe that protective worker 2 has the requisite training and expertise to give an opinion about the nature of the attachment between the mother and the children. I therefore give no weight to item [12] of her assessment.

However, she has ample qualifications, training and expertise to conduct a general parenting assessment. As I have said, she was a generally impressive witness.²⁷⁶ She did not seem to me to exhibit bias. After years working in the refuge movement, if she had a pre-disposition to bias it would not have been surprising had she been biased against the male but she was not.

Unfortunately the mother does not like protective worker 2. For her part protective worker 2 believes she does not have a very open relationship with the mother:

Mr Teare- "Do you have a good, bad or indifferent working relationship?
Protective worker 2- Not a very open relationship. I've tried to make contact to speak with her but I'm told she's asleep or had a doctor's appointment or a dentist's appointment and the only time I've been able to have contact is if she calls me back."²⁷⁷

²⁷³ The information summarized below is taken from protective worker 2's case note dated 26/08/2008 at pp.3-4.

²⁷⁴ See the Business & Government section of the White Pages [2008/2009] at p.849.

²⁷⁵ Evidence of protective worker 2 at p.2 of my notes.

²⁷⁶ See section 14 above.

²⁷⁷ At p.18 of my notes.

Although the mother tries to be compliant with the Department's directions, she attempts to avoid protective worker 2, as Ms M explained:

Mr Stevens- "There are references through the reports to when workers have attempted to try to contact the mother she's not available and you report her asleep.

Ms M- I do. The reason is her prior solicitor told her she doesn't have to talk to [protective worker 2]. DOHS continued wanting to talk to her. I tell them she's asleep. The mother and DOHS don't get along and the mother's anxiety goes through the roof and that's nothing for the kids to see."²⁷⁸

...

Mr Stevens- "You have been shielding the mother from DOHS. How would she cope if she had to work with DOHS herself?

Ms M- If she got a new worker she'd be able to handle it better.

Mr Stevens- She had the same problem with the previous worker as well.

Ms M- Not as bad as protective worker 2. I tried to explain to the mother that the protective worker was trying [to help]. She didn't take it too kindly when the protective worker dumped court on us. Then it was all downhill. Before that it wasn't too bad."²⁷⁹

...

Ms M- "I made up that situation with protective worker 2 only. With the protective worker she was available. If she was [really] asleep I'd tell the protective worker she was. With protective worker 2 that was it because protective worker 2 was the mother's trigger. It set her off a lot more than the protective worker ever did."²⁸⁰

Given the mother's strong dislike of protective worker 2, it may be that her performance during the assessment was coloured by the anxiety she is said to experience in dealings with protective worker 2. However, this assessment was not the subject of any cross-examination by counsel for the mother and the mother herself did not give evidence. Hence there was little in the way of opposition to protective worker 2's observations on which her assessment was based. There is evidence from witness 4 that interaction between the mother and the children "always seemed very appropriate".²⁸¹ Witness 4 had more opportunity to make observations than protective worker 2 and the mother has a better working relationship with witness 4. Thus on balance I do not accept that protective worker 2's observation of the mother's interactions with the children being artificial and staged represents the norm. Other than that, I accept the validity of items [1] to [11] of protective worker 2's parenting assessment of the mother.

²⁷⁸ At p.102 of my notes.

²⁷⁹ At p.104 of my notes.

²⁸⁰ At p.120 of my notes in cross-examination by counsel for the father.

²⁸¹ See her evidence at p.57 of my notes and see section 22 above.

24. MS M'S OPINIONS ON MOTHER'S PARENTING

On several occasions since she moved into the mother's house in February 2008 to assist her in caring for the children, Ms M has raised significant concerns about the mother's parenting of the children. These include:

- [1] On 24/04/2008 Ms M told the protective worker that she was providing the full-time care of the children as the mother was sleeping all day and constantly getting angry at the children.²⁸²
- [2] On 10/06/2008 Ms M told the protective worker that she was receiving no help from the mother in caring for the children and that the mother had stated to her that she did not want the children any more. Ms M advised that she was about to walk out and stop looking after the children as she was not receiving help from the mother, she has been requested by the Department not to smoke marijuana any more and she does not have any time to herself.²⁸³
- [3] As recently as 21/10/2008 Ms M told witness 7 that she "has had to stop work to care for the mother and her three children" and that "The mother cannot cope alone"²⁸⁴. Counsel for the mother asked witness 7 whether Ms M was referring to the present or the past. She replied:

"I let that comment go. I knew we were heading into dangerous territory with my drug & alcohol assessment. I didn't pursue it. I don't know what she meant. I thought if I did pursue it she would shut down because she would think I was investigating the mother."²⁸⁵

But like witness 4, all of a sudden Ms M now considers that the mother will be able to look after the children on her own after all:

Mr Stevens- "If you were not living in the home you'd be concerned about the mother's ability to look after the children on her own?"

Ms M- Not at the moment, no. I reckon she now has the ability. [This is] coming from the heart. I've seen kids neglected. She plays with them. She may not be able to handle all of them at once now and again. The kids are jealous of each other, pushing each other away. She'll still have to learn to spread herself, getting the kids to understand there is more than one in the house. I tell WDW that constantly. I've told LD that. If I'm changing the girls LD will sit there and he will squeeze between. He wants a nappy. He wants attention. The girls are needing a little more care than LD. He can't understand. He gets his attention in other ways.

²⁸² DOHS' Application & Disposition report of the protective worker at p.5.

²⁸³ *Op.cit.*, p.8. See also third dot point on p.9 of protective worker 2's first report dated 22/09/2008.

²⁸⁴ See witness 7's report at p.2 and see also her evidence in cross-examination by counsel for the father at p.90 of my notes.

²⁸⁵ At p.91 of my notes.

Mr Stevens- It is difficult to manage a lot of children together at any time. Is the mother handling that properly?

Ms M- Yes. I do. They do love her. They say it every night. LD will say ‘I want mum to do this today’ and mum does it.

Mr Stevens- Are there any mood swings with the mother?

Ms M- Not so often now. When they were trying to get her medication right, yes, she’d have her highs and lows.”²⁸⁶

And – as was also the case with witness 4 – her reasons for expressing this opinion do not withstand even mild scrutiny. Like Mrs Weinberg I am sceptical of the professed sea-charge:

Mrs Weinberg- You say your sister is ready and competent to take over the care of the children?

Ms M- Yes.

Mrs Weinberg- There has been a sea-change in her ability to change?

Ms M- Yes.

...

Mrs Weinberg- What happened 2 months ago to cause the change?

Ms M- I can’t remember.”²⁸⁷

In any event Mrs Weinberg had it easy because the reasoning underpinning Ms M’s opinion about the new mother – which I consider to be much more of a wish than a reality – had already been quietly and systematically demolished by Mr Stevens:²⁸⁸

Mr Stevens- “What do you say about the ability of the mother to look after the children on her own?

Ms M- I reckon she can look after them on her own.

Mr Stevens- Why?

Ms M- Because I see how she is with them. I’ve seen how she was when I first went there and she has improved heaps.

Mr Stevens- You still do a large amount of the work?

Ms M- Yes, but I automatically do it because I’m used to doing things for myself.

Mr Stevens- How do you say she can do it?

Ms M- She would be able to cope if I wasn’t there. I do a lot of things. I can’t do everything because of my back. I’m not supposed to be doing cleaning but I do some. If my back is really, really bad she’ll pick up the kids, clean the rooms. She’ll do it.

I interpose to say that this answer clearly demonstrates that it has been Ms M who has been doing the lion’s share of the household work. The examination continued:

Mr Stevens- When did you come to the view she could look after the children on her own?

Ms M- About 2 months ago.

I note that this coincides almost exactly with the time at which Ms M said to witness 7 that “The mother cannot cope alone”. The demolition continued:

Mr Stevens- What was the change 2 months ago?

Ms M- She was doing a lot more and spending a lot more time with the kids.

Mr Stevens- Until that time you were of the view that she couldn’t cope [with the kids]?

²⁸⁶ At p.104 of my notes.

²⁸⁷ At p.122 of my notes.

²⁸⁸ At p.103 of my notes.

Ms M- She could but only in small doses. When she stopped talking to DOHS she got a lot better. They were going to replace the worker but nothing came of it.

Mr Stevens- Once she stopped talking to the worker?

Ms M- Yes.

Mr Stevens- Is it fair to say you still provide the bulk of the care of the children?

Ms M- Not really, no.

Mr Stevens- The evidence of witness 2 is that the mother's anxiety is quite high.

Ms M- Yes, but she is still able to cope...

Mr Stevens- Have you noticed her anxiety high?

Ms M- Yes, at the moment because she is stressed. Once it has settled down she'll be back to her normal self.

Mr Stevens- That's been the situation for the whole year?

Ms M- Yes it has but honestly I think she can cope.

Mr Stevens- What happens when she is stressed?

Ms M- We have tea. She spends an hour with the kids. Then she will go and play and put the kids in bed. She goes into her room where she'll stay apart from coming out and playing on the computer."

Finally, I consider that the mother's inability to remember to take her own medication all the time does not bode well for her remembering to do necessary things for her children all the time if she was alone and without a leader:

Mr Stevens- "On 05/05/2008 you advised the Department that you were of the belief that the mother wasn't taking her medication?

Ms M- Yes. She refused to take medication when the protective worker told her she had to get off all medications. The protective worker kept hounding and hounding her. She will lose her children unless she gets off medication. You get told that and told that.

Mr Stevens- The mother had dropped KD?

Ms M- Yes because the protective worker had told her to get off medication.

Mr Stevens- Is that the only incident?

Ms M- Yes. She takes her own medication at the moment. She forgets but not very often. Ninety percent of the time she'll remember. It's not very often she forgets.

Mr Stevens- What's the reason?

Ms M- If [she is] doing other things at the same time she'll forget but she always remembers by lunchtime. I move the pillbox closer to her so she will see it. If it's still there by 1pm I say 'Are you going to take your medication?' I went out and bought her a day to day medication box.

Mr Stevens- It most often happens when there's a lot of stuff on?

Ms M- Mostly before I got a pillbox which sits on a table. The kids can't get into the kitchen. Very occasionally I need to remind her. I reckon she'd take it 99% of the time if I wasn't living in the home. You could always put notes everywhere on the fridge 'Have you taken your medication?' There are always ways of making sure she remembers if I'm not there.²⁸⁹

Although on other matters I found Ms M to be a fairly good witness, her evidence on the central issue of the mother's ability safely to parent the children full-time on her own was not her finest hour.

²⁸⁹ At pp.103-104 of my notes.

25. ONGOING PROTECTIVE CONCERNS RE MOTHER

In previous sections I have made findings about a number of ongoing protective concerns which have not yet been adequately addressed by the mother. In combination they lead me to the strong view that at present the mother can neither safely parent the children full-time on her own nor safely be their primary carer even with continued ongoing support from Ms M. Indeed findings [1] & [3](i) by themselves would have led me to the same view. The three major findings may be summarized as follows:

- [1] The mother has chronic mental health problems – dating back 27 years – and her mental health continues to be fragile, as evidenced by her fairly recent suicidal ideation and her ongoing high levels of anxiety.²⁹⁰ Ms M gave a particularly striking illustration of the adverse effects of the mother’s anxiety on the children:

Mr Stevens- “When the mother spoke with DOHS her anxiety would go through the roof?

Ms M- Yes.

Mr Stevens- How did that show itself?

Ms M- Oh, she would take it out on me. She would go into her room and do nothing. She wouldn’t come out until she was calm enough for the kids to see her.

Mr Stevens- How long would she be in her room for?

Ms M- One hour, two hours.

Mr Stevens- Did the children see this?

Ms M- No. They did at the start and they picked up on it and got upset. That’s when she started going into her room. I agreed. I’d play with the kids in the lounge room or take them for a walk.”²⁹¹

- [2] The mother uses cannabis persistently notwithstanding professional concern about whether her cannabis use is affecting her mood and her anxiety.²⁹² She is clearly so addicted to cannabis that her counsel submitted that I should not include a condition prohibiting such use when with the children because it would be breached by the mother.²⁹³

²⁹⁰ See sections 9.1-9.4 above.

²⁹¹ At pp.102-103 of my notes.

²⁹² See sections 9.2 & 9.5 above.

²⁹³ See section 3.3 above. This pragmatic but bold submission by itself would be fatal to the mother’s bid for the children if I was to take the view that her ongoing cannabis use by itself placed the children at unacceptable risk of harm.

- [3] **The mother's parenting capacity is significantly flawed. This is evidenced by:**
- (i) **the largely negative parenting assessment conducted by protective worker 2 on 26/08/2008²⁹⁴;**
 - (ii) **the events which triggered DOHS' involvement in February 2008²⁹⁵ and the father's reason for asking Ms M to help:**

“Because I knew the mother couldn't return to Sydney because of court issues [involving the L children] and I knew she couldn't cope by herself. When I returned at Christmas the house was bad [but] not as bad as later. She said it was her way and the children would have to get used to it. I thought of quitting work to take over management of the house. The children were my main concern.”²⁹⁶

- (iii) **the concerning observations/reports about the mother's household which ultimately led to the issue of the protection applications on 13/06/2008²⁹⁷;**
- (iv) **the litany of concerns expressed by witness 4²⁹⁸ and Ms M²⁹⁹;**
- (v) **the reasons I gave for rejecting the opinions of witness 4 and Ms M that the mother could now safely parent the children full-time on her own;**
- (vi) **some comments made by the mother - relayed by witness 2 - of the cyclic nature of some of her parenting problems:**

“There are times when she has difficulty managing the children when they are upset. She gets upset because they are upset and she then has problems managing the situation. That's what the mother has told me.”³⁰⁰

- (vii) **an admission made by the mother to protective worker 2 as recently as her first home visit on 16/07/2008:**

Mrs Weinberg- “The mother has said that she couldn't manage these children alone?”

Protective worker 2- Yes.

Mr Power- When and in what circumstances?

Protective worker 2- In the first home visit when I asked the mother directly if she could have the children in her own care by herself and she said no.

Mrs Weinberg- Did you get the impression working with the aunt and mother that the aunt wasn't getting too far with the mother in changing her ways?

Protective worker 2- Yes.”³⁰¹

There are also two other significant protective concerns:

²⁹⁴ See section 23 above.

²⁹⁵ See section 13 above.

²⁹⁶ Evidence in chief at p.128 of my notes.

²⁹⁷ See sections 17.1-17.3 above.

²⁹⁸ See section 22 above.

²⁹⁹ See section 24 above.

³⁰⁰ Evidence in chief of witness 2 at p.24 of my notes.

³⁰¹ At p.10 of my notes.

[4] The clear impression one gets of the mother is that she is a well-meaning but very dependent person. Although it may be a consequence of her very long history of serious mental health problems, with the mother it is all about her. Her focus is egocentric. The high-water marks of this are:

- The mother's actions in effectively preventing the children from having any contact with their father from 27/02/2008 until she lost this power when orders were made by this Court on 13/06/2008;
- her comment at the Best Interests Planning Meeting on 13/06/2008 that her children needed to "live with her and her mental illness" as her older children have done³⁰²; and
- her retort to the father about when he talked to her about the poor state of the house at Christmas 2007: "She said it was her way and the children would have to get used to it."³⁰³

The contrast with the father's focus could not be greater. With him it is all about the children. This is evidenced, *inter alia*, by:

- his immediate return to Melbourne on the overnight train from Sydney when the mother asked him for help "before 'Welfare' took the children";³⁰⁴
- his comment to Ms LC on 26/02/2008 that he did not plan to have the children in his care but that he would not return the children to the mother's care until the concerns reported to DOHS had been addressed;³⁰⁵ and
- his request to DOHS that the mother have regular contact with the children as he acknowledges the importance of the children continuing to have a relationship with their mother.³⁰⁶

[5] On 07/11/2008 protective worker 2 received a report that:

- Ms M has been working at night time and has left the children alone with the mother;

³⁰² See section 17.2 above.

³⁰³ See DOHS' Application & Disposition report of the protective worker at p.5.

³⁰⁴ See section 13 above.

³⁰⁵ See section 17.2 above.

³⁰⁶ See first report of protective worker 2 dated 22/09/2008 at p.9.

- LD has said that his mum takes the children to Mr L's house and that Mr L has been hitting him;
- LD said that he doesn't want to go to Mr L any more;
- LD said that Mr L comes to his mum's house and smacks him on his face and pours beer on his head.³⁰⁷

Ms M's comment on LD's disclosure of being hurt by Mr L was understandably confined to her own observations:

Mr Stevens- "LD makes a disclosure about being hurt by Mr L?"

Ms M- I don't know how because Mr L is never there unless we are there and Mr L hasn't ever hit him or anything like that and I can swear to that. I don't believe in leaving them with someone I know can get angry.

Mr Stevens- What's an example of him getting angry?

Ms M- I've seen [his] kids come over – it's in DOHS' reports – with marks on their hands from their father.

Mr Stevens- Have you questioned whether it is appropriate to have him in the house at all?

Ms M- If he is in the room it's OK because we can see him and I can protect them if I have to."³⁰⁸

But the mother herself did not give evidence and so she did not respond to LD's concerning disclosures about Ms M working at night time and about being subjected to physical abuse by Mr L. Accordingly, although I do not doubt the honesty of Ms M's evidence, the reports received by DOHS on 07/11/2008 are of significant concern.

26. NO MAJOR PROTECTIVE CONCERNS RE MS M

Despite – or perhaps because of - her very deprived background and the rather poor hand of cards which fate has dealt her, Ms M presented as a very kind, generous and generally impressive person. She trained as a personal care assistant because she wanted to help people and although she enjoyed that work she dropped everything immediately when she was asked to help the mother with the children.³⁰⁹

Notwithstanding the Department's concerns which led to it requesting and receiving from Ms M on 20/05/2008 a written undertaking that she would not use inappropriate discipline towards the children³¹⁰, the Department assessed her on 13/06/2008 as a suitable person to care for the children. I do not criticize the

³⁰⁷ See second DOHS' report of protective worker 2 dated 18/11/2008 at p.2.

³⁰⁸ At p.101 of my notes.

³⁰⁹ Evidence of witness 7 in cross-examination by counsel for the father at p.90 of my notes.

³¹⁰ See section 17.1 above.

Department for that. I would have made the same decision had the father not been on the scene as a willing, able and competent parent. Ms M has had interim legal custody of the children on interim accommodation orders for the past 7 months. However, DOHS now appears to regret its decision. It seems to me that DOHS' present concerns about Ms M as a carer are grounded on four issues:

[1] The Department has received several reports – including one on 17/07/2008 and another on 19/07/2008 - in which the reporter expressed concerns about the way in which Ms M was treating the children, in particular that she-

- frequently verbally abuses the children;
- frequently smacks the children; and
- locks LD in his room and threatens that he will not get fed.³¹¹

These allegations were largely denied by Ms M both at the time they were put to her by protective worker 2 and in sworn evidence in this Court.³¹² On balance I accept the accuracy of Ms M's denials:

Mr Stevens- "You admitted to the protective worker on 14/02/2008 that you punished the children by hitting them and verbally abusing them. How do you punish the children?"

Ms M- By timeout.

Mr Stevens- Have you hit the children?

Ms M- Earlier on and I signed a contract with DOHS and I haven't hit them since.

Mr Stevens- Where did you hit them?

Ms M- On their bums.

Mr Stevens- How hard?

Ms M- Not very hard. You can tap KD on the fingers and she'll cry.

Mr Stevens- What about the mother?

Ms M- Puts them in timeout.

Mr Stevens- Has she ever physically disciplined them?

Ms M- Not that I've seen.

Mr Stevens- Has LD ever expressed any concerns about being hit?

Ms M- No.

Mr Stevens- What about swearing at the children?

Ms M- Half the time I don't know I'm doing it. I've been doing it since I was a kid. We were brought up around it. Half the time I don't know I'm doing it.

Mr Stevens- What do you say to the children?

Ms M- Why don't you bloody listen. If you do what you are supposed to do, I wouldn't have to yell at you. We were brought up around that and with my mum every second word was a swear word.

Mr Stevens- You admitted to protective worker 2 you use the "F" word a lot?

Ms M- I probably do.

Mr Stevens- There is also a report of LD saying you smack him on the head.

Ms M- That's not true.

Mr Stevens- LD has made disclosures of being locked in his room.

³¹¹ See DOHS' first report of protective worker 2 dated 22/09/2008 at p.5 and DOHS' second report of protective worker 2 dated 18/11/2008 at pp.2-3.

³¹² See DOHS' first report of protective worker 2 dated 22/09/2008 at p.5, DOHS' Application & Disposition report of the protective worker at p.8 and evidence in chief of Ms M at pp.100-101 of my notes.

Ms M- I'd like to see how. There is a latch on one side of the door and nothing to put it into. There is no lock on the door. I can take photos and get the mother to bring them in. On one side of the door to make him think that he would stay there. We have removed the lock."

- [2] The Department is concerned about Ms M's ongoing use of cannabis. Ms M explained her use to the protective worker on 05/06/2008:**

"Ms M confirmed she and the mother did smoke marijuana, stating that she had smoked marijuana for 20 years for managing her chronic back pain. Ms M stated that she smoked approximately 2-3 'bongs' daily and 2grams of marijuana weekly. Ms M stated that the drug use did not impact on her parenting; however it did cause the muscles in her back to relax."³¹³

Although I do accept witness 7's evidence that people with ADHD are contraindicated for central nervous system depressants (including cannabis)³¹⁴, I do not regard Ms M's ongoing use of cannabis for pain management as a significant protective concern, especially as I accept the mother's and her assertion that it is not used in front of the children.³¹⁵

- [3] The Department is also concerned that Ms M has been working at night and leaving the children alone in the care of the mother.³¹⁶ However, in my view, this does not breach the strict letter of the current interim accommodation order, especially as the order also contains a condition that the mother may reside in the family home with the children. As a legal custodian Ms M is not required to be in the physical presence of the children 24 hours per day. However, her absence at work or at (location removed) would be a significant concern if the mother's mental health had presented as unstable or if any of the children had suffered harm in Ms M's absence. I am satisfied that Ms M would not leave - and has not left - the children alone with the mother at any time when her mental health has been unstable. I am less certain about the latter. If LD's recent disclosure on 07/11/2008 about mistreatment at the hands of Mr L³¹⁷ is correct and relates to recent rather than historical events, then he certainly appears to have suffered harm in Ms M's absence.**

³¹³ DOHS' Application & Disposition report of the protective worker at p.8.

³¹⁴ See second part of evidence in chief of witness 7 at p.88 of my notes and see section 11 above.

³¹⁵ See for instance the first dot point on p.10 of DOHS' Application & Disposition report of the protective worker.

³¹⁶ See for instance the report received by DOHS on 07/11/2008 which is detailed in DOHS' second report of protective worker 2 dated 18/11/2008 at p.2. See also earlier instances (referred to at pp.6 & 63 of my notes) in which Ms M had left at least one of the children with the mother when she went back to her home at (location removed) for the weekend.

³¹⁷ See p.86 above.

[4] Ms M has not always been frank with DOHS. For instance on a weekend in May when she planned to return to her home in (location removed) and leave the children with their mother, she asked witness 4 not to advise the Department of this.³¹⁸

Despite these concerns, it is my strong opinion that Ms M has been an appropriate suitable person and I was quite content to leave the *status quo* intact with the children remaining in her care until I handed down this judgment.

Ms M's current mental health and mental functioning raise no significant concerns as to her ability to relate to and care for the children. Her multiple medical problems have not prevented her from being, in my view, a competent caregiver for LD, WDW & KD and these problems are unlikely to prevent her from continuing to be a major support to her sister the mother and to the children. I do not underestimate the importance of her supporting role. Nor should she!

I would have no significant concern about the children having overnight access with their mother provided that Ms M was living in the house at that time.

Further, had the father not been available as an able, willing and competent carer for the children, I would probably have placed the children in Ms M's care on a supervised custody order or alternatively placed them on a custody to Secretary order with a strong recommendation that the Secretary leave them in Ms M's care.

27. 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 three (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

³¹⁸ See evidence of protective worker 2 at p.6 of my notes, evidence of witness 4 at p.63 and DOHS'

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) appear to have some potential 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.
- (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 a number of the matters set out in ss.10(2) & 10(3) of the CYFA are difficult to reconcile but this case is not one of them. All of

the matters other than the “continuity” component of s.10(3)(f) point in the one direction, namely towards the father being the more appropriate primary carer.

28. P.A. IS PROVED FOR EACH CHILD

28.1 THE RELEVANT LEGAL PRINCIPLES

The question 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.³¹⁹

In *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)*³²⁰ Lord Nicholls of Birkenhead (with whom Lord Goff of Chieflly & 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...[L]ikely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.”³²¹

28.2 P.A. PROVED ON LIKELIHOOD UNDER s.162(1)(e)

Neither the mother nor the father dispute proof of the protection applications on the likelihood limb of s.162(1)(e) of the *CYFA*. They were right not to contest this. The matters on which DOHS relied to apprehend the children on 13/06/2008 were:

- the limited change in the mother’s mental health;
- the recently identified concerns of inappropriate discipline and drug use in the home;
- Ms M acknowledging that she was struggling to care for the children and was getting no assistance from the mother; and

³¹⁹ 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}.

³²⁰ [1996] AC 563.

³²¹ At p.585. The emphasis is mine.

- the need for long-term involvement with the family.³²²

These matters overwhelmingly lead to the conclusion that had DOHS not issued a protection application at that time there was a real possibility, a possibility that could not sensibly be ignored, that each of the children would suffer emotional or psychological harm of such a kind that his or her emotional or intellectual development would be significantly damaged.

Each of the protection applications is proved on the likelihood limb of s.162(1)(e) of the *CYFA*.

28.3 NO FINDINGS OF SEXUAL ABUSE OF ANY CHILD

On 05/05/2008 Ms M expressed concerns to the team leader, Ms KE, about LD & WDW having possibly been sexually abused as they were displaying sexualized behaviour. She said that-

- WDW had inserted a 6 inch doll into her own vagina and becomes giggly when she wipes her bottom;
- LD “grabs her boobs, fanny and arse” and the previous day LD had an L-shaped ruler and had said to her “Do you want this up your fanny to make you feel better?”;
- when WDW returned from her father’s care she had red genitals; Ms M took her to the doctor and was informed that a forensic examination would need to be conducted in order to establish abuse but Ms M did not want WDW to be subjected to this procedure.³²³

The prospect of LD being interviewed was enough to cause the mother to take to her bed for several days.³²⁴ Ms KE interviewed LD at his home but no disclosures were made.³²⁵ Over a month later, on 09/06/2008, the protective worker advised the father of these allegations. The father presented as disgusted and angry and said

³²² See section 17.3 above.

³²³ DOHS’ Application & Disposition report of the protective worker at p.6.

³²⁴ See sections 17.1 & 22 above.

³²⁵ Evidence of the protective worker at p.38 of my notes.

that he did not want to be informed of the details.³²⁶ In the course of powerful cross-examination by Mrs Weinberg the protective worker-

- said that she didn't assume that if a child displays sexualized behaviour he or she has been sexually abused; and
- denied that her meeting with the father on 09/06/2008 was "for DOHS to see if he was the creator of the sexualized behaviours".³²⁷

There have apparently been no further incidents of sexualized behaviour and the Department did not include a ground under s.162(1)(d) of the *CYFA* when it issued the protection applications on 13/06/2008. I do not find that either LD or WDW has been sexually abused.

28.4 P.A. NOT PROVED UNDER s.162(1)(c)

At the end of the evidence I advised counsel of my view that the evidence elicited – in particular the disclosure by Ms M on 05/05/2008 that the mother had not taken her medication over the weekend and had dropped KD³²⁸ - would probably be sufficient to justify a finding of proof of each protection application on the likelihood limb of s.162(1)(c) of the *CYFA*. However, given the parties' consent at the outset that this ground would not be pursued, it would not afford procedural fairness to the mother to make a finding on this ground at that stage. Since in this case nothing turns on which ground or grounds the protection application is proved, it was not appropriate for me to re-open the case and recall witnesses to allow counsel for the mother to contest a finding on s.162(1)(c) and I did not do so.

None of the protection applications are proved on either limb of s.162(1)(c) of the *CYFA*.

28.5 THE MISUNDERSTOOD CONCEPT OF "CUMULATIVE HARM"

In their reports the protective worker and protective worker 2 have cut and pasted part of Robyn Miller's paper on "cumulative harm":³²⁹

³²⁶ *Op.cit.*, p.8.

³²⁷ See pp.47-48 of my notes.

³²⁸ See sections 9.2 & 17.1 above.

³²⁹ At p.7 of the protective worker's report and p.11 of protective worker 2's first report. The quotation derives from "Cumulative Harm: A Conceptual Overview", Miller, R., December 2006, p.3). The underlining is mine.

“Cumulative harm refers to the effects of patterns of circumstances and events in a child’s life which diminishes a child’s sense of safety, stability and wellbeing. Cumulative harm is the existence of compounded experiences of multiple episodes of abuse or layers of neglect. The unremitting daily impact on the child can be profound and exponential, covering multiple dimensions of the child’s life. Cumulative harm is experienced by a child as a result of a pattern of harmful events and experiences that may be historical, or ongoing with the strong possibility of the risk factors being multiple, interrelated and co-existing over critical developmental periods.”

They have also urged³³⁰ that the protection application be proved on the ground set out in s.162(2) of the CYFA which provides:

“For the purposes of sub-sections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstances or accumulate through a series of acts, omissions or circumstances.”

The concept expressed in s.162(2) is neither new nor revolutionary. For as long as I can remember this Court has regularly taken into account the notion of cumulative risk of harm, applying where appropriate dicta of Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed) in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)*³³¹:

“[F]acts 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.”

And of course the less minor and less trivial the multiple facts, the more likely it is that their accumulation will suffice to satisfy the court to the requisite level.

But section 162(2) of the CYFA does not set out a separate ground for proof of a protection application. It is clear from its wording that it is no more than an evidentiary provision which may, in appropriate circumstances, make it easier for DOHS to prove one or more of the grounds set out in sub-sections (1)(c) to (1)(f).

Further, there is one thing in the above extract from Robyn Miller’s fine paper with which I disagree. That is the underlined word “is”. In my view it should read “may be”. To say that harm is experienced by a child as a result of harmful events and experiences ignores the reality of resilience and treats a child as a automaton. Some children may be harmed by exposure to relatively minor events. Other children may not be harmed by exposure to relatively traumatic events. It all depends on the

³³⁰ At pp.3 & 3 respectively.

³³¹ [1996] AC 563, 591.

resilience of the child. There is no evidence in this case that LD, WDW or KD have actually been physically harmed or psychologically harmed as yet by exposure to life events. This suggests to me that they are probably rather robust, resilient children since their life experiences to date could fairly be described as somewhat chaotic. If they have not yet suffered harm, it makes no sense to speak of them having suffered cumulative harm. In algebraic terms $0^x = 0$. The relevance of Robyn Miller's thesis to the present case is in relation to cumulative risk of harm, not to cumulative harm *per se*.

29. SUPERVISION ORDER TO FATHER FOR EACH CHILD

The protection applications having been proved, the question is what (if any) protection orders should be made.³³² I have no doubt that a significant role remains for the Department in their children's life and indeed the parents concede that supervision orders are appropriate.³³³

The difference between the parents' positions is whether the children should be in the care of their father or their mother on supervision orders.

29.1 WHY SPO TO FATHER RATHER THAN TO MOTHER

LD has told protective worker 2 that he wants to live with his father and asked protective worker 2 to help him do so. The other children are too young to have expressed any wish, either actually or by implication.³³⁴ LD's express wish is corroborated by the evidence of him getting out of the window from time to time to chase after his father.³³⁵ I give his wish very significant weight.

The following table, in which I have summarized some of my findings made in earlier sections of this judgment, bears eloquent testimony as to why I am satisfied that it is in the best interests of each of the children to be placed in the full-time care of their father rather than their mother.

³³² See ss.274 & 275 of the *CYFA*.

³³³ See sections 3.2 & 3.3 above.

³³⁴ See protective worker 2's first report at p.11.

³³⁵ See sections 7 & 18 above.

FINDING	THE FATHER	THE MOTHER
PROTECTIVE CONCERNS	None.	Significant ongoing protective concerns, <i>inter alia</i> in relation to mental health, drug use and inconsistent focus on the children's needs.
MENTAL HEALTH	No mental health concerns, past or current.	Significant mental health problems over 27 years and mental health remains fragile.
CHILDREN SAFE IN FULL-TIME CARE	Yes.	No.
NEED FOR SUPPORTS AND/OR SERVICES	Would benefit from the provision of services but supports are not absolutely essential for the children's safety and development.	Even with substantial ongoing supports and services I am not satisfied that the children will be safe in her full-time care.
DRUG USE	No current drug use and not likely to use drugs if children in his care.	Regular and persistent user of cannabis and certain to remain so whether or not there is a condition on a court order barring such use.
LD'S WISHES	To live with father.	Not to live with mother.

FINDING	THE FATHER	THE MOTHER
EGOCENTRICITY ENHANCING THE EMOTIONAL WELFARE OF THE CHILD	Very focused on the needs of the children. Living in his full-time care will enhance the emotional welfare of all three children.	Very focused on her own needs and problems. Takes the view that the children will just have to "live with her and her mental illness" so she is unlikely to enhance the children's emotional welfare.
INTERACTION WITH THE CHILDREN	Very positive, consistent, attentive interaction.	When her mental health is OK, her interaction with the children is very appropriate.
ONGOING CRISES	Unlikely.	Very likely.
ABILITY TO WORK WITH DOHS	No problems at all.	Though she tries to be compliant she does not like the current protective worker and attempts to avoid any dealings with her. She gets very anxious when DOHS speak with her. No realistic prospect of being able to work with DOHS.

The last issue is almost sufficient by itself to make a supervision order to the mother unworkable. Ms M put it eloquently: “The mother and DOHS don’t get along and the mother’s anxiety goes through the roof and that’s nothing for the kids to see.”³³⁶ Section 280(1)(a) of the *CYFA* provides that “a supervision order gives the Secretary responsibility for the supervision of the child.” Section 282(1) provides that if the Court makes a supervision order, “the parent must permit the Secretary to visit the child at his or her place of residence and to carry out the duties of the Secretary under the order.” I do not see how the Secretary can properly carry out those duties if a protective worker is not able to have regular and relatively stress-free communication with the parent with whom the child is living.

Taking into account all of the evidence and applying the “best interests” principles in s.10 of the *CYFA*, I am satisfied that at the present time:

- To be placed on supervision orders in the care of their father is in each child’s best interests and will adequately and optimally protect them from harm, protect their rights and promote their development [ss.10(1) & 10(2)].
- Intervention into the relationship between the children and their parents to an extent greater than that provided by a supervision order is not necessary to ensure their safety and wellbeing [s.10(3)(a)].
- The need to strengthen, preserve and promote positive relationships between the children and their parents is best achieved by returning them to their father’s care and making provision for them to have liberal access with their mother [ss.10(3)(b) & 10(3)(k)].
- LD’s strong wish to live with his father should be granted [s.10(3)(d)].
- There is no foreseeable risk of cumulative harm affecting the children’s safety and development if they are placed in their father’s care [s.10(3)(e)].
- The children are not at unacceptable risk of harm if placed in their father’s care but they would be at unacceptable risk of harm at the moment if placed in their mother’s full-time care [s.10(3)(g)].
- The father has the requisite capacity to provide for the children’s needs on a full-time basis whereas the mother does not [s.10(3)(j)].

³³⁶ Evidence in chief of Ms M at p.102 of my notes. See also sections 23 & 25 above.

- It is desirable that the siblings reside together even though they are not in out of home care [s.10(3)(q)].

Other than the “continuity” component of s.10(3)(f), none of the matters in other relevant paragraphs of s.10(3) militate against the children being placed in the full-time care of their father. I do not believe that moving the girls to another child care facility contravenes s.10(3)(o) and LD will probably need to change from kindergarten to school anyway. The desirability of continuity in the child’s care is vastly outweighed by all of the other matters detailed above.

In his final submission counsel for DOHS drew an analogy with the case of *F v C*³³⁷. In that case the Court had placed a 6 year old child on an IAO in the care of his father, who had been the non-custodial parent. The Department had raised no protective concerns in relation to the father. It had been conceded by the mother that she was not fit, because of her continuing history of alcohol abuse, to have the child placed in her care on an IAO at that time. However, she sought unsuccessfully that the child remain in the care of foster parents with whom he had been living for 21 days because of the disruption she said would be caused to the child if he was now taken from their custody and placed with his father. On appeal, Beach J found no error in the magistrate's decision nor in his reliance on s.87(1)(j) of the *Children and Young Persons Act 1981* [in similar terms to s.10(3)(g) of the *CYFA*]. His Honour disagreed with dicta of the Family Court in *R v M*³³⁸ that "the fact of parenthood does not establish a presumption in favour of the natural parent nor generate a preferential position in favour of that parent from which the Court commences its decision-making process." His Honour preferred and approved the following dicta of Latham CJ in *Storie v Storie*³³⁹:

"Prima facie the welfare of a young child demands that a parent who is in a position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger. The fact that a stranger can also provide a good (or even, I should say, a better) home is in such circumstances an element of only slight, if any, weight."

I consider that the analogy with *F v C* is valid. I agree with Mr Stevens that it is the aunt who has primarily been providing the care to the children and any supervision

³³⁷ Supreme Court of Victoria-Beach J, unreported, 28/01/1994.

³³⁸ (1993) FLC-80233.

³³⁹ (1945) 80 CLR 597 at 603. In this extract “stranger” is being used to mean “non-parent”.

order to the mother would be a *defacto* supervision order to the aunt – a “stranger” in the parlance of *Storie v Storie* - should she decide to remain in the home. Read together, ss.10(3)(g) & 10(3)(h) prohibit such an order when there is a perfectly appropriate carer in the form of the father. I also agree with Mr Stevens that the father is not only an appropriate carer, he is in law the only possible carer. And in any event – in contrast with the last sentence of the extract from *Storie v Storie* – I strongly believe that the father is capable of providing a better home for the children than is Ms M.³⁴⁰ Just to be sure of the validity of Mr Stevens’ argument I initiated the following exchange:

Mr Power- “What if I had a situation in which the mother could be the caregiver but needed support from a third party living in the house?”

Mr Stevens- Only the parent would be appropriate because it requires the court to make an order compelling a third person – a non-party – to be the *defacto* carer.”³⁴¹

I might not necessarily agree with the validity of Mr Stevens’ answer in a case which was less clear cut than the present but I entirely agree with his answer as applied to the facts of this case. I am not satisfied that the mother could safely cope with the children in her full-time care whether she had appropriate supports in place or not.

This case illustrates in a graphic way the operation of s.10(1) of the *CYFA*, the provision giving paramountcy to the best interests of the children. While it is overwhelmingly in their best interests to be in their father’s full-time care, the risk that this raises to the mother’s well-being is significant.³⁴² I can only ask the mother to bear in mind that her children need to have ongoing contact and an ongoing relationship with her. She is and will remain a very significant person in their lives.

Section 280(2) provides that a supervision order must be for a period not exceeding 12 months unless there are special circumstances which warrant the making of an order not exceeding 2 years. There are no such special circumstances in this case. Given the Department’s history with this extended family, the mother’s fragile mental health and the need to provide the father with appropriate services for a realistic period, the orders should be for 12 months, the maximum period permitted in the absence of special circumstances.

³⁴⁰ See p.139 of my notes.

³⁴¹ *Ibid.*

³⁴² See the opinion of witness 2 and my concerns which were raised in closed session and are discussed in section 9.3 above.

I will therefore order that each child be placed on a supervision order in the care of the father for a period of 12 months.

29.2 INTERIM PROTECTION ORDER CONSIDERED BUT REJECTED

Early in the case I had wondered whether it might be too big a jump for the father to go from being the carer of the children 2 nights a week to being a full-time carer (less any time the children are on access with their mother). However, I accept that when he was living with LD and WDW the father was a “very hands-on” parent even though he was working most of the time doing both truck driving and a casual night job at Barwon Cleaning. He was asked what his involvement had been with the children. I accept his answer:

“I would come home and cook the meal at night. I’m not saying that the mother wouldn’t clean the house or look after the children but I did most of it.”³⁴³

In answer to questions by me protective worker 2 confirmed that the recommendation of an interim protection order had been considered by DOHS but rejected. But her most useful evidence on this point came in re-examination:

Mr Stevens- “You are seeking a supervision order for the children in the father’s care for 12 months. You were asked whether you had turned your mind to the children being in their father’s care [on an order] for 3 months. You were confident the father would be able to look after three children in his sole care. Is there any reason why you chose 12 months rather than 3 months?”

Protective worker 2- Because it will give DOHS and myself an opportunity to set up support services to help the family in implementing the Family First Placement Prevention Program through DOHS which assists families. Also to supervise over a longer period of time to stabilize the children where they need to be.

Mr Stevens- You are saying that 12 months would be more appropriate than 3 months to set services in place?

Protective worker 2- Yes.

Mr Stevens- Based on your assessments of the father are you confident he will be able to look after the children in his full time care?

Protective worker 2- Yes.

Mr Stevens- Why?

Protective worker 2- Because he has demonstrated over a period of time he can do that. I’ve observed him with the children. I’ve had conversations with him, assessed where he is currently living and his plans about the future for the children.

Mr Stevens- The children have been in his care 2 nights per week?

Protective worker 2- Yes.

Mr Stevens- Who does the parenting in the overnights?

Protective worker 2- He does it all.

Mr Stevens- He has told you that?

Protective worker 2- Yes. He attends to all their needs.

Mr Power- You are aware that there are current Family Law Act orders?

³⁴³ Evidence in chief of the father at p.127 of my notes.

Protective worker 2- Yes.

Mr Power- Is it fair to say from your observations that you believe there are no protective concerns about the father?

Protective worker 2- Currently no [protective concerns]. If the court was to place the children in his care there would be an opportunity for me to monitor closely how things are going and to make sure the family was supported and are following through with recommendations. Of course, if there were any problems with that we would be having several options, including breach of orders.

Mr Power- Should it be the Family Court or this court given there are no current protective concerns about the father?

Protective worker 2- My advice to other clients is that everything goes well for the supervision order to lapse and the family to attend the Family Court for further long term arrangements.”³⁴⁴

I agree with all of protective worker 2’s answers and hence I have made 12 month supervision orders rather than either 3 month interim protection orders or short interim accommodation orders pending the continuation of Family Law Act proceedings.

30. MOTHER’S ACCESS CONDITIONS

Giving proper weight to s.10(3)(k) of the *CYFA*, I must ensure that there is ongoing access between the children and their mother. I have included four rather complicated alternative access conditions in order to try to cater for four different contingencies.

The Department is seeking that the mother have access 3 times per week and that it be supervised by DOHS or its nominee unless DOHS assesses that supervision is not necessary. In the event that the supervision orders placed the children in their father’s care, the mother is seeking overnight and unsupervised access. The father was asked: “Do you have a personal view on how much access the children should have with their mother?” He replied:

“Very liberal. It depends on the mother whether she wanted to see them and the children if they wanted to see her. I don’t feel the mother should not see the children in any way. I would commit to any access at the moment except for overnight access at the start.”³⁴⁵

The principle of minimum intervention in s.10(3)(a) of the *CYFA* and the need in s.10(3)(b) to strengthen, preserve and promote positive relationships between the children and their mother lead me strongly to the view that access should be liberal.

³⁴⁴ At pp.35-36 of my notes.

³⁴⁵ Evidence of the father in cross-examination by counsel for DOHS at p.134 of my notes.

Although I do not believe that at the moment the children could live safely in the full-time care of their mother, I do not consider that they will be exposed to an unacceptable risk of harm if they have unsupervised overnight access with their mother for two consecutive nights per week provided that she is not mentally unwell or drug affected and that-

- (i) Ms M is available to live in the same house as the children during overnight access; or
- (ii) if Ms M is not available, some other person approved by DOHS is available to live in the same house as the child during overnight access.

If no such person is available to live in the same house, the children should have unsupervised access with their mother three times per week for two hours per visit.

Given that these orders are for 12 months' duration, the access arrangements may need to be changed – either permanently or temporarily – during the currency of the orders. In order to provide flexibility and to avoid the necessity of coming back to court to seek a consent variation, I have included a fourth broad alternative. Provided that all parties agree, the above three alternative access arrangements may be overridden and the mother may have access with the child at times and places and in such manner as is agreed between the parties.

It is important to note that these four access conditions are alternatives, only one of which will be operable in any given week. To have Ms M living in is the preferable option. Some other person approved by DOHS is the next best option. The third option of three visits per week of two hours each is a fall-back position only if options (i) & (ii) are not available in a particular week. The fourth option is in effect a consent variation – permanent or temporary - if all parties agree. Nothing in these conditions is intended to compel or pressure Ms M to make herself available to live with the mother and the children during overnight access.

The essential *quid pro quo* for the mother's access being unsupervised is that she must be monitored immediately prior to the commencement of each access visit and if she presents as mentally unwell or drug affected that access visit must not proceed.

LD's schooling (but not his kindergarten) is to take precedence over his access except in the case of the fourth option. If it is not possible to schedule access without interfering with LD's school obligations, then his school obligations must take precedence over access.

It may be necessary for the mother to assist in the transport of LD to/from school if overnight access occurs on school days. The father has a current driver licence and he gave evidence that he expected to have a car by Christmas day.³⁴⁶ It will probably be easier for him to facilitate access by car than it has been by public transport. Nevertheless he should not be expected to facilitate all transport of the children to and from access.

I have also included a condition which:

- allows contact between the father & the mother for the purpose of arranging and facilitating access if no one else is available to arrange access on behalf of the mother; and
- allows the father to attend outside the mother's residence to facilitate access changeover if there is no other place where access changeover can reasonably occur.

This condition will activate the "except by order of any court" exceptions in prohibitions 2 & 3 of the varied intervention order.³⁴⁷

Finally, although I have not included this specifically in the condition, the mother's two consecutive nights' access should not occur every weekend unless the father agrees to this. The children and their father should have an opportunity for other family activities on at least some weekends.

³⁴⁶ In answer to questions by me at p.135 of my notes.

³⁴⁷ As to which see section 34 below.

31. OTHER CONDITIONS ON SUPERVISION ORDERS

Witness 7 recommended that the father be required to provide weekly supervised drug screens and to attend drug & alcohol counselling.³⁴⁸ DOHS is not seeking any such conditions. I agree with DOHS.

The parties all agreed that LD should attend counselling/therapy as agreed.³⁴⁹ However, I have re-worded the draft condition to put the primary obligation on the father, not on the child.

The parties all agreed with Mrs Weinberg's request that there be a condition prohibiting contact between Mr L and any of the children. Since Mr L is not a party to this proceeding, I have preferred to couch the obligation on the mother to ensure that there is no such contact.

I agree with Mrs Weinberg that there is no evidence which would justify draft conditions (7) that the father not use or be affected by illegal drugs when with the child or (10) that the father not hit or hurt the child for any reason. These conditions are drafted to bind the mother only.

At this stage I agree with Mr Teare that it is preferable that the mother continue to attend witness 2 & witness 5 rather than to go to other professionals. I don't know whether that will prove to be the case for the whole 12 months of the orders. Hence I have drawn the psychologist/psychiatrist condition to be "as agreed with DOHS" and I have added "and/or general practitioner".

I have adopted Mr Teare's suggestion that the drug treatment condition should reflect the fact that the mother may seek to re-engage with Moreland Hall.

Given that I have included conditions allowing the mother to have overnight access with the children on certain terms, I agree with Mr Stevens' submission that there should be a condition requiring the mother to undergo random drug testing as

³⁴⁸ See her report dated 10/09/2008 at p.3.

³⁴⁹ The father said of this (at p.134 of my notes): "I believe that LD should have counselling, yes. I've been asking DOHS about LD. Apparently nothing has been done about that. I believe the trauma my children suffered over the last few months must have affected them in some way. I don't know how to help them. They need professional help."

directed by DOHS. Because the primary drug concern is cannabis, I agree with Mr Teare that testing should be not more than once per week.

I have included a condition that the mother must not use illegal drugs and must not be affected by illegal drugs when having access with the children. I am mindful of Mr Teare's submission that such a condition is likely to be breached by ongoing cannabis use by the mother. However, given the professional concern about whether her cannabis use is affecting her mood and her anxiety, I believe it is in the best interests of the children to include this condition. If the mother decides to breach it, that is her lookout. She will have no one to blame but herself.

I have re-worded the draft school/kindergarten/child care conditions and respite conditions submitted by DOHS to put the primary obligation on the father rather than on the child.

32. RELEVANCE OF DECISION TO L SIBLINGS

I have earlier discussed the Department's current investigation in relation to the L siblings and I have noted that Ms M's evidence painted a very bleak picture of Mr L and his impact on CL, BL & AL.³⁵⁰

Since I do not know the outcome of the investigation and since Mr L has not been a party to this proceeding, I express no view as to whether or not DOHS should apprehend CL, BL & AL from the care of their father and issue protection proceedings on their behalf.

However, should DOHS proceed to do so, there is nothing in the evidence I have heard in the present case nor is there anything in this judgment which would prevent Ms M being assessed as a suitable person to care for the L siblings on interim accommodation orders, whether she was residing at the mother's home or in her own home.

³⁵⁰ See section 12.4 above.

33. ORDERS ON THE PROTECTION APPLICATIONS

For the above reasons I make the following findings and orders on the protection applications:

- A. Each protection application is found proved on the likelihood limb of s.162(1)(e) of the *CYFA*.
- B. Pursuant to ss.280 & 281 of the *CYFA*, LD is placed on a supervision order in the care of the father for a period of 12 months until 06/01/2010. The order contains the following 20 conditions:
1. Each parent must accept visits from and cooperate with DOHS.
 2. Each parent must accept support services as agreed with DOHS.
 3. Mother must continue to go to a psychologist and/or psychiatrist and/or general practitioner as agreed with DOHS for treatment and must allow reports to be given to DOHS.
 4. Mother must participate in treatment for drug dependence as agreed with DOHS (including re-engagement with Moreland Hall if she & DOHS agree) and must allow reports to be given to DOHS.
 5. Mother must submit to random supervised drug testing not more than once per week as directed by DOHS and must allow the results to be given to DOHS.
 6. When having access with the child, mother must not use or be affected by illegal drugs.
 7. Father must make his best endeavour to find a suitable home.
 8. Mother and father must not expose the child to physical or verbal violence.
 9. Mother must ensure that the child is not hit or hurt for any reason.
 10. Father must ensure that the child attends school or kindergarten as agreed with DOHS.
 11. Father must allow the child to have respite as agreed with DOHS.
 12. Father must ensure that the child attends counselling/therapy as agreed with DOHS and must allow reports to be given to DOHS.
 13. Mother must ensure that there is no contact between Mr L and the child.
 14. **IF MS M IS AVAILABLE TO LIVE IN THE SAME HOUSE AS THE CHILD DURING OVERNIGHT ACCESS:** Subject to conditions 18 & 19, the mother may have unsupervised access with the child for one overnight visit comprising two consecutive nights per week at times and places as agreed between the parties and Ms M.
 15. **IF MS M IS NOT AVAILABLE BUT SOME OTHER PERSON APPROVED BY DOHS IS AVAILABLE TO LIVE IN THE SAME HOUSE AS THE CHILD DURING OVERNIGHT ACCESS:** Subject to conditions 18 & 19, the mother may have unsupervised access with the child for one overnight visit comprising two consecutive nights per week at times and places as agreed between the parties and the other person approved by DOHS.

16. **IF NEITHER MS M NOR ANOTHER SUITABLE PERSON IS AVAILABLE PURSUANT TO CONDITIONS 14 OR 15:** Subject to conditions 18 & 19, the mother may have unsupervised access with the child three times per week for 2 hours per visit at times and places as agreed between the parties.
17. If all parties agree, conditions 14 to 16 may be overridden and subject to condition 18 the mother may have access with the child at times and places and in such manner as is agreed between the parties.
18. Either Ms M or DOHS or its nominee (as the case may be) must monitor the mother immediately prior to the commencement of each access visit. If the mother presents as mentally unwell or drug affected, that access visit must not proceed.
19. If it is not possible to schedule access for two consecutive nights per week or three times per week for 2 hours (as the case may be) without interfering with the child's school obligations, then his school obligations must take precedence over access.
20. If no one else is available to make access arrangements on behalf of the mother, the mother and father may contact and/or approach each other for the purpose of arranging and facilitating access. If there is no other place where access changeover can reasonably occur and no other person who can reasonably facilitate the changeover, the father may attend outside the mother's residence to facilitate access changeover.

C. Pursuant to ss.280 & 281 of the CYFA, WDW & KD are each placed on a supervision order in the care of the father for a period of 12 months until 06/01/2010. Each order contains the following 19 conditions:

1. Each parent must accept visits from and cooperate with DOHS.
2. Each parent must accept support services as agreed with DOHS.
3. Mother must continue to go to a psychologist and/or psychiatrist and/or general practitioner as agreed with DOHS for treatment and must allow reports to be given to DOHS.
4. Mother must participate in treatment for drug dependence as agreed with DOHS (including re-engagement with Moreland Hall if she & DOHS agree) and must allow reports to be given to DOHS.
5. Mother must submit to random supervised drug testing not more than once per week as directed by DOHS and must allow the results to be given to DOHS.
6. When having access with the child, mother must not use or be affected by illegal drugs.
7. Father must make his best endeavour to find a suitable home.
8. Mother and father must not expose the child to physical or verbal violence.
9. Mother must ensure that the child is not hit or hurt for any reason.
10. Father must ensure that the child attends child care as agreed with DOHS.
11. Father must allow the child to have respite as agreed with DOHS.
12. Father must take the child to the Maternal and Child Health Nurse as often as the nurse recommends.
13. Mother must ensure that there is no contact between Mr L and the child.
14. **IF MS M IS AVAILABLE TO LIVE IN THE SAME HOUSE AS THE CHILD DURING OVERNIGHT ACCESS:** Subject to condition 18, the mother may have unsupervised access with the child for one overnight visit comprising two consecutive nights per week at times and places as agreed between the parties and Ms M.
15. **IF MS M IS NOT AVAILABLE BUT SOME OTHER PERSON APPROVED BY DOHS IS AVAILABLE TO LIVE IN THE SAME HOUSE AS THE CHILD DURING OVERNIGHT ACCESS:** Subject to condition 18, the mother may have unsupervised access with the child for one overnight visit comprising two

consecutive nights per week at times and places as agreed between the parties and the other person approved by DOHS.

16. **IF NEITHER MS M NOR ANOTHER SUITABLE PERSON IS AVAILABLE PURSUANT TO CONDITIONS 14 OR 15:** Subject to condition 18, the mother may have unsupervised access with the child three times per week for 2 hours at times and places as agreed between the parties.
17. If all parties agree, conditions 14 to 16 may be overridden and subject to condition 18 the mother may have access with the child at times and places and in such manner as is agreed between the parties.
18. Either Ms M or DOHS or its nominee (as the case may be) must monitor the mother immediately prior to the commencement of each access visit. If the mother presents as mentally unwell or drug affected, that access visit must not proceed.
19. If no one else is available to make access arrangements on behalf of the mother, the mother and father may contact and/or approach each other for the purpose of arranging and facilitating access. If there is no other place where access changeover can reasonably occur and no other person who can reasonably facilitate the changeover, the father may attend outside the mother's residence to facilitate access changeover.

34. IVO VARIED TO AVOID INCONSISTENCY

Section 173 of the *Family Violence Protection Act 2008* (Vic)³⁵¹ – which came into operation on 08/12/2008 replacing the *Crimes (Family Violence) Act 1987* – provides:

- (1) A family violence intervention order applies despite any child protection order.
- (2) However, if the Children's Court is hearing an application for a child protection order in relation to a child and the child is a protected person under a family violence intervention order, the Court may, on its own initiative, revoke or vary the family violence intervention order to the extent the order would be inconsistent with the order the Court proposes to make under the *CYFA*.
- (3) For the purposes of sub-section (2), if the Court proposes to revoke or vary the family violence intervention order-
 - (a) the appropriate registrar for the Court must give notice of its intention to revoke or vary the order to all parties to the proceeding in which the order was made; and
 - (b) the Court must not revoke or vary the order until all parties have had an opportunity to be heard by the Court; and
 - (c) the Court may make an interim order varying the family violence intervention order until all the parties have been given an opportunity to be heard.

When – on the second day of this hearing – I became aware of the existence and the terms of the intervention order, it was immediately apparent that it was inconsistent in material respects with the protection order which DOHS and the father were requesting me to make. The only parties to the proceeding in which the intervention order was originally made were the mother and the father. Both were legally

represented before me in this case. I immediately gave verbal notice to counsel of the fact that if the protection orders which I ultimately considered to be in the best interests of any of the children proved to be inconsistent with the intervention order, then I intended to vary the intervention order.³⁵² I also invited counsel to take the opportunity to be heard and – if they wished – to lead evidence on this in the course of the contest on the protection applications.

The intervention order was made under the *Crimes (Family Violence) Act 1987*, not under the *FVPA*. However, the transition provisions in s.215(1) of the *FVPA* deem the intervention order to be a final order made under the new Act. Hence s.173 is clearly applicable to it.

The operation of s.173(2) is not entirely clear. However, it seems to me that it does not operate as a quasi-appeal against an intervention order nor does it give the court an unfettered discretion to vary an intervention order. On the evidence I have heard in this case, I would not have made an intervention order against the father in relation to any of the three children.³⁵³ But that does not mean that I can vary the intervention order to exclude conditions even though I believe there is no proper evidentiary basis for them. I can only vary the intervention order to remove any inconsistencies between it and the supervision orders. This means that I cannot vary conditions 1, 4, 5, 6 & 7 since they are not inconsistent with the supervision orders.

However, the supervision orders are inconsistent to a significant degree with conditions 2 & 3 of the intervention order insofar as those conditions relate to the children. In order to avoid inconsistency it is necessary to-

- delete the three children as protected persons in conditions 2 & 3; and
- delete the words “attend school or childcare” from condition 3.

³⁵¹ Hereinafter ‘the *FVPA*’.

³⁵² Rather than send counsel upstairs to the Principal Registrar to be given notice pursuant to s.173(3)(a), notice which I would have had to have communicated to the Principal Registrar in any event, I considered that I had implied power to cut out the middleman and give that notice to counsel directly: see *Grassby v The Queen* (1989) 168 CLR 1,16 per Dawson J.

³⁵³ See section 15.1 above.

Hence pursuant to s.173(2) of the *FVPA* I vary, of my own motion, the intervention order made against the father at (location removed) Magistrates' Court on 13/03/2008. The varied family violence intervention order, which lasts until 13/03/2009, provides that the respondent, the father, is prohibited from-

1. assaulting, harassing, threatening, intimidating or behaving in an offensive manner towards the protected persons at any time;
2. approaching, telephoning or contacting the mother in any manner (including in writing, text message, email, other electronic communication or through another person) except-
 - (a) to participate in counselling, mediation or family dispute resolution; or
 - (b) by order of any court ; or
 - (c) by prior agreement with the mother; or
 - (d) through a lawyer; or
 - (e) in the company of a police officer
3. knowingly being at or within 200 metres of any address or any premises where the mother lives or works except-
 - (a) by order of any court; or
 - (b) by prior agreement in writing with the mother.
4. damaging, threatening to damage or interfering with any property of the protected persons; this includes property situated at the premises in which the protected persons live or work and property of any other person being used by the protected persons.
5. causing another person to engage in any of the behaviour prohibited by this intervention order on the respondent's behalf or at the defendant's request, direction or instigation;
6. possessing, carrying or using any firearm; if the respondent has a firearms licence, permit or authority it is revoked and the respondent is disqualified from obtaining another during the course of this order and for any other period provided in the *Firearms Act 1996*; any firearms in the respondent's possession are forfeited to the Crown to be disposed under the *Firearms Act 1996*;
7. causing or allowing the children named in this order to hear or witness any of the behaviour prohibited by this order.

Given the definition of "counselling order" in s.3 of the *FVPA* and the wording of ss.129(1) & 130(1) and given the definition of "family violence intervention order" in s.11 of the *FVPA*, the counselling assessment order made on 13/03/2008 and the counselling attendance order made on 18/03/2008 are probably not part of the intervention order. If that is right they could not be varied by operation of s.173(2). But in any event there is no need to vary them. They are not inconsistent with any terms of the supervision orders and they are now spent.

In condition 2 of the original intervention order, paragraphs (b) & (c) were partial duplicates. Both provided – in slightly different words – that condition 2 would apply except by order of any court. Exercising an implied power of the court to correct a "slip" in its orders, I have removed the duplication by deleting the original

2(c) and splitting 2(b) into two parts: (b) except by order of any court; and (c) except by prior agreement with the mother.

Peter T. Power

PETER T. POWER
Magistrate
Melbourne Children's Court

