

IN THE CHILDREN'S COURT OF VICTORIA

FAMILY DIVISION

APPLICANT: Department of Health & Human Services (DHHS)

CHILD: Kasey (name has been changed) *

<u>MAGISTRATE:</u>	J. Bowles
<u>DATE OF HEARING:</u>	14 and 15 January 2016, 17, 18 and 19 February 2016
<u>DATE OF SPECIAL MENTION:</u>	25 February 2016
<u>DATE OF DECISION:</u>	29 February 2016
<u>CASE MAY BE CITED AS:</u>	DHHS and K
<u>MEDIUM NEUTRAL CITATION:</u>	[2016] VChC 2

REASONS FOR DECISION

Catchwords:

Child protection – interim accommodation order contest – effect of transitional provisions of the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* on proceedings to breach supervised custody order – calculation of period of time child has been in out of home care including relevance of time child has been on a supervised custody order – s287A *Children, Youth and Families Act 2005* – effect of child being in out of home care for in excess of 24 months – effect of suspension of a supervised custody order – s262(6) and (7) *Children, Youth and Families Act 2005* – s14(2)(d) *Interpretation of Legislation Act 1984* – interim accommodation order could not be extended beyond 29 February 2016 – new protection application issued.

APPEARANCES:

<u>PARTY</u>	<u>COUNSEL</u>
DHHS	Mr Klein
Mother	Mr Halfpenny
Father	In person (14/1/2016, 17/2/16) Ms Davies (written submissions)

* The names of the other children named in this decision have also been changed.

Background

1. The mother in this case has three children. The current interim accommodation order proceedings are in respect of Kasey. Kasey's father is Mr S.¹ Kasey is 8 years of age and is residing on an interim accommodation order to her paternal aunt. The paternal aunt resides with her husband and their three children. Kasey's half-brother, Kevin is almost 10 years of age and is residing with the maternal grandfather, on a permanent care order. Kasey also has a half-brother, Josh who is 6 years of age and resides with their mother on a supervision order.²
2. Throughout Kasey's life she has spent periods residing with her mother, with her maternal grandparents (at times with her mother residing with them also) and now with her paternal aunt and uncle. The mother resides in (location removed) which is approximately a 5 minute drive from Kevin. The paternal aunt and uncle reside in (location removed), which is approximately a 1.5 hour drive from the mother's home.
3. Kasey was placed on a supervised custody order to her maternal grandparents on 17 August 2012. However, on 15 August 2015 the maternal grandmother unexpectedly passed away. As the maternal grandfather indicated he was unable to care for Kasey because he was the sole carer for Kevin, he relinquished care of Kasey. Consequently, on 29 September 2015 breach proceedings in respect of the supervised custody order were initiated. On 23 October 2015 an interim accommodation order was made to the paternal aunt.
4. The interim accommodation order has been extended and varied. The current contact condition provides for the mother to have overnight contact with Kasey once a week. She is having contact each Friday night after school and Kasey is returned to placement the next day (Saturday).
5. On 30 November 2015 an application to extend the supervised custody order was filed.
6. The Department of Health & Human Services (DHHS) had a time limited reunification plan which has now expired. The current case plan is non reunification. An appeal has been lodged by the mother. The principal practitioner, Ms G is responsible for determining the appeal. She has indicated that she will await the outcome of these proceedings before making a decision. It appears however that it is her understanding that this is a final contested hearing.³

Positions of the parties

7. During opening submissions, the DHHS was seeking that the interim accommodation order remain to the paternal aunt. Ultimately the DHHS would be seeking that a custody to Secretary order be made. In closing submissions the DHHS' first position was that the breach of the supervised custody order should be proved and a 12 month custody to Secretary order be made. Alternatively, if the proposed amendments to the *Children Youth and Families Act 2005 (CYFA)* impacted on the ability of the court to make an order, the DHHS could issue a new protection application. The third position was that the application to extend the supervised custody order could be 'rolled over' to a family reunification order.

¹ The father attended on the first day of the contested hearing. As the hearing was in respect of whether Kasey should reside with her mother and if not, the contact arrangements, he indicated his position but did not wish to participate in the proceedings. He did however attend again at the request of the court on 17 February 2016 when the issue of his contact arose and the Children's Court Clinic report dated 12 February 2016 was released.

² The supervision order was made on 6/11/2015 for 12 months.

³ Exhibit 1.

8. In opening submissions, the mother was seeking that the court place Kasey in her care but was prepared for there to be a staged transition with reunification being achieved by February 2016. There is significance attached to February 2016 as the pending amendments to the *CYFA* come into operation on 1 March 2016. In closing submissions, the mother's primary submission was that there be a structured transition for Kasey to return to reside with the mother. It was acknowledged that February 2016 would be premature. The secondary position was for there to be a significant increase in the mother's contact regime. The ultimate goal being reunification. It was submitted that an interim accommodation order extending beyond 29 February 2016 should be made and that the matter should remain part heard.
9. The father did not have any real concerns about Kasey residing with the mother. However, he acknowledged that Kasey had been progressing well whilst she has been residing with the paternal aunt (his sister) and her husband. In the closing submissions filed on behalf of the father his position was – *'The father is of the opinion that his daughter's behaviours have improved 100% since his sister has cared for her, and that he can see the mother does struggle from time to time with Kasey in her care. It should be noted that the father still very much supports the reunification of Kasey to her mother, but that this occur gradually with a view to Kasey returning to her mother's full time care at the end of the school year.'* It was submitted that a 9 month supervised custody order should be made.
10. The father did not seek for Kasey to be placed in his care as he acknowledged that his housing was not appropriate for a young child. Whilst the current order provides for the father to have contact a minimum of three times a week or otherwise as agreed with the DHHS and that it could include overnight contact should the father's accommodation be suitable, the father is having contact with Kasey every Sunday.⁴ He is also on occasions assisting in returning Kasey to the paternal aunt's after the mother's contact concludes on Saturdays.

Witnesses

11. The following witnesses (in the following order) gave evidence in the proceedings.

Dr J	Consultant psychiatrist (for the mother).
Ms N	Advanced DHHS child protection worker – Kasey's allocated worker from 10/12/2013. Ms N is not Kasey's current worker but she represented the DHHS for these proceedings.
Ms S	Senior clinician Berry Street Take Two.
Ms R	Senior clinician Berry Street Take Two.
Ms K	Psychologist (for the mother).
Dr E	Clinical psychologist, Children's Court Clinic.

The mother also gave evidence.

⁴ Dr E recommended that more information be obtained regarding the details of what occurs during Kasey's contact with her father. In my view this recommendation should be acted upon.

Protective concerns

12. The DHHS' protective concerns and rationale for a permanent care case plan include :-
- The mother's mental health;
 - Inconsistencies in the mother addressing her mental health issues;
 - Inconsistencies in the mother working with support services;
 - The mother's ability to maintain stable housing;
 - The exposure of Kasey to the mother's aggression and temper;
 - The difficult relationship Kasey has had with the mother when Kasey's behaviour has triggered the mother into rejecting behaviour;⁵
 - The ability of the mother to manage the difficult behaviours of both Kasey and Josh together;
 - The ability of the mother to manage the care of Kasey and Josh, including setting appropriate boundaries and discipline;
 - The mother's lack of insight into the potential causes for Kasey and Josh's challenging behaviours;
 - The significant improvement in Kasey's presentation since she has been residing with the paternal aunt and uncle.

Kasey

13. Kasey has had major behavioural issues. They include aggressive outbursts at school and home, being oppositional and non-compliant,⁶ impulsive, easily triggered to anger, when distressed very controlling and demanding and struggling to concentrate or manage relationships.⁷
14. Whilst she was residing at the maternal grandparents' home with the mother, she was suspended a number of times from her primary school due to her behaviour. Her behaviour included putting the safety of other students at risk and included on one occasion the classroom being evacuated.⁸ Her behaviour had also been described as including hitting, kicking, spitting, swearing, yelling,⁹ throwing rocks at school and not knowing how to handle the angry feelings she was experiencing.¹⁰ The evidence was that she was replicating the experience of living at the maternal grandparents' home.¹¹ The maternal grandmother was the key support person for the mother but there was and continues to be a difficult relationship between the mother and the maternal grandfather.
15. The consistent evidence of all of the witnesses, including the mother, was that there had been a significant improvement in Kasey's presentation since she had commenced residing with the paternal aunt and uncle. The mother referred to Kasey having matured. There was also evidence that Kasey had positively responded to the routines, discipline and

⁵ Exhibit C page 7.

⁶ Evidence of Ms S

⁷ Evidence of Ms R

⁸ Evidence of Ms N

⁹ Evidence of Ms N

¹⁰ Evidence of Ms R

¹¹ Evidence of Ms S and Ms R

stability in the paternal aunt and uncle's home. Kasey enjoys being with the carers' children, her cousins¹² and has a close relationship, in particular, with their youngest child. The reports were that there had been an *'immense improvement in Kasey's behaviour, presentation, social skills, general well-being and academic performance'*.¹³ Dr E assessed Kasey on 9 December 2014 and 27 January 2016. She also observed a major change in Kasey's behaviour. Ms S observed a dramatic improvement in Kasey's presentation and stated that she is not presenting as distressed or confused. She is much happier and is more responsive to nurturing.

16. Ms N considered that Kasey's placement was stable with the paternal aunt and uncle albeit that there is a very strained relationship between the mother and the paternal uncle. The aunt had previously facilitated contact but this could not continue as it had put stress on the family.¹⁴ However, she was supportive of contact. There had been issues with the eldest child coming to terms with Kasey residing there. The matters to be worked on included managing an additional child in their home, attempting to mend the relationship between the mother and the paternal uncle and the carers attempting to respond to Kasey's special needs, for example, dealing with her grandmother's death.
17. The consistent evidence was also that there is a very close bond between Kasey and her mother and that she loves her mother very much. Ms S, Ms R and Ms N observed that their relationship is very important and needs to be encouraged and facilitated. Kasey looks forward to seeing her mother.¹⁵ She also has a close bond with her half-brother, Kevin. However, Kasey's relationship with Josh is a difficult relationship. It is more than sibling rivalry. Kasey says she dislikes him. During contact, the mother is required to keep them apart in separate rooms at times, in order for them to engage in their own activities. Kasey does not like Josh being close to her.

Josh

18. One of the major concerns of the DHHS is that it is not in Kasey's best interests for her to reside with the mother because she is not able to manage both Josh and Kasey being in her care.
19. The difficulties in managing Josh cannot be overestimated. He has a global developmental delay and whilst not meeting the clinical diagnosis of post traumatic stress disorder, he meets some of the criteria. He attended court during the proceedings. He is a very active child and examples of his aggression were also evident in court. However, the close bond he shares with his mother was evident too. He continually seeks her attention. When Kasey and he are together there is much competition between them.
20. The extremities of his behaviour are evident by the practices the school has had to adopt. Josh is in prep. He attended school for 30 minutes on the first day and now attends for mornings only save for Wednesdays, when he does not attend at all.
21. A request was made for Josh to remain at school for the whole day whilst the mother gave evidence. However the request was declined due to the level of his violence which presented a risk to the other children. He had thrown bocce balls at a teacher the preceding day. Every lunch time he is required to be with a teacher and three other students so as not to harm other students. He cannot be on his own and cannot complete tasks on his own. He has poor concentration and difficulty processing information.

¹² There are three children aged 9, 7 and 5 years.

¹³ Exhibit D page 3.

¹⁴ Exhibit D page 3.

¹⁵ Evidence of Ms N.

22. Funding for a full time aide is being sought by the school and is supported by the mother. The school is attempting to implement strict routines and consistency and has been liaising with the mother with the expectation that she will implement such strategies at home.
23. Despite Josh's extremely challenging behaviours, Ms N has stated that for the majority of the time the mother is doing quite well with Josh, at times she can put boundaries in place although at times, she does not follow through. Dr E acknowledged that the mother had made progress but also observed the mother utilising an ineffective parenting technique of making empty threats, that is, 'I will call the police'. There has not been any breach of the supervision order initiated.

The mother

24. The mother has attended three sessions with her psychiatrist, Dr J.¹⁶ She was diagnosed as having a generalised anxiety disorder, major depression and displaying borderline personality symptoms when she first consulted Dr J. Psychotherapy, supports and medication were required for her mental health to be stable. Over the course of the sessions she attended, Dr J assessed that her mood had stabilised and she was not stressed. Dr J prescribed an anti depressant, Sertraline (also referred to as Zoloft) for her. She recommended that the mother continue on anti depressant medication for at least another one to two years. She described the mother's mental health as stable.
25. Since July 2014 the mother has engaged consistently (subject to financial constraints) with her psychologist, Ms K. Fortunately, the DHHS provided financial assistance last year in order for the mother to continue to attend. She has attended 23 or 24 sessions. Her presenting symptoms of depression included reduced motivation, being withdrawn, anxious, having difficulties in sleeping and feeling overwhelmed and hopeless in the context of DHHS. She had also experienced difficulties in her childhood, being exposed to domestic violence from ex partners and physical and verbal abuse. She had previously presented to Ms S and Ms R as heightened in mood and was aggressive. The mother had subsequently attended at Take Two and apologised for one significant episode.
26. The mother sought assistance from Ms K for parenting strategies (for example, establishing a routine for Josh and setting boundaries), for grief (the passing of the maternal grandmother and not having Kasey or Kevin in her care) and her anxiety. She appreciated her anxiety would have an impact on her children. Ms K's evidence was that the mother has demonstrated a commitment to the therapy, attending regularly and on time and engaging not only in the sessions but also at home (for example, practising strategies at home and writing down her feelings). Ms K has observed Josh in her waiting room and has also observed that Josh has a close bond with the mother and the mother has become more authoritative in dealing with him. The mother's mood has improved as a result of Josh being in her care. She is happier and feels more in control. However, she is distressed at not having Kasey in her care and feels she has not had an opportunity to grieve for the passing of her mother.

Attempts made by the mother to address the protective concerns

27. Progress has been made by the mother in attempting to address the protective concerns. The progress should be viewed in the context of the loss of the central, and it would appear, only non-professional support person in her life, her mother. The mother was required to leave the maternal grandparents' home shortly thereafter and is now privately renting a three bedroom home. The accommodation has been assessed as suitable. The contact with Kasey has changed from the mother living with her and seeing her daily whilst at the maternal grandparents' home, to once a week for two hours at McDonald's¹⁷ and

¹⁶ 14/10/15, 13/11/15 and 8/1/16. She did not attend the appointment in December as she said she was feeling unwell.

¹⁷ The mother consistently attended contact.

now the current regime. Her mental health has been assessed as stable. She has had Josh in her care since November 2015.

28. She has demonstrated a greater preparedness to accept professional supports, for example, engaging with Ms K and to a lesser extent Dr J, working with Crossroads (Ms V) and has agreed to work with Families First. She has acknowledged that she requires assistance in setting boundaries, routines and consequences for the children and has insight regarding the negative impact her aggressive or heightened mood has on the children, including that they mimic the behaviour. She supports Kasey continuing to work with Take Two and is seeking a mental health plan for herself and Josh. She has also demonstrated the capacity to prioritise Kasey's interests over her own, for example, whilst she would have liked Kasey to be returned immediately to her care, she acknowledged that that would not be in Kasey's best interests. Prior to contact occurring in her home, the mother appreciated Kasey's attachment to her cat and brought the cat to contact on occasions. The mother also finished contact early one Saturday in order for Kasey to attend a birthday party. The mother appears to have a good relationship with the paternal aunt who updates the mother about Kasey via text messages and has, for example, advised when Kasey will be attending the dentist in order for the mother to have the opportunity to attend.
29. However, what is essential in this case is that there is no regression in Kasey's presentation. Significant progress has been made and it is to be hoped will continue to be made. Dr E observed that in the past Kasey's dysregulated behaviour has made her vulnerable to any environment where there is chaos. She is sensitised to any environment which is disorganised or unstructured. Despite the progress made by the mother, the behaviour of Josh and the requirement for improved parenting strategies, impact on the stability of a placement with the mother. Dr E opined that the last thing Kasey requires is an environment that triggers dysregulation. One such environment could be if Josh and Kasey are not sufficiently managed by the mother. An environment may be risky for Kasey and yet may not be for other children.¹⁸
30. It is apparent that the mother has attempted to address many of the protective concerns of DHHS. Managing the difficult behaviours of Josh when Kasey attends contact, managing her own emotions and implementing appropriate parenting strategies, remain a challenge.
31. The mother acknowledged there are difficulties during contact with the children's behaviours but felt there had been an improvement. I accept Dr E's opinion regarding the potential advantage to be gained of a parenting agency, for example, Families First working in the home when Josh and also Kasey and Josh are in the mother's care in order for practical parenting strategies to be implemented at the time. It seems to me that the need for this to occur is independent of whether Kasey is ultimately reunified into the mother's full time care. It will potentially improve Kasey's relationship with her mother and Josh, which will be of considerable significance as Kasey becomes older and is required to understand, if she does not return home, why Josh resided with their mother and she did not. Ms N has made a referral. She advised that the service operates between 9 and 5 on weekdays. If it was possible for Families First to work with the family during school holidays, then it would be of maximum benefit for Kasey to be present with Josh in order to assist in setting boundaries and appropriate guidelines.
32. The mother will have additional contact pursuant to the order made this day. However, it will be critical for the impact of contact on Kasey to be carefully monitored by Take Two and Families First, in addition to those observations made by the mother and the carers. The observations would be instructive as to the future direction of this case. Dr E did not consider the door to reunification should be closed but considered that it is early days in the improved functioning of Kasey. Kasey would have to demonstrate she was stable and could cope with some change before reunification could be considered. She would need to

¹⁸ Evidence of Dr E.

be stable for 12 months or more. The mother would need to engage with Families First, continue to see her psychologist and remain motivated to make changes. I accept this evidence.

33. The geographic distance between the households presents an additional complication. The potential emotional harm to Kasey if contact increases too quickly is great. A conservative approach is required for the reasons advanced by Dr E whose opinion was based upon the individual characteristics of this family and not, as became apparent during her evidence, on the legislation.

The law

34. Section 10 *CYFA* provides that the best interests of the child must always be paramount.¹⁹ In determining the best interests of a child, the need to protect them from harm and to promote their development must always be considered.²⁰ The criteria to be applied in determining the best interests of a child are contained in s 10(3) *CYFA*.
35. I am satisfied that it is in Kasey's best interests to remain with her paternal aunt and uncle. Whilst acknowledging the significant bond Kasey shares with her mother and the need to assist and support the relationship between Kasey and her mother,²¹ for the reasons advanced above, her emotional development requires the stability which she is receiving in her current placement. There is an unacceptable risk of harm to her emotional state and development if she were to be returned to her mother's care now.²² Her educational needs are being met and she has commenced to catch up academically at her school.²³ Whilst it is almost invariably in a child's best interests to reside with a sibling, for the reasons previously discussed, the current relationship between Kasey and Josh has to be improved before this could be the case. The mother conceded that Kasey should not be returned immediately but sought a staged transition plan to reunify Kasey into her care. Apart from an increase in contact, the tyranny of distance in this case together with the fragility of Kasey's development would make any staged return at this time to be contrary to Kasey's best interests. I accept the evidence of Dr E in regard to this matter and the evidence of Ms S and Ms R regarding the essential requirement for Kasey to reside in a stable, consistent placement.
36. This decision is being handed down on the eve of significant amendments to the *CYFA* commencing operation. In my view the pending amendments affect not only the outstanding applications before the court but also the impact of making an interim accommodation order which could extend beyond this day.
37. The applications before the court include an extension and an oral application to vary the interim accommodation order, an application to breach the supervised custody order and an application to extend the supervised custody order. Whilst the contested hearing was an interim accommodation order contest, it is necessary for the reasons detailed below, to have regard to the applications to breach the supervised custody order and to extend the supervised custody order in determining the order to be made.

¹⁹ Section 10(1) *CYFA*

²⁰ Section 10(2) *CYFA*

²¹ Section 10(3)(a) and 10(3)(b) *CYFA*

²² Section 10(3)(g) *CYFA*

²³ Section 10(3)(o) *CYFA*

Submissions of the parties regarding the orders to be made

38. I have previously indicated that the hearing proceeded as an interim accommodation order contested hearing. I have also detailed the submissions made by the parties as to the appropriate orders to be made. During the proceedings, I raised with the parties whether the hearing should be converted into a final contested hearing. Mr Halfpenny on behalf of the mother resisted the matter proceeding as a final contest.
39. In order for submissions to be made by the parties regarding the impact of the pending amendments on the orders which could be made by the court, the matter was listed for a special mention on 25 February 2016. The DHHS submitted that a custody to Secretary order should be made, alternatively the DHHS could issue a new protection application to ensure there was an order in place or by virtue of the application to extend the supervised custody order, it would convert to a family reunification order. Mr Halfpenny retained his position that the only appropriate order was an interim accommodation order which provided for an increase in contact for the mother. It was submitted that the hearing had been conducted as an interim hearing and that the mother's position would be prejudiced were a final order to be made. On behalf of the father it was submitted that the breach of the supervised custody order should be found proven and a 9 month supervised custody order should be made to the paternal aunt which included a different contact regime for the parents.

Application to breach the supervised custody order

40. The DHHS filed a breach of the supervised custody order. On 23 October 2015 Kasey was placed on an interim accommodation order to her paternal aunt, with whom she continues to reside.
41. The making of the interim accommodation order resulted in the supervised custody order being suspended.
42. The relevant parts of s 262(7) CYFA of the current provisions of the CYFA provide :-

Despite anything to the contrary in this Chapter, if an interim accommodation order is made as a result of a breach of a supervised custody order, that supervised custody order is suspended on the making of an interim accommodation order and remains suspended for the period of operation of the interim accommodation order but the period of the supervised custody order is not extended by the suspension.

43. On 30 November 2015 the DHHS filed an application to extend the supervised custody order for 12 months. The current case plan of the DHHS is non reunification.²⁴ The ultimate disposition sought by the DHHS is a custody to Secretary order. However, the DHHS has not filed an application to revoke the supervised custody order.
44. On 1 March 2016 amendments made to the CYFA by the *Children Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014* commence operation.
45. The transitional provisions relevant to these proceedings are as follows:-
- Schedule 5 clause 3 provides for certain protection orders to be renamed – On 1 March 2016 a supervised custody order becomes a family reunification order.
46. A family reunification order confers parental responsibility for the child on the Secretary²⁵ and responsibility for the sole care of the child on the Secretary²⁶. This amendment

²⁴ I have previously referred to the mother appealing the case plan and that the decision is pending the outcome of these court proceedings.

²⁵ s 287(1)(a) CYFA

represents a significant departure from a supervised custody order pursuant to which sole or joint custody of the child is vested in the person/s named in the order and could not be made in favour of the Secretary in his or her official capacity.²⁷

47. One consequent result is that whilst breach proceedings in respect of a supervised custody order could be initiated²⁸ and is the situation in this case, there is no provision for a family reunification order to be breached. As indicated, parental responsibility and sole care is vested in the Secretary.
48. In my view the breach proceedings which from 1 March 2016 would be in respect of a family reunification order are unable to proceed on or after 1 March 2016 as the amendments do not provide for such an order to be breached.

Application to extend the supervised custody order

49. In addition to the breach proceedings, there is an application to extend the supervised custody order.

50. Schedule 5 clause 7 provides -

On and after the relevant commencement day, in any Act (other than this Act), or in any instrument made under any Act or in any other document of any kind ...

(b) a reference to a supervised custody order under the old provisions is taken to be a reference to a family preservation order....

51. The transitional provision is inconsistent with the other references to a supervised custody order in the amending legislation becoming a family reunification order and a supervision order becoming a family preservation order. There is no family preservation order to extend in this case. It would however appear to be an error. A Bill has been prepared which, if passed, will rectify the inconsistency. It is unclear the weight, if any, a court can attach to a proposed legislative amendment. However, until the legislation is passed the validity of these proceedings is in issue.

52. An additional issue in respect of the application to extend the supervised custody order is that the amending provision in respect of applications to extend family reunification orders provides as follows:-

The court must not extend a family reunification order unless it is satisfied that –

(a) there is compelling evidence that it is likely that a parent will permanently resume care of the child during the period of the extension and

(b) the extension will not have the effect that a child will be placed in out of home care for a cumulative period that exceeds 24 months calculated according to s 287A.²⁹

53. Section 287A prescribes how to determine the period of a family reunification order. It provides for the time that a child has been in out of home care on –

(a) an interim accommodation order;

(b) a family reunification order;

(c) a care by Secretary order;

²⁶ s 287(1)(b) CYFA

²⁷ s 284(1)(a) and (b) CYFA

²⁸ s 311 CYFA

²⁹ S 294A(1) CYFA

- (d) a long term care order;
- (e) a therapeutic treatment (placement) order

to be calculated and the period of the order is dependent on whether the child has been in out of home care for less than 12 months or more but less than 24 months.

- 54. The DHHS advised that Kasey has been in out of home care for approximately 1515 days (approximately 50.5 months).
- 55. However, that calculation was made having regard to the period of time Kasey was on an interim accommodation order and a supervised custody order. Section 287A CYFA does not provide for regard to be had to the period that a child has been on a supervised custody order.
- 56. An amendment is proposed³⁰ to add a supervised custody order to the list of orders for which regard can be had when calculating the period of time that a child is in out of home care.
- 57. In the event the amendment is passed, when regard is had to the period in out of home care on a supervised custody order and also an interim accommodation order, the period in out of home care would exceed the maximum period provided for in s 287A(3).

If the child has been in out of home care for 12 months or more but less than 24 months under one or more orders specified in subsection (1), the period specified in a family reunification order must not have the effect that the child will be placed in out of home care for a cumulative period that exceeds 24 months commencing on the date that the child is first placed in out of home care under the first of those orders.

- 58. The legislation does not expressly provide for the situation in which a child has been in out of home care for a period that exceeds 24 months. This is a further issue regarding the validity of the application to extend the family reunification order from 1 March 2016 as the order may not be able to be made.

The validity of an interim accommodation order from 1 March 2016

- 59. Prior to 1 March 2016, as previously indicated, s 262(7) CYFA provides for the making of an interim accommodation order as a result of a breach of a supervised custody order.
- 60. From 1 March 2016 section 262(6) CYFA will provide as follows :-

Despite anything to the contrary in this section, an interim accommodation order must not be made in respect of a child in relation to whom a family reunification order, a care by Secretary order or a long term care order is in force.

- 61. Section 262(7) CYFA will provide as follows :-

Despite anything to the contrary in this Chapter, if an interim accommodation order is made as a result of a breach of a family preservation order, that family preservation order is suspended on the making of the interim accommodation order and remains suspended for the period of operation of the interim accommodation order but the period of the family preservation order is not extended by the suspension

- 62. It was submitted on behalf of the mother and raised on behalf of the DHHS that as the supervised custody order had been suspended on the making of the interim accommodation order, there was no supervised custody order to transition to a family

³⁰ Section 20 *Children Legislation Amendment Bill 2016* – insertion of clause 6A in Schedule 5.

reunification order and accordingly, an interim accommodation order could continue in force beyond 1 March 2016.

63. I do not accept this submission for the following reasons:-

1. Section 262(7) provides for an interim accommodation order to be made if there is a breach of a family preservation order and the family preservation order is suspended. The section has been drafted to expressly delete all references to a supervised custody order.
2. The submission filed on behalf of the DHHS included :-

Arguably once a breach has been filed, an interim accommodation order made, this then suspends the supervised custody order, as such in the face of a suspension of the supervised custody order there is nothing to transition to a family reunification order. It is clear that a custody order transitions pursuant to s 4 of Schedule 5 and that one certainly cannot have an interim accommodation order on a custody order, nor a family reunification order when it comes into effect.

As such as there is no supervised custody order to transition to a family reunification order, as the supervised custody order is suspended there is potential for an interim accommodation order.

64. In my view, the suspension of a supervised custody order does not render it a nullity such that *'there is no supervised custody order to transition to a family reunification order'*. The order is in abeyance but it exists. It remains a court order subject to s 262(7) CYFA which provides for a supervised custody order not to be extended by the suspension.
65. The interpretation I have adopted is consistent with the amendments made to the legislation. The family reunification order, as I have previously indicated, provides for parental responsibility for and care of the child to vest in the Secretary. It would be inappropriate for an inconsistent concurrent order to be able to be in place which provides for a child to be placed into the care of a named individual who has parental responsibility pursuant to an interim accommodation order.
66. I have given consideration to the meaning of the words in s 262(6) – *'an interim accommodation order must not be made in respect of a child in relation to whom a family reunification order is in force.'* (emphasis added)
67. One possible interpretation is that an interim accommodation order cannot be made when a family reunification order is in place. An interim accommodation order made or extended on 29 February 2016 is not being made when a family reunification order is in force. Further, that any extensions of the order from 1 March 2016 are extensions rather than an interim accommodation order being *'made'*.
68. Whilst this is a possible interpretation, it would not promote the clear purpose of sections 262(6) and 262(7), namely that there not be inconsistent orders in place concurrently.
69. It was submitted that pursuant to s 14(2)(d) *Interpretation of Legislation Act 1984* an interim accommodation order could be made and extended pending the final determination of this matter. The submission was that the absence of a reference to a suspended order in the amending legislation, in this case a suspended supervised custody order, resulted in the suspension being unaffected. I do not accept this submission. I refer to the interpretation of s 262(7) CYFA above in which the reference to a suspended supervised custody order has been expressly deleted. A *'contrary intention expressly appears'*.
70. In addition, it was submitted that s 14(2)(d) could be utilised in interpreting s 287A CYFA in which a supervised custody order is not included in the orders listed when calculating the

period of time in out of home care. The effect of the provision (as currently drafted and which commences on 1 March 2016) is that regard cannot be had to the period of time a child is in out of home care on a supervised custody order when determining the period of a family reunification order. I am not satisfied that s 14(2)(d) in these circumstances could be utilised to enable an interim accommodation order to be made which extends beyond 29 February 2016

71. Moreover, the lack of certainty leads to a significant risk that there could be no valid order in place on or after 1 March 2016 if an interim accommodation order is made extending to or beyond that date.

Decision

72. Kasey is a child who is in need of protection. In my view the best interests of Kasey require an order to be made which is a valid order; provides for her to reside with her paternal aunt; for her mother to have increased contact and for her father to continue to have contact with her.³¹ There are such serious concerns regarding the validity of the applications before the court, as and from 1 March 2016 that the only appropriate order is to extend and vary the interim accommodation order part heard to 2.00 pm on 29 February 2016.

73. The conditions of the interim accommodation order are:-

1. Mother must accept visits and cooperate with DHHS.
2. Father must accept visits and cooperate with DHHS.
3. Mother must accept support services as agreed with DHHS.
4. Father must accept support services as agreed with DHHS.
5. Mother must continue to attend her psychologist and psychiatrist for treatment and must follow through with recommendations. Mother must allow reports to be given to DHHS.
6. Mother must engage with and follow the advice of Families First.
7. Mother must tell DHHS within 24 hours of changing address.
8. Father must tell DHHS within 24 hours of changing address.
9. Mother must not expose the child to physical or verbal violence.
10. Father must not expose the child to physical or verbal violence.
11. The child may have respite as agreed between the carers and DHHS.
12. Mother may have one overnight contact with the child from after school on Friday until Saturday or otherwise as agreed between the mother and the paternal aunt. DHHS is to be kept advised. During the school holidays the mother may have a minimum of three overnight contacts as agreed between the mother and the paternal aunt. In determining when contact occurs, regard must be had to the child's activities and commitments, the involvement of Families First and the activities of the carers' family. In determining the frequency of contact regard must be had to how the child is managing the increase in contact.

³¹ There were two proposals suggested on behalf of the father ranging from the status quo on the interim accommodation order and a proposed condition if a supervised custody order is made.

13. Mother may have daily phone contact with the child between 5 – 6 pm unless requested otherwise by the child.
14. Mother must not discuss the court proceedings with the child or within the hearing of the child.
15. Child may have contact with her sibling, Kevin, at times and places as agreed by the mother and the maternal grandfather.
16. Mother must not be physically or verbally aggressive towards the paternal aunt and uncle.
17. Father may have contact as agreed between the father and the paternal aunt which may include overnight if the father has suitable accommodation. DHHS is to be kept advised.
18. Father must not drink alcohol to excess or be affected by alcohol during contact.
19. Mr (name removed) must not have any contact with the child.

Magistrate Jennifer Bowles

29 February 2016