

# Children's Court of Victoria

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

<b>Children:</b>	<u><b>KB</b></u>	[13/05/2001]
	<u><b>TG</b></u>	[04/05/2005]
	<u><b>WB</b></u>	[28/07/2007]
	<u><b>JB</b></u>	[28/07/2007]

<b><u>JUDICIAL OFFICER:</u></b>	<b>PETER T. POWER</b>
<b><u>WHERE HELD:</u></b>	<b>MELBOURNE</b>
<b><u>DATES OF HEARING:</u></b>	<b>28-29/04/2008<sup>1</sup>, 05-09/05/2008, 12-16/05/2008, 19-22/05/2008, 26/05/2008</b>
<b><u>DATE OF DECISION:</u></b>	<b>05/06/2008</b>
<b><u>CASE MAY BE CITED AS:</u></b>	<b>DOHS v Ms B &amp; Mr G</b>
<b><u>MED. NTRL. CITATION:</u></b>	<b>[2008] VChC 1</b>

## REASONS FOR DECISION

Child protection – Protection applications & applications to extend and vary custody to Secretary orders – Protective concerns centred on relationship between mother and father and father’s history of aggression – Whether in best interests of children to be caseplanned for permanent care or reunification with one or both parents – Admissibility of prior DOHS reports – Issue estoppel – Expert evidence – Attachment – Frequency & duration of access – Conditions relating to parental & sibling access - *Children, Youth and Families Act 2005*, ss.8, 10, 162(1)(c), 162(1)(e), 162(1)(f), 287, 296-297, 301-302.

PARTY	COUNSEL	SOLICITOR
Department of Human Services [Child Protection] <sup>2</sup>	Mr R Gipp	Court Advocacy Unit – Ms Preston
Mother [name removed] “the mother”	Mr S Gelfand	Cathleen Corridon
Father of TG, WB & JB [name removed] “the father”	Ms B Aitken	Gorman & Hannan
KB	Ms L Athanasopoulos	Dowling McGregor
Father of KB	Not present – whereabouts unknown	
TG, WB & JB	Unrepresented - Too young to give instructions	

<sup>1</sup> The case proceeded for less than 1 hour on each of these 2 days. The issue which led to the case ultimately being adjourned to 05/05/2008 was whether or not KB was mature enough to give instructions and whether he should be legally represented either pursuant to s.524(2) or s.524(4) of the *Children, Youth and Families Act 2005* (‘the CYFA’). Ultimately Mr McGregor (solicitor) determined that he was mature enough to give instructions and he was thus represented on the “instructions” model under s.524(2).

<sup>2</sup> Hereinafter ‘DOHS’ or ‘the Department’.

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# 1. FAMILY STRUCTURE

## 1.1 THE TWINS, TG, KB & PARENTS

The children the subject of this case are twins WB & JB [28/07/2007, 10m] and boys TG [04/05/2005, 3y1m] & KB [13/05/2001, 7y]. The parents of the twins and TG are Ms B (“the mother”) [02/10/1979, 28y] & Mr G (“the father”) [02/05/1970, 38y].<sup>3</sup> The mother is also the mother of KB and the father considers himself to be KB’s father.<sup>4</sup> The mother told the clinician (name removed) “witness 22” in August 2007 that that she had been with the father “nine years on and off, the last five years straight”.<sup>5</sup> However, it appears likely that at least for some time in 2005 the mother and the father were living separately but had re-commenced cohabitation late in the latter part of 2005.

## 1.2 THE “B” EXTENDED FAMILY & HALF-SIBLINGS<sup>6</sup>

The mother grew up in the (location removed) “location 1” area. Her father is of Albanian origin. Her mother died in 2004 at the age of 46y. Her mother’s parents, (names removed), live in location 1 and the mother remains in contact with them. Her father [53y] still lives in the location 1 area and has re-partnered, the mother referring to her step-mother as “mum” in conversation with witness 22. The mother has a younger sister (name removed) [21y] who is studying law at university. The mother is also the mother of sons (name removed) “child A” [18/09/1996, 11y8m] & (name removed) “child B” [27/02/1998, 10y3m]. Neither child has lived in her full-time care since 08/04/1998. Child A is on a guardianship to Secretary order initially made on 23/05/2000 and child B on a permanent care order made on 16/06/2003. Both are living with their maternal grandfather in location 1.

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<sup>3</sup> The mother’s surname is pronounced as if it were spelt “name removed”. The father’s surname is pronounced with a long (letter removed).

<sup>4</sup> The father is certainly a “parent” of KB within the meaning of s.3 of the CYFA: see discussion which I had with counsel on 28/04/2008 & 29/04/2008 at p.2 of my notes. See also Children’s Court Clinic report of witness 22 at p.9.

<sup>5</sup> Children’s Court Clinic report of witness 22 at p.9.

<sup>6</sup> The information in this section is compiled from the reports of witness 28 dated 01/04/2008 at pp.1-2, witness 29 at pp.12-15 & witness 22 at p.9, from DOHS’ Application and Disposition report dated 20/08/2007 at pp.18-19, from *viva voce* evidence of witness 8 at p.56, witness 16 at p.112 and witness 30 at p.269 of my notes and from the Court’s LEX computer system.

### **1.3 THE “G” EXTENDED FAMILY & HALF-SIBLINGS <sup>7</sup>**

The father is the second eldest of four children. His parents are of Maltese origin. His father died in 1988 of a heart attack. The father grew up in (location removed) “location 4”. He still keeps in touch with his mother and one of his sisters but he does not see his other siblings, both of whom live in location 1. The father met his first partner, (name removed) “Ms H”, through his sister when he was approximately 14 years old and met up with her again shortly after being released from prison in 1990. Ms H already had two children of her own. The father had a further four children with her:

- the first, (name removed), died of ‘cot death’ in 1991;
- the second & third are (name removed) “child C” [31/01/1993, 15y] & (name removed) “child D” [05/07/1995, 12y11m];
- the fourth, (name removed) “child E”, was born in 1997 or 1998.<sup>8</sup>

The father advised witness 22 that Ms H had died in about December 2005 from a brain tumor. For at least part of the earlier period in which the father & the mother cohabited, child C & child D lived with them but they were removed from their care by DOHS in about 2000 after a violent incident in a caravan park. The Department of Community Services in NSW has subsequently been involved with child C, child D & child E and the father has informed DOHS that a court order prevents him from having any contact with any of these three children.<sup>9</sup>

## **2. PREVIOUS ORDERS FOR THE CHILDREN**

### **2.1 PROTECTION APPLICATIONS DATED 12/04/2005 & 20/06/2005**

On 12/04/2005 DOHS filed and served a protection application by apprehension in relation to KB on the grounds set out in ss.63(c) & 63(e) of the *Children and Young*

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<sup>7</sup> The information in this section is compiled from the reports of witness 29 at pp.3-7, witness 22 at pp.9-11 and witness 26 dated 30/03/2008 at p.2.

<sup>8</sup> The father advised witness 29 [see p.4 of her report] that “Ms H felt pregnant without his knowledge just prior to their final break-up and he was not informed of this child until approximately two years later. LG has always lived with Ms H.”

<sup>9</sup> DOHS’ Application & Disposition report dated 20/08/2007 at p.19.

*Persons Act 1989*.<sup>10</sup> On 20/06/2005 DOHS filed and served a protection application by notice in relation to TG on the same grounds.

## **2.2 SUPERVISION ORDERS DATED 30/06/2005**

On 30/06/2005 these protection applications were found proved. KB & TG were found to be in need of protection and each was placed on a supervision order in the care of the mother for 12 months with a number of conditions. The key condition was probably condition 5 prohibiting the father from living with or having contact with either child. Since the Court's findings and orders were not contested, no written judgment was prepared.

## **2.3 CUSTODY TO SECRETARY ORDERS DATED 18/09/2006**

On 20/02/2006 - following a number of violent incidents involving the father since September 2005<sup>11</sup> - KB & TG were apprehended and DOHS filed a notice alleging a breach of condition 5 of the supervision order. On 21/02/2006 the Court made interim accommodation orders placing both boys in community service placements.<sup>12</sup> They have remained out of parental care ever since. On 18/09/2006 the breaches of the supervision orders were found proved and KB & TG were placed on custody to Secretary orders until 18/04/2007. Again, no written judgment was prepared as the findings and orders were not contested. Each of the custody to Secretary orders contained the following 9 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 counselling as agreed with DOHS and must allow reports about attendance to be given to DOHS.
6. Mother must go to family violence counselling as agreed with DOHS and must allow reports about attendance to be given to DOHS.
7. Mother must make best endeavour to find a suitable home.
8. Father must not live with or have contact with the child.
9. Mother may have access with the child for a minimum of 3 times per week at times and places as agreed between the parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.

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<sup>10</sup> Hereinafter referred to as 'the *CYPA*'. These sections were the predecessors of ss.162(1)(c) & 162(1)(e) of the *Children, Youth and Families Act 2005*. That Act is hereinafter referred to as 'the *CYFA*'.

<sup>11</sup> These incidents are detailed in section 14.2.3 below.

<sup>12</sup> A bail justice had made a similar order on the evening of 20/02/2006.

## **2.4 VARIATIONS OF CUSTODY TO SECRETARY ORDERS**

The custody to Secretary orders have subsequently been varied. They still prohibit any contact between the father and either KB or TG but the mother's access condition has been varied as follows:

- On 05/02/2008 the custody to Secretary orders were varied on an interim basis pursuant to s.302 of the *CYFA* by suspending face to face access [condition 9] and adding telephone access in lieu [condition 10]:

9. Mother's face to face access is suspended until further order.

10. Mother may have telephone access with the child 3 times per week for a minimum of 15 minutes each occasion. The children's end of the call will be on speakerphone and monitored by DOHS or its nominee. Mother must not discuss the conduct of the protection matter, nor DOHS staff, with the child.

- On 18/03/2008 the custody to Secretary orders were varied pursuant to s.301 of the *CYFA*<sup>13</sup> by reinstating face to face access [condition 9] and varying telephone access [condition 10]:

9. Mother may have access on one day per week commencing Thursday 20 March 2008 for one hour on each occasion. Such access to be supervised by DOHS or its nominee. Such access is contingent upon the mother's behaviour in that if the mother becomes aggressive and/or verbally abusive during any access, access will be terminated on that occasion and will then be suspended until further order of the Court.

10. Mother will have telephone access with KB on Tuesday 18 March 2008 for a minimum of 15 minutes. KB's end of the call will be on speakerphone and monitored by DOHS or its nominee. Mother must not discuss the conduct of the protection matter, nor DOHS staff, with the child.

It appears that the variation made on 18/03/2008 removed telephone access with TG and limited telephone access with KB to that day.

## **2.5 PROTECTION APPLICATIONS DATED 30/07/2007**

On 30/07/2007 – 2 days after the twins were born - DOHS filed and served protection applications by apprehension in relation to WB & JB on the grounds set out in ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *CYFA*. These sections respectively provide that a child is in need of protection if:

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<sup>13</sup> Although the filed minutes are unhelpfully silent on this issue, it was conceded by counsel that the applications to vary which were granted on 18/03/2008 were the ones filed by DOHS on 05/02/2008 which give as grounds: "New facts and circumstances including threats to Department and agency staff." See also section 3.1 below.

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

## **2.6 INTERIM ACCOMMODATION ORDERS TO HOSPITAL**

**Between 30/07/2007 & 30/08/2008 each of the twins was on an interim accommodation order placing him in care of the Royal Women's Hospital, Grattan St, Carlton. From 31/07/2007 the orders contained the following 10 conditions:**

1. Mother & father must accept visits from and cooperate with DOHS.
2. Mother & father must accept support services as agreed with DOHS.
3. Mother & father must go to a course on anger management as agreed with DOHS and must allow reports to be given to DOHS.
4. Mother & father must tell DOHS at least 24 hours before changing address.
5. Mother & father must not expose the child to physical or verbal violence.
6. Mother & father must not hit or hurt the child for any reason.
7. Father must not threaten or assault DOHS and/or hospital staff.
8. Mother & father may have daily access with the child in the Special care nursery of the Royal Women's Hospital, monitored by hospital staff and/or DOHS.
9. Upon request by DOHS, mother & father will inform DOHS of when they will be attending the hospital.
10. Mother and/or father must not remove the child from the special care nursery of the Royal Women's Hospital.

**Although there was a submissions contest on 31/07/2007 Acting Magistrate Ehrlich "made no decision as to whether access should be supervised as the parties agreed that access by the parents only take place in the supervised environment of the nursery"<sup>14</sup>.**

**On 21/08/2007 the interim accommodation orders were varied by addition of:**

11. Mother & father must attend ARBIAS or other recommended neuropsychological assessment as directed by DOHS and must allow results to be made available to DOHS.
12. Mother & father must attend Caraniche assessment on Thursday 23/08/2007 or as otherwise agreed between the parties. Parents must allow reports to be made available to DOHS.

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<sup>14</sup> See brief written comments by Ms Ehrlich on the Court file.

## **2.7 INTERIM ACCOMMODATION ORDERS TO FOSTER CARE**

On 30/08/2007 the twins were discharged from hospital. Since then each has been on an interim accommodation order in out of home care through the auspices of Ozchild. The orders have been extended every 21 days. After a submissions contest on 31/08/2007 the following 10 conditions were placed on each of the orders:

1. Mother & father must accept visits from and cooperate with DOHS.
2. Mother & father must accept support services as agreed with DOHS.
3. Mother & father must go to a course on anger management as agreed with DOHS and must allow reports to be given to DOHS.
4. Mother & father must allow the child to be taken to a paediatrician and Maternal & Child Health Nurse for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
5. Mother & father must tell DOHS at least 24 hours before changing address.
6. Mother & father must not expose the child to physical or verbal violence.
7. Mother & father must not hit or hurt the child for any reason.
8. Father must not threaten or assault DOHS staff.
9. Mother & father must attend ARBIAS (or other recommended neuropsychologist) as directed by DOHS and must allow reports to be made available to DOHS.
10. Mother & father may have access together with the child for 4 hours each day. Such access is to take place on 01/09/2007 & 02/09/2007 at the (location removed) "location 2" office of DOHS and thereafter at the (location removed) "location 3" office of DOHS. On weekdays the parents must confirm their attendance at access each day by 9am. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.

## **2.8 VARIATIONS OF INTERIM ACCOMMODATION ORDERS**

The conditions on the interim accommodation orders have subsequently been varied on several occasions:

- On 17/10/2007 an IAO contest by evidence before Acting Magistrate Ehrlich settled on the basis of *viva voce* evidence by (name removed) "witness 26" with conditions 1-9 as per above and the following conditions 10-13:

10. Mother may have access on 5 days weekly, being Monday to Friday, for 3½ hours on each occasion. Access will be at the location 3 office of DOHS and will be supervised by DOHS or its nominee.
11. Father may have access 3 days per week, being Monday, Wednesday & Friday commencing on 22/10/2007, for 1 hour on each occasion, being concurrent with the first hour of the mother's access, such access to be supervised by DOHS or its nominee. Such access is contingent upon the father's behaviour in that if the father becomes aggressive and/or verbally abusive during any access, access will be terminated on that occasion and will then be suspended until further order of the Court.
12. Parents must allow child to be taken to hospital as required and must follow all directions of the hospital.
13. Unless attending for access, the father is not to enter the offices of DOHS location 3.

- On 05/02/2008 the mother's access condition was suspended until further order and condition 8 was amended to read:
  8. Father & mother must not threaten or assault DOHS staff.
- On 18/03/2008 the mother's access was reinstated on one day per week and the father's access was ordered to be separate from that of the mother, conditions 10 & 11 being varied to the following:
  10. Mother may have access on one day per week commencing 19/03/2008 for one hour on each occasion. Such access to be supervised by DOHS or its nominee. Such access is contingent upon the mother's behaviour in that if the mother becomes aggressive and/or verbally abusive during any access, access will be terminated on that occasion and will then be suspended until further order of the Court.
  11. Father may have access 3 days per week, being Monday, Wednesday & Friday commencing on 22/10/2007, for 1 hour on each occasion. Such access to be supervised by DOHS or its nominee. Such access is contingent upon the father's behaviour in that if the father becomes aggressive and/or verbally abusive during any access, access will be terminated on that occasion and will then be suspended until further order of the Court.

### 3. CURRENT APPLICATIONS

#### 3.1 THE DEPARTMENT'S APPLICATIONS

The following 10 applications by the Department have not yet been determined:

- AD1** applications dated 11/04/2007 to extend the custody to Secretary orders for KB & TG which were made on 18/09/2006;
- AD2** applications dated 05/11/2007 to revoke the custody to Secretary orders for KB & TG;<sup>15</sup>

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<sup>15</sup> These applications were filed 4 days prior to a Directions Hearing in relation to an 8 day contest listed for 26/11/2007 on the other live applications. Naturally this meant that that contest had to be vacated since DOHS was now seeking to call a great number of additional witnesses. The applications unhelpfully stated no grounds whatsoever. In response to my order dated 09/11/2007, the Department provided particulars dated 23/11/2007 which included the following:

- "The parents are not able or fail to make appropriate guardianship decisions that are essential to the physical and mental health of the children and the stability and development of the children. The parents have disagreed and disregarded medical and therapeutic advice. The parents seek to use medical services for their own interests in dealing with the Department as opposed to serving the interests of the children.
- The parents fail to acknowledge and take responsibility for the harm and risk of harm they imposed on the children whilst in their care. The parents fail to acknowledge and take responsibility for the fact that the children continue to suffer from that harm. The parents fail to acknowledge and take responsibility for continuing domestic violence. Such failures are evident in the decision of the parents to resume cohabitation.
- The parents are either not able or refuse to place the long term needs and wellbeing of their children over their own needs and or their own relationship."

**AD3** applications dated 28/06/2007 to vary the custody to Secretary orders, giving as details: “Conditions to be varied in relation to mother’s access, parents not to threaten or assault DOHS workers and children to be allowed to access services they require”;<sup>16</sup>

**AD4** protection applications dated 30/07/2007 in relation to the twins on the grounds set out in ss.162(1)(c), 162(1)(e) & 162(1)(f) of the *CYFA*;

**AD5** applications dated 04/02/2008 alleging a breach of interim accommodation orders in relation to the twins and giving as particulars: “New facts and circumstances”<sup>17</sup> and “Condition 6: Mother and father must not expose the child to physical or verbal violence.”

### **3.2 THE MOTHER’S APPLICATIONS**

**AM1** On 28/09/2007 the solicitor for the mother filed applications to vary the custody to Secretary orders for KB & TG, giving as details: “Mother seeks unsupervised access. Mother is currently only permitted access twice per week.”

## **4. POSITIONS OF THE PARTIES IN THIS CONTEST**

### **4.1 THE DEPARTMENT**<sup>18</sup>

**AD1 & AD3** The Department is seeking that applications **AD1** be granted and that the custody to Secretary orders for KB & TG be extended for 12 months.<sup>19</sup> It is also seeking that the custody to Secretary orders be varied but is apparently relying on the mother’s applications **AM1** to ground this variation since counsel said to me on 12/05/2008 in relation to applications **AD3**: “In a literal sense those applications have been abandoned and I make formal application to withdraw those applications”.

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<sup>16</sup> It is conceded by counsel that the applications to vary which were granted on 18/03/2008 were those dated 05/02/2008, not those dated 28/06/2007. See also section 2.4 above.

<sup>17</sup> “New facts & circumstances” is not a ground for breaching an IAO: see s.269(1) of the *CYFA*.

<sup>18</sup> See pp.1-2 & 122-123 of my notes.

<sup>19</sup> At my request, this was made clear by counsel for DOHS: see p.123 of my notes.

**AD2** At the third Directions hearing conducted by Acting Magistrate Ehrlich on 22/04/2008 DOHS stated that it was no longer seeking that the custody to Secretary orders for KB & TG be revoked and guardianship to Secretary orders be made. This means that it is no longer wishing to proceed with applications **AD2**. That was confirmed by counsel for DOHS on 28/04/2008 and on 12/05/2008.

**AD4** The Department is seeking that the protection applications for the twins be proved on the grounds set out in ss.162(1)(c) & 162(1)(e) - but not on the grounds in s.162(1)(f) of the *CYFA* - and that each twin be placed on a custody to Secretary order for 12 months.

**ADS** The Department is also seeking formal orders that the breaches of the interim accommodation orders be found proved.<sup>20</sup>

At the outset of the case on 29/04/2008 counsel for DOHS said: “The Department’s position is for all 4 children that access should be confined to 3 hours once per fortnight to be supervised. The current place is at location 3 DOHS office.”<sup>21</sup> It was not until after the Department had formally closed its case that it sought to specify precisely what conditions it was seeking on any of the custody to Secretary orders. This is very unusual but it appears to have come about inadvertently. Prior to the third Directions Hearing DOHS had been seeking guardianship to Secretary orders for all 4 children. Its reports dated 05/11/2007, 14/03/2008 & 01/04/2008 reflected that position and so contained no draft conditions.<sup>22</sup> The difficulty caused by such a late provision of draft conditions was that it effectively prevented counsel for the family members from being able to cross-examine any DOHS’ witnesses on the proposed conditions. I have ultimately admitted the draft conditions dated 26/05/2008 as an addendum to (name removed) “witness 24’s” report dated 01/04/2008 without objection but on the basis that I will give to them only such weight as is commensurate with the rules of natural justice.

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<sup>20</sup> As none of the dispositions in s.269(7) of the *CYFA* are applicable at this stage of the proceedings, counsel for DOHS conceded that a finding was all that DOHS sought.

<sup>21</sup> See p.2 of my notes. I have confirmed the accuracy of this by listening to the recording of 29/04/2008.

<sup>22</sup> See DOHS’ reports of the protective worker dated 05/11/2007 at p.12 and of witness 24 dated 14/03/2008 at p.3 & dated 01/04/2008 at p.29.

The 20 conditions sought by DOHS on the orders for each of the 4 boys are as follows<sup>23</sup>:

1. Mother & father must accept visits and cooperate with DOHS.
2. Mother & father must accept support services as agreed with DOHS.
3. Mother & father must allow the children to be taken to a paediatrician and Maternal & Child Health Nurse for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
4. Mother & father must attending counselling/therapy with psychologist and/or psychiatrist as recommended and must allow reports on attendance and treatment to be provided to DOHS.
5. Mother & father must tell DOHS at least 24 hours before changing address.
6. Mother & father must not expose the child to physical or verbal violence.
7. Mother & father must not hit or hurt the child for any reason.
8. Mother & father must not threaten or assault DOHS staff or their nominees.
9. Mother & father must not attend placement of the child.
10. Mother may have supervised access with KB, TG, JB and WB for a minimum of once per fortnight for 3 hours. This access is to be supervised by DOHS or its nominee unless supervision is assessed by DOHS as unnecessary. Current weekly access regime to be gradually reduced over three month period to fortnightly regime in consultation with Australian Childhood Foundation and Take Two.
11. Father may have supervised access with KB, TG, JB and WB for a minimum of once per fortnight for 3 hours. This access is to be supervised by DOHS or its nominee unless supervision is assessed by DOHS as unnecessary. Current weekly access regime to be gradually reduced over three month period to fortnightly regime in consultation with Take Two.
12. Father's access to resume with TG & KB as recommended by Take Two and Australian Childhood Foundation and DOHS to be supervised by DOHS or its nominee. Such access to be dependant on the therapeutic recommendations for TG & KB and that father has engaged and receiving treatment from psychologist and or psychiatrist.
13. Sibling access to occur between KB, TG, WB & JB for a minimum of once per fortnight for 3 hours.
14. That access will be terminated if the parents engage in any verbal or physical violence or any threatening behaviour or actions whilst attending access.
15. Mother & father must confirm access by 9am on the day of access.

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<sup>23</sup> I do not know who drafted these proposed conditions but many of them are very indifferently drawn. For example:

- condition 3 would appear to contemplate KB & TG attending a maternal and child health nurse;
- conditions 10 & 11 specify in the first sentence that the parental access is to be supervised but in the second sentence that this will not apply if supervision is assessed by DHS as unnecessary;
- condition 10 refers to mother's access being reduced "in consultation with Australian Childhood Foundation and Take Two" whereas condition 11 refers to father's access being reduced "in consultation with Take Two"; the reason for the difference is not at all clear;
- condition 12 goes far beyond the opening statement of counsel for DOHS and, in my view, well beyond the evidence adduced in the case;
- condition 14 is ambiguous in that it is not clear whether it is limited to that particular access visit or is intended to include any future access visits;
- condition 15 provides no consequence if the parents do not confirm access by 9am;
- conditions 16-20 use the words "as required" without specifying who is to do the requiring;
- the syntax in condition 18 is dreadful;
- condition 19 puts the primary obligation on the 10 month old twins to attend childcare;
- condition 20 puts the primary obligation on TG & KB to attend school / childcare and I have no idea what is meant by "other day programs".

16. That KB attend counselling through the Take Two program and any other recommended therapeutic services as required.
17. That TG attend counselling as required and any other recommended therapeutic services as required.
18. That TG, JB and WB receive continued services through Specialist Children's Services and that the parents allow for any further recommended treatment and/or services as required.
19. That JB & WB attend childcare as required.
20. That TG & KB attend school / childcare and other day programs as required.

## 4.2 THE MOTHER & THE FATHER<sup>24</sup>

The mother & the father presented a fairly united front. At the second Directions Hearing conducted by Acting Magistrate Ehrlich on 21/04/2008 their solicitors had conceded that – on legal advice – the mother & the father were not seeking that the children be returned to their immediate care. That was confirmed by counsel on 28/04/2008. Accordingly they are not disputing proof of the protection applications on the likelihood limb of the grounds in s.162(1)(e) of the *CYFA* but they do not concede proof on either limb of s.162(1)(c). Further, they do not contest the making of 12 month custody to Secretary orders in relation to the twins nor a 12 month extension of the custody to Secretary orders for KB & TG. Nor are they contesting the breach of interim accommodation orders for the twins. The key issue for them is the level of their access with each of the children.

**AM1** Counsel stated the mother's position on access as follows:

“The current situation is that the mother is only getting 1 hour per week supervised. She is seeking to have that level increased to what it was before February 2008. In relation to all the children a minimum of 3 per week is sought in line with some of the recommendations of the expert reports. It is conceded that the suggestion of a longer access period of less frequency might be in the best interests of the children but in relation to once per fortnight that is not acceptable at the moment. There is also quite an emphasis placed on quality of access. She used to feed KB & TG dinner twice a week. She has been unable to have that sort of family interaction for some time and she wants that to return.”<sup>25</sup>

Counsel stated the father's position on access as follows:

“Currently he has one hour access 3 times per week with the twins and no access with KB & TG at all. He has never had any access with KB & TG. He wishes to have and to at least maintain the current level of access with the twins. He is amenable to the idea of longer access periods and maybe less frequent but he does not want his access to be reduced to what DOHS proposes.”<sup>26</sup>

<sup>24</sup> See pp.1-3, 122-123, 233 & 287-288 of my notes.

<sup>25</sup> At p.2 of my notes.

<sup>26</sup> *Op.cit.*, pp.2-3.

### 4.3 KB<sup>27</sup>

**Counsel stated KB's position as follows:**

**“KB eventually wants to go back home. He wants his access to be longer with his mother. He says the visits are good...He was asked who lives with his mother and he said ‘Dad’. He was asked if he wants visits with [the father] and he said ‘Yes’ and gave a big nod.”<sup>28</sup>**

**To some extent this is a spin on KB's wishes for it is clear that if he had his way he would go back home not “eventually” but “now”. That seems evident from the instructions which his solicitor Mr McGregor relayed to me on 29/04/2008:**

**“He confirmed the position he conveyed to witness 22 [on 13/08/2007, namely that he ‘wanted to go home to mum and dad’<sup>29</sup>]. He says he enjoys his access. He likes seeing TG...I did not at this opportunity go into the detail of the level of access.”<sup>30</sup>**

**However, given the position appropriately adopted by the mother and the father not to contest the extension of his custody to Secretary order, there was no room for KB's counsel to move on the question of his immediate return to parental care.**

### 4.4 ISSUE IN RELATION TO THE CASE PLANS

**Although the primary issue in dispute is the level of access between the mother, the father and all 4 boys, a related issue is whether or not the Department's permanent care case plans are in the best interests of the boys since the appropriate frequency of access is to some extent dependent on whether or not it is in the best interests of the boys – or any of them – to be case-planned for permanent care.<sup>31</sup>**

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<sup>27</sup> See pp.1-3 & 122-123 of my notes.

<sup>28</sup> At p.4 of my notes.

<sup>29</sup> Children's Court Clinic report of witness 22 at p.7.

<sup>30</sup> At p.3 of my notes.

<sup>31</sup> See the last paragraph of section 21 below.

## 5. REPORTS & OTHER DOCUMENTS

I have read the following reports and other documents:

	SHORT DESCRIPTION OF DOCUMENT	DATE
<b>DOCUMENTS TENDERED BY DOHS</b>		
D1	Report of (name removed) "witness 1" [Ozchild]	31/03/2008
D2	Statement of (name removed) "witness 2"	22/04/2008
D3	Statement of (name removed)	03/05/2008
D4	Amended DOHS' Application report of (name removed) "witness 4" re KB & TG	10/03/2006
D5	DOHS' Disposition report of witness 4 re KB & TG	10/03/2006
D6	DOHS' Addendum report of witness 4 re KB & TG	07/07/2006
D7	First visit case note written by (name removed) "witness 5"	12/04/2005
D8	DOHS' Statutory Case Plan re KB & TG endorsed by (name removed) "witness 7"	21/10/2005
D9	DOHS' Statutory Case plan Review re KB & TG endorsed by witness 7	06/03/2006 <sup>32</sup>
D10	DOHS' Addendum report re child A & child B co-signed by (name removed) "witness 8"	30/04/1998
D11	DOHS' Disposition report re child A & child B co-signed by witness 8	25/06/1998
D12	DOHS' Disposition report re child A co-signed by witness 8	24/09/1998
D13	DOHS' Application report re child A co-signed by witness 8	31/03/1999
D14	DOHS' Disposition report re child A co-signed by witness 8	01/04/1999
D15	DOHS' Application report re child A co-signed by witness 8	19/05/2000
D16	DOHS' Disposition report re child A co-signed by witness 8	22/05/2000
D17	DOHS' Application report re child A & child B written by witness 8	Delivered 27/06/2002
D18	Report of witness 21 re child A & child B	03/03/2003
D19	Report of witness 21 re child A	07/08/2003
D20	Take Two report of witness 23 & Ms Tenille Abell	29/03/2008
D21	Take Two report of (name removed) "witness 23" & (name removed)	14/05/2008
D22	Amended DOHS' Application & Disposition report of witness 24 re KB, TG, WB & JB	14/03/2008
D23	Amended DOHS' Addendum report of witness 24 re KB, TG, WB & JB with an added list of proposed conditions for the boys' custody to Secretary orders	01/04/2008 + 26/05/2008
D24	Psychological Report of witness 25 re KB, TG & the mother	29/06/2006
D25	Infant Mental Health Opinion of witness 26	16/09/2007
D26	Infant Mental Health Report of witness 26 re the twins, the mother & the father	30/03/2008

<sup>32</sup> This report is undated but the meeting was held on 06/03/2006: see p.54 of my notes.

D27	Specialist Children's Services' report of witness 27 & (name removed)B	31/03/2008
D28	Neuropsychology report of witness 28 re the mother	01/04/2008
D29	Psychological Assessment Report of witness 29 re the father & the mother	27/08/2007
D30	Amended DOHS' Addendum report of witness 30 re WB & JB	12/10/2007
D31	Amended DOHS' Disposition report of the protective worker re KB & TG	27/05/2007
D32	Amended DOHS' Application & Disposition report of the protective worker re WB & JB co-signed by (name removed) "witness 30"	20/08/2007
D33	Amended DOHS' Addendum report of the protective worker re WB & JB	08/11/2007
D34	Amended DOHS' Application & Disposition report of the protective worker re KB & TG	05/11/2007
D35	Chart of placements for KB & TG prepared for DOHS	26/05/2008
D36	Neuropsychological report of (name removed) re the father	10/10/2007
D37	Report of (name removed) re KB	19/04/2007
D38	Letter of (name removed) to DOHS re WB & JB	21/01/2008
D39	Letter of (name removed) to DOHS re KB	22/01/2008
D40	Report of (name removed) to DOHS re TG, KB, WB & JB	24/03/2008
<b>DOCUMENTS CONSIDERED BY ME OF MY OWN MOTION<sup>33</sup></b>		
C1	Children's Court Clinic report of witness 22	August 2007
C2	Document prepared at my request by witness 24 detailing the Department's case plans and draft case plans in relation to the boys	Prepared on 19/05/2008
C3	Handwritten information from Royal Women's Hospital file re WB & JB	28/08/2007
C4	Summary of observations by (name removed) of an access which he supervised at location 3 DOHS	24/09/2007

Counsel did not require the author of documents D3 & D36-D40 inclusive to be called for cross-examination. Because the Department's (2) protective workers were not available to give evidence, documents D22, D23, D30, D31, D32, D33 & D34 were partly amended to delete information provided by the protective worker about which witness 24 & witness 30 did not have first-hand knowledge.<sup>34</sup>

<sup>33</sup> As I am entitled to do under s.215(1)(d) of the CYFA.

<sup>34</sup> Documents D22, D23, D30, D31, D32, D33 & D34 were amended – appropriately and fairly in my view - after counsel for DOHS was advised that the protective worker was not available to give evidence due to illness and after he had discussed the situation with counsel for the other parties. While counsel for the mother, the father & KB did not object to the tendering of these documents, they made it clear that they were not abandoning all objection to the tender but were "content for their contents to be a matter of weight" for me: see p.253 of my notes.

## 6. WITNESSES

### ALL WITNESSES WERE CALLED BY DOHS

	NAME	DESCRIPTION OF WITNESS
W1	Witness 1	Ozchild social worker who on 17/07/2007 commenced working with the children's carer to support the children in their fostercare placement and who remains working with the carers of KB & the twins.
Adopted document D1		
<p>Witness 1 presented as a low key, careful, reasonable and honest professional witness. As well as providing a great deal of background in relation to the children in her helpful report, witness 1's evidence included-</p> <ul style="list-style-type: none"> <li>● observations and opinions about KB's attachment with his mother; and</li> <li>● the circumstances leading to TG's change of placement on 18/03/2008.</li> </ul>		
W2	Witness 2	Ozchild social worker who commenced working with TG's carer on 14/04/2008 to support his new therapeutic fostercare placement.
Adopted document D2		
<p>Although it was disturbing that she did not know the frequency of TG's attendance at child care in his previous placement, witness 2 presented as a generally competent witness whose evidence included-</p> <ul style="list-style-type: none"> <li>● information about TG's progress in his new placement;</li> <li>● details of the interminable and at that time fruitless negotiations re sibling access; and</li> <li>● information about TG's presentation for access with his mother.</li> </ul>		
W3	(name removed) "Witness 3"	Ozchild senior therapeutic social worker who worked with TG's carer from 14/03/2008 to 20/04/2008 to support his new therapeutic fostercare placement.
Adopted document D3 <sup>35</sup>		
<p>Witness 3 presented as quite a good professional witness who had a generally good knowledge of the case apart from the frequency of TG's attendance at child care in his previous placement and who provided me with useful evidence about the TG's progress in his new placement and his relationship with his mother and siblings.</p>		
W4	Witness 4	Former DOHS' protective worker who was allocated to the cases of KB & TG from July 2005 to October 2006.
Adopted documents D4, D5 & D6		
<p>Witness 4 was an excellent professional witness who presented as very fair, honest and reasonable. His evidence centred on his involvement with KB, TG &amp; the mother in his 15 months as allocated protective worker.</p>		
W5	Witness 5	Protective worker who was working in the response team at DOHS location 3 on 12/04/2005.
Adopted document D7		

<sup>35</sup> No counsel wished to examine or cross-examine (name removed), the author of document D3.

Witness 5 gave evidence of one urgent outreach visit to the then home of the mother on 12/04/2005. Most of her evidence would have been more relevant to RB than to the 4 children the subject of the current applications. The evidence of witnesses (name removed) “witness 12” and (name removed) “witness 13” seemed to me – in combination – to be a much more comprehensive account of the chaotic events of 12/04/2005. The chief value in witness 5’s evidence were admissions by the mother & RB that the father had been staying overnight in the house.

W6	(name removed) “Witness 6”	Ozchild social worker who was working to support the placement of KB & TG in 2006.
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Witness 6 was a very good witness who presented as fair, honest and reasonable. However the value of her evidence was slightly reduced by the fact that she had not brought her notes to court with her. Witness 6’s evidence primarily involved disclosures made by KB to her on 03/04/2006 and to the foster carer (name removed) on 02/05/2006. Although she was cross-examined at some length about the accuracy of her recall of a conversation she had with KB in a car on 03/04/2006, I am satisfied that her *viva voce* evidence presented an accurate account of the content – if not the precise wording – of KB’s conversation with her.

W7	Witness 7	DOHS former unit manager who chaired case plan meetings on 21/10/2005 & 03/06/2005.
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**Adopted documents D8 & D9**

Witness 7’s evidence was not much use to me. His evidence of the case plan meeting of 06/03/2006 which is contained in document D9 merely repeated evidence of witness 4 who was the author of the document. In the event he was not required for cross-examination by counsel for any of the family members.

W8	Witness 8	Supervising manager for DOHS’ case workers who were assigned to child A & child B’s cases for parts of the period between 1998 & 2003.
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**Adopted documents D10, D11, D12, D13, D14, D15, D16 & D17**

Witness 8 was an excellent professional witness with an extraordinarily good recall of events dating from up to 10 years ago and with a remarkable knowledge of the contents of the DOHS’ files re child A & child B. She was called by DOHS to adopt 8 DOHS reports re child A and/or child B dating from 30/04/1998 to 27/06/2002. DOHS called her to establish at that early stage the mother had failed to provide a safe environment for child A & child B by exposing them to severe violence not only perpetrated by the father but by other of her partners. Although drawing a parallel between this period and 2008 must be tempered by the fact that the mother was a very young mother at the time witness 8 was involved with child A & child B, her evidence did have some value for me, especially in relation to 2 incidents of domestic violence involving the father which led the mother to separate from him twice.

W9	(Name removed) “Witness 9”	DOHS’ protective worker who is based at DOHS’ location 3 office.
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Witness 9 has had no direct involvement with any of the B-G children. Her important evidence was of her chance observations of an incident between the father & the mother at the DOHS’ offices at location 3 on 27/09/2007. I accept her evidence *in toto*.

W10	(Name removed) "Witness 10"	Security guard employed by DOHS from March 1999 to 25/01/2008 and who was a supervisor behind a one-way mirror of most of the accesses the parents had with the twins at DOHS' location 3 office until January 2008.
<p>Witness 10 presented as a good witness who was fair and honest. Much of his evidence was quite favourable to the parents. I accept his evidence without qualification. It included-</p> <ul style="list-style-type: none"> <li>evidence of an incident on 24/09/2007 when the father had verbally abused an access supervisor, (name removed); and</li> <li>evidence of observations of the father &amp; the mother on 27/09/2007.</li> </ul>		
W11	(name removed) "Witness 11"	DOHS' case support worker who has been allocated to the B-G children since 20/09/2007 and whose role is to supervise access as required and transport the children to and from access on occasions.
<p>Witness 11 was a very good witness who presented as fair and balanced in her observations of the many accesses she has supervised involving the mother and KB &amp; TG and involving the parents and the twins.</p>		
W12	Witness 12	Ambulance paramedic involved in transporting the mother to location 3 Hospital on 12/04/2005.
<p>Witness 12 presented as a good witness with a reasonably good recall of events involving the mother &amp; the father over a relatively short period on one day over 3 years ago. The centerpiece of her evidence was of a lengthy argument between the mother &amp; the father about whether or not child A should accompany the mother to hospital in the ambulance.</p>		
W13	Witness 13	Midwife/Clinical educator involved with the provision of maternity services at location 3 Hospital.
<p>Witness 13 gave evidence from her notes of an incident involving the mother at location 3 Hospital on 12/04/2008 and a subsequent apologetic phone call by the mother. She had no independent memory of the incidents and reading her notes did not refresh her memory. Nevertheless I have no reason to doubt the accuracy of her notes.</p>		
W14	(Name removed) "Witness 14"	Case support workers employed by McArthur Management Services Pty Ltd who have supervised a large number of accesses between the twins and the parents and a number of accesses between KB & TG and their mother.
W15	(Name removed) "Witness 15"	
<p>Although Witness 14 is not as yet highly qualified, she is quite experienced in child care and I found her a very good witness, thoughtful, dispassionate and calm. Her evidence of her observations at access was very favourable to the parents.</p>		
<p>Although I had no evidence of Witness 15's qualifications or experience, I found her a good witness of accesses she had supervised, albeit not as dispassionate as Witness 14.</p>		
W16	(Name removed) "Witness 16"	DOHS' access supervisor.
<p>Witness 16 presented as a competent witness who gave evidence of her observations of access involving KB &amp; TG on two occasions and the twins on many occasions, including occasions on 15/01/2008 &amp; 01/02/2008 when the mother became upset and angry.</p>		

<b>W17</b>	<b>(Name removed) “Witness 17”</b>	<b>DOHS Team Leader</b>
<p><b>Witness 17 gave evidence of an abusive phone call which she received from the mother on 01/02/2008. It was complete overkill to call her. There was abundant evidence on the issue of the mother’s angry misbehaviour on that day from other witnesses, notably Witness 15 &amp; Witness 16.</b></p>		

<b>W18</b>	<b>(Name removed) “Witness 18”</b>	<b>Employees of Genesis Security Pty Ltd, a company engaged to provide security services to DOHS.</b>
<b>W19</b>	<b>(Name removed) “Witness 19”</b>	
<p><b>Witness 18 is the director of Genesis and witness 19 is an employee. Both were competent witnesses although witness 19 did not have a good recall without the use of notes. They gave evidence of incidents involving the father at (location removed) “location 5” Children’s Court in February 2008 &amp; March 2008.</b></p>		

<b>W20</b>	<b>(Name removed) “Witness 20”</b>	<b>Social worker employed as Direct Services Co-ordinator at Royal Women’s Hospital who provided support and assistance to the mother &amp; the father in July &amp; August 2007.</b>
<p><b>Witness 20 was a good witness who presented as very supportive of the parents. She gave very positive evidence of the parents’ behaviour and interaction with the twins and nursing staff during the period from 28/07/2007 to 30/08/2007 when the babies were in the special care nursery. In re-examination she gave evidence of problems which the parents had posed for staff during the mother’s preliminary admission on 12/07/2007.</b></p>		

<b>W21</b>	<b>(Name removed) “Witness 21”</b>	<b>Clinical child psychologist and researcher who is a principal of Family Transitions and an Associate Professor at Latrobe University.</b>
<b>Adopted document D19</b>		
<p><b>Witness 21 is a learned and highly qualified clinical psychologist who gave evidence of-</b></p> <ul style="list-style-type: none"> <li><b>• an assessment she conducted of child A &amp; the mother on 03/03/2003; and</b></li> <li><b>• expert opinions on 17/09/2007 and at the present time on the appropriate level of access between the twins and their parents.</b></li> </ul> <p><b>Although I found her discussion of the research and literature relating to infant development very interesting, I ultimately gave little weight to her expert opinions given that she had never assessed the interaction between the twins and their parents and was not privy to a great deal of other factual information about this case.</b></p>		

<b>W22</b>	<b>Witness 22</b>	<b>Clinical psychologist employed on a sessional basis at the Children’s Court Clinic who conducted an assessment of the family on 13/08/2007 on a referral from the Court.<sup>36</sup></b>
<b>Adopted document C1</b>		
<p><b>Although I do not accept her opinion about the optimal level of the mother’s &amp; the father’s access with KB &amp; TG, I consider Witness 22 to be a good clinical psychologist and a good professional witness. The evidence of her assessment session included-</b></p> <ul style="list-style-type: none"> <li><b>• observations of the demeanour of the father &amp; the mother;</b></li> <li><b>• a recommendation that KB &amp; TG remain with their current carers; and</b></li> <li><b>• a recommendation that they have supervised parental access for 2 hours twice weekly.</b></li> </ul>		

<sup>36</sup> Unfortunately, as a result of a clerical error by Court staff, the terms of reference for the referral were not properly drawn to the Clinic’s attention nor was the Clinic provided with 2 reports, namely those of witness 25 & CAMHS, which the Court had wished to be See p. 15 of my notes.

W23	Witness 23	Psychologist and Take Two clinician
Adopted documents D20 & D21		
<p>As a professional witness witness 23 was an enigma. On several issues she expressed bold opinions, from all but one of which she subsequently retreated under cross-examination. While it is commendable that she is flexible enough to resile from an untenable proposition, it is concerning that she expressed those bold opinions at all. In the end I accepted most of her evidence as it ended up after cross-examination.</p>		
W24	Witness 24	Senior protective worker who was allocated this case as her only case from 06/02/2008 but who moved to another role within DOHS on 30/05/2008.
Adopted documents D22 & D23		
<p>Although I do not agree with all of her opinion evidence, I consider witness 24 to be an excellent protective worker and a good professional witness on matters relating to her period as the boys' allocated protective worker. From the point of view of this family, I consider it a great pity that she moved to a new role within DOHS on 30/05/2008 and so is no longer the allocated protective worker.<sup>37</sup></p>		
W25	(Name removed) "Witness 25"	Psychologist who assessed the mother, KB & TG on 30/05/2006.
Adopted document D24		
<p>Although witness 25 has impeccable professional qualifications, I did not find her a compelling witness. In particular I do not understand her rationale for forming an opinion that there were problems in the attachment between KB and his mother.<sup>38</sup> While I do not have any doubt about any of her factual evidence, I do <u>not</u> accept <u>any</u> of her opinions unless they are supported by other evidence.</p>		
W26	Witness 26	Infant psychiatrist who assessed the twins and their parents on 14/03/2008 and the twins and their carers on 17/03/2008.
Adopted documents D25 & D26		
<p>Witness 26 has outstanding qualifications and enormous experience in the field of infant psychiatry. I accept his observations and generally his opinions but differ from him on the need for access to be 'therapeutic' and also differ from him on the vexed question of the frequency (but not the duration) of access between the twins and their parents.</p>		
W27	(Name removed) "Witness 27"	Psychologist from Specialist Children's Services
Adopted document D27		
<p>Witness 27 gave evidence of services provided by her and speech pathologist (name removed) for TG from 30/10/2007 to March 2008 and for WB &amp; JB from December 2007 to the present time. Although I deplore witness 27's inappropriate intrusion into the mother's access with the twins on 01/02/2008<sup>39</sup>, I found her a good, thoughtful professional witness.</p>		

<sup>37</sup> I note in particular the comments (at p.158 of my notes) of counsel for the mother on his client's appreciation of witness 24's role: "She believes she has a very good relationship with witness 24 and has had numerous meetings with her at the office."

<sup>38</sup> For a detailed explanation of why I have difficulty accepting witness 25's assessment independently of other evidence, see section 18.1 below.

<sup>39</sup> For further details of this see section 14.3.2 below.

W28	(Name removed) “Witness 28”	Neuropsychologist in private practice
Adopted document D28		
A very impressive professional witness who performed a neuropsychological assessment of the mother based on interviews & tests in February/March 2008.		

W29	(Name removed) “Witness 29”	Psychologist at Caraniche who performed a psychological assessment of the mother & the father based on interviews & tests on 21/08/2007.
Adopted document D29		
I found Witness 29 a very impressive professional witness. Although she was commissioned by DOHS to assess whether the father & the mother would be able to interact appropriately with staff if they and the twins were admitted to the Queen Elizabeth Centre for a parenting assessment and although she was unfortunately not able to see the interaction between the parents and the twins, I thought that she had very good insight into the parents’ functioning and I give significant weight to most of her evidence.		

W30	Witness 30	DOHS’ unit manager involved with this case since February 2007.
Adopted documents D30, D31, D32, D33 & D34		
Witness 30 proved to be an excellent witness, presenting as objective, thoughtful and very fair and with an encyclopaedic knowledge of these very resource-intensive cases and their history. While remaining properly focused on the developmental needs of the boys, she presented as sympathetic to the mother’s quite difficult situation in a very human way, saying appropriately enough at one stage that she had been concerned for the mother’s own safety. <sup>40</sup> I was very critical of two specific aspects of the case [DOHS’ failure to comply with the court orders in relation to the frequency of KB’s & TG’s access with their mother and the dismissive attitude of the permanent care agencies to children having a high level of access with parents] and she handled my criticisms properly and with dignity.		

There is no issue about the honesty of any of these 30 witnesses. Further, I am satisfied that all of the professional witnesses who gave opinion evidence were appropriately qualified to give such evidence in their respective fields.<sup>41</sup>

The protective worker was involved with all four children from February 2007 until 06/02/2008 when she was replaced by witness 24. I accept that she was unable to give evidence because of a stress-related illness. Neither the father nor the mother gave evidence nor were any witnesses called on their behalf or on KB’s behalf.

In *O’Donnell v Reichard*, after citing a number of authorities including *Jones v Dunkel*<sup>42</sup>, *Newton & Norris JJ* held-

<sup>40</sup> See p.271 of my notes.

<sup>41</sup> Applying the tests set out in *R v Anderson* (2000) 1 VR 1 per Winneke P at 22-23; *R v Smith* [1987] VR 907 per Vincent J; *Witness 22 v The Queen* (1989) 167 CLR 94 per Mason CJ & Toohey J at 110, Deane J at 126 & Dawson J at 130; *R v Perry* (1990) 49 A Crim R 243 at 249 per Gleeson CJ, citing *Clark v RB* (1960) 103 CLR 486) and *Grace v Southern* [1978] VR 75.

*DOHS v Ms B & Mr G:*

Judgment of Magistrate P. T. Power dated 05/06/2008

*“[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.”<sup>43</sup>*

However, a reasonable explanation was given by DOHS for its inability to call the protective worker as a witness and in the circumstances of this case it was not unreasonable for the parents to have chosen not to give evidence themselves.<sup>44</sup>

On the last day of the contested hearing DOHS was intending to call (name removed) of the Australian Childhood Foundation to give evidence as to how TG had settled into his new placement. DOHS was also intending to tender report D36 of the neuropsychologist, (name removed), and make him available for cross-examination. I urged they not be called and ultimately they were not.

So far as it relates to past fact, there is some – but not a great deal of - conflict in the evidence. The major conflict is in relation to opinion about what is in the best future interests of each of the children. Where there is a conflict of evidence, I am obliged to determine the conflict on the balance of probabilities<sup>45</sup> and I do so.

## 7. WHETHER ISSUE ESTOPPEL APPLIES

At the commencement of proceedings on 05/05/2008 counsel for DOHS made an application, said to have been based on the principle of issue estoppel, for an order that the Secretary be permitted to tender absolutely 19 protection and disposition reports<sup>46</sup> without making the authors of the reports available for cross-examination. The application was opposed by counsel for the mother, the father & KB. I refused the application, giving the following *extempore* reasons:

**“This is an application by DOHS that I should admit into these proceedings 19 reports prepared by DOHS for previous Court cases dated between April 1998 & March 2006. The first 15 reports that DOHS seeks to rely on relate to half-**

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<sup>42</sup> (1959) 101 CLR 298.

<sup>43</sup> [1975] VR 916 at 929. The emphasis is mine.

<sup>44</sup> Counsel for DOHS expressly and properly declined to make an *O’Donnell v Reichard* submission in respect of the parents’ election not to give evidence: see p.253 of my notes.

<sup>45</sup> See s.215(1)(c) of the *CYFA*. Where appropriate I have also taken into account the dicta of Latham CJ & Witness 27 J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pp.343 & 362 as explained in paragraph 4.8.3 of the Research Materials on the Children’s Court website [www.childrencourt.vic.gov.au](http://www.childrencourt.vic.gov.au).

<sup>46</sup> The reports in question were prepared by DOHS for earlier proceedings in 2005 & 2006 involving KB & TG and in 1998-2000 involving child A & child B and child C & child D.

siblings of the 4 siblings the subject of this contest. They are child A & child B and child C & child D. The 17<sup>th</sup> 18<sup>th</sup> & 19<sup>th</sup> reports that DOHS seeks to be able to rely on without calling the authors relate to KB & TG.

This case is limited to the question of the appropriate level of access between the children and their parents. In order to determine that, the Court will probably – albeit not necessarily - have to consider whether or not a permanent care caseplan for the children is appropriate or alternatively whether planning should be engaged in for the children’s return to their parents. Hence, some of the history of the parents and their children will no doubt be relevant to the issue of the appropriate level of access.

The Department says that the 19 reports which it lists in paragraph 15 of counsel’s written submissions can be admitted by the Court without a requirement that the authors of the reports be made available for cross-examination and that the appropriate way for the Court to determine the issues contained in the previous reports is to allow counsel to make submissions on the weight that should be given to each of the reports.

The Department relies on the doctrine of issue estoppel to support that submission. In my view the Department’s submission is not correct. The governing principles of issue estoppel were stated by the High Court in *Blair v Curran*<sup>47</sup>, a case that was involved with the determination of a will although that is no reason why the principles are not equally applicable in proceedings in this Court. The leading judgment to which I have been referred is that of Dixon J who said:

‘A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion...Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.’<sup>48</sup>

Counsel for DOHS took me through the provisions in ss.274-276 of the *CYFA* which provide for the Court making a finding that a child is in need of protection and the making of a protection order. These are in largely identical terms to those in the *CYPA* which applied at the time the reports in question were provided to the Court and the Court made its orders.

It appears that the Court has never previously been asked to determine the issues between these parties in a contested hearing. I don’t have the files in relation to child C, child D, child B & child A nor do I have the earliest parts of the files relating to KB & TG. I don’t know whether the parties consented to the orders or whether the orders were uncontested but nothing much turns on the difference. What the principle of issue estoppel means as applied to the circumstances of this case is that no party would be entitled to lead evidence in an attempt to show that the respective children were not in need of protection on the dates this Court has previously found that they were. Nor would any party be entitled to lead evidence to demonstrate that the protection orders

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<sup>47</sup> (1939) 62 CLR 464.

<sup>48</sup> At pp.531-532. The emphasis is mine.

made by the Court in relation to the other 4 children ought not to have been made at the time at which they were made. Counsel for the parents & KB do not seek to do that. They simply say that it would deny them procedural fairness not to be able to cross-examine the writers of reports on factual matters contained in the reports insofar as any of those matters are relevant to the current contest. Counsel for KB raised an interesting point that the Department, by seeking to tender these reports, was trying to raise the same issues again with the same parties. On reflection all I think the Department is trying to do is to provide to the Court the material which it says justified the making of the orders in the first place in order to provide a factual foundation for the orders it is now seeking.

I have sat in this Court for about 13 years over a 15 year period dealing with thousands of cases involving Departmental reports. Sometimes I make a decision without accepting all of the material that is contained in the Department's reports. Sometimes it appears wrong or irrelevant. Sometimes it is obviously wrong, as in the case of the most recent report dated 01/04/2008 which refers to the applications before the Court as including breach of custody to Secretary orders and applications for guardianship orders, neither of which are known to the law. Sometimes not all of the contents of reports are accepted by the Court because objectively they seem improbable but there is frequently still enough material which is accepted to enable the Court to make the order that the Department is seeking or that the parties have agreed should be made. Sometimes – quite often in contested hearings – I have made findings of fact that certain material in the Department's reports is simply wrong.<sup>49</sup> It is not uncommon for Departmental reports to be written to achieve an outcome and for material which does not support that outcome to be omitted from the reports. I could give dozens of examples of that over the past 5 years. The Department's submission, if it is adopted, would require me to accept as 'gospel truth' and as the last word everything which is contained in the 19 reports which it seeks to tender without calling the respective writers. But I don't know what factual material in those reports each of the judicial officers who made the orders has relied on - or not relied on - in making the orders. Hence the relevance to this case of the limitation put by Dixon J in *Blair v Curran*: 'The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its

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<sup>49</sup> There were a number of examples which subsequently came to light in which material in several of the DOHS' reports was either misleading or wrong or both. One particularly striking example demonstrated what I might term the 'virus' effect. In document D31 at pp.6-7, the author, the protective worker, refers to further concerns being "expressed in relation to the children being exposed to severe verbal abuse by both parents". In cross-examination witness 30 said (at p.269 of my notes) that from her reading of the file the initial protection application report in relation to KB in 2005 documented concerns about the mother's interactions with child A in the incident on 12/04/2005 described in section 14.2.2. Witness 30 conceded that she was not aware of any evidence that since that date either KB or TG had been exposed to verbal abuse by the mother. So one specific incident in which KB was indirectly exposed to verbal abuse directed by his mother towards his very out of control older brother has been transmogrified into a general statement that both KB & TG have been exposed to severe verbal abuse by the mother. And then up pops the same sort of general statement in a report written by the psychologist, witness 29, on 27/08/2007 referring to "the mother's parenting capacity and propensity towards verbal aggression toward her children" [emphasis mine], a statement clearly deriving from material provided by DOHS. This demonstrates a very concerning aspect of Departmental report writing, made even worse by the fact that a DOHS' report dated 10/03/2006 reported no protective concerns at all in relation to the mother's care of her children other than the unacceptable risk associated with her ongoing domestic relationship with the father.

conclusion...Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded.’

In this case what is closed or concluded is any suggestion by any party that the findings or orders made by the Court on previous occasions were not appropriate orders and can be the subject of challenge in this hearing. I don’t understand that anyone is seeking to do that anyway but taking it to its logical conclusion DOHS’ submission is that everything contained in its reports must be regarded by the Court on any later occasion as being ‘gospel truth’. If I was to make that finding, which in my view is not supported by the law, it would bring the mention court of this Court to its knees. There is likely to be a much smaller number of cases which would be dealt with either by consent or uncontested. However, the basis of my decision is not the damage that this issue would do to the processes of the Court. It is the fact that in my view it is not supported by law.

DOHS needs seriously to consider whether it needs to adduce before this Court factual material dating back to 24/04/1998 when the orders made by the Court and the circumstances of each of the 4 children involved speak for themselves. In any event as in my view issue estoppel does not enable the reports to be tendered absolutely as evidence of the truth of the material contained in them, it would be a denial of natural justice for counsel for the parents & KB not to be able to cross-examine the authors of those reports on any factual matters which are relevant to the current case.’<sup>50</sup>

Subsequently counsel for DOHS called former protective worker witness 4 to adopt documents D4 to D6 and senior protective worker witness 8 to adopt documents D10 to D17. It seemed to me that - at least partly as a consequence of very good cross-examination by counsel for the mother - their evidence was relatively favourable to the mother. This confirmed my view that it would have been quite unjust to the parents and to KB to allow admission of these reports without affording them procedural fairness in the form of an ability to cross-examine witnesses upon whose reports DOHS sought to rely.

Notwithstanding the above, I would not like it to be thought that I consider that the adversarial system provides a good foundation for the conduct of proceedings in the Family Division of the Children’s Court. It does not. It is a system, refined over centuries in the common law world, whose primary function is to determine which of one or more conflicting issues of past fact is more likely to be correct. But conflict of past fact is not the central issue in the majority of Family Division proceedings. The issue is usually what is the best future outcome for the child

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<sup>50</sup> This is a slightly edited transcript of *ex tempore* reasons given at on 05/05/2008. The editing does not alter the substance of the decision in any way. See *Fletcher Construction Australia Ltd v Line Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28; [2001] VSCA 167.

within the framework of either an uncontested or a very lightly contested factual matrix. The present case is no exception. It is true that the Family Division must conduct proceedings before it in an informal manner and must proceed without regard to legal forms.<sup>51</sup> However, the High Court has held in relation to broadly similar provisions in the *Family Law Act 1975 (Cth)* that Justice Watson was wrong in saying that “proceedings in [the Family] Court are not strictly adversary proceedings [but are] more in the nature of an inquiry, an inquisition followed by an arbitration”. In disapproving this view, a majority of the High Court said:

“The judge called upon to decide proceedings of that kind is not entitled to do what has been described as ‘palm tree justice’. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down...He must follow the procedure provided by the law. The provisions of s.97(3) of the [Family Law] Act, which require him to proceed without undue formality, do not authorize him to convert proceedings between parties into an enquiry which he conducts as he chooses.”<sup>52</sup>

It follows that the adversarial system prevails. This means that generally this Court can effect little control over what witnesses are called or how they are examined. Left effectively to its own apparently unlimited resources, the Department thought it necessary to call 30 witnesses in order to contest the narrow issue of the appropriate level of access between the children and their parents. It is scarcely surprising that the other counsel then cross-examined those witnesses at some length since generally it is not appropriate for me to telegraph in running what is important to me and what is not. Indeed sometimes I could not tell whether a particular topic was important until I had heard further evidence on it. The end result was that a significant part of the evidence adduced during the 15 days of this contested hearing was not of any real assistance to me in the determination of this narrow issue. I say this without intending any criticism of counsel. They, like I, are prisoners of the grossly wasteful processes of the adversarial system with their concomitant negative impact on the efficient, timely and economical disposition of proceedings in the Family Division of this Court.<sup>53</sup>

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<sup>51</sup> See ss.215(1)(a) & 215(1)(b) of the *CYFA*.

<sup>52</sup> *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257-258.

<sup>53</sup> To illustrate how uneconomical this process is, I estimate that this contested hearing cost the Victorian taxpayer somewhere between \$50,000 & \$100,000 in relation to costs incurred by DOHS & VLA alone, without taking into account the costs attributable to DOJ in providing court facilities. This does not, however, mean that I am critical of the decision to grant the parents legal aid. On the contrary, it would have been quite unjust to have run this case with them unrepresented.

## **8. THE “BEST INTERESTS” OF THE CHILD**

Section 8(1) of the *CYFA* requires the Court to have regard to relevant principles in Part 1.2 in making any decision or taking any action under the *CYFA*.<sup>54</sup> For the purposes of this hearing, the relevant principles are set out in s.10 of the *CYFA*. The fundamental principle is that in s.10(1) which provides that for the purposes of the *CYFA* the best interests of the child must always be paramount. Section 10(2) requires the decision-maker, when determining whether a decision or action is in the best interests of a child, always to consider the need to protect the child from harm, to protect his/her rights and to promote his/her development (taking into account the child’s 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. The following 15 matters in s.10(3) appear to have some relevance to the present case, although it must be noted that some are inconsistent with others:

- (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) KB’s & TG’s views and wishes should be given such weight as is appropriate in the circumstances.
- (e) The effects of cumulative patterns of harm on the child’s safety and development.
- (f) The desirability of continuity and stability in the child’s care.
- (g) A child is only to be removed from the care of his 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 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 the child’s age, maturity and sex.

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<sup>54</sup> 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.

- (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.

## 9. THREE SETS OF APPLIC'NS QUICKLY DISPOSED OF

DOHS wishes to withdraw applications AD2 and AD3. In *DOHS v Y*<sup>55</sup> Nathan J held at [42] that once the judicial process has been enlivened in this Court, then it requires a judicial process to bring it to an end. At [44] his Honour continued:

“The decent administration of justice demands that it should be the Court which decides whether a case is withdrawn or discontinued.”

It follows that the Court may permit the Department to withdraw its applications only if the Court considers it is in the best interests of the children to do so.

In the case of the *B Children*<sup>56</sup> I set out a test for determining whether a custody to Secretary order should be revoked and replaced by a guardianship to Secretary order. In my view the same test also applies to circumstances in which a guardianship to Secretary order may properly be made on a protection application. That test is that a guardianship to Secretary order will be in the best interests of a child if but only if:

- (i) both parents are unavailable or unwilling to make or had failed to make appropriate guardianship decisions; or
- (ii) both parents are incapable of making such decisions; or
- (iii) in the past both parents had made one or more significantly inappropriate guardianship decisions; or
- (iv) a permanent care case plan was in the best interests of the child but this plan could not be properly advanced unless the child was on a guardianship to Secretary order.

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<sup>55</sup> [2001] VSC 231.

<sup>56</sup> [Children’s Court of Victoria, unreported, 17/12/2007] at p.43.

On the evidence presented in this case, it is my strong view that the Department is unlikely to have succeeded in obtaining guardianship to Secretary orders for any of the boys. Hence it is appropriate to strike out its applications **AD2**.

Further, in my view, there is no point in having two sets of applications to vary - namely **AD3** & **AM1** - alive. Hence DOHS' applications **AD3** are struck out.

The parents, appropriately, do not contest the breach the subject of applications **AD5**. Given the uncontested evidence of the mother's threats to and in relation to the protective worker in early February 2008 and her demeanour at that time<sup>57</sup>, breach of the interim accommodation orders in relation to WB & JB are found proved.

## 10. THE CHILDREN'S PLACEMENTS & RESPITE CARE

### 10.1 OZCHILD FOSTER CARE PLACEMENTS

Since they were removed from their mother's care on 20/02/2006, KB and TG have lived in the following foster care placements under the auspices of Ozchild, as have the twins since they were discharged from the Royal Women's Hospital on 30/08/2007:

<b>KB<sup>58</sup></b>		
	DATE	PLACEMENT
1	20/02/2006	Overnight emergency placement
2	21/02/2006-11/04/2006	With (name removed) "carer 1"
3	11/04/2006-29/06/2007	With (name removed) "carer 2"
4	29/06/2007 to present	With (names removed) "carers 3 & 4"
<b>TG</b>		
	DATE	PLACEMENT
1	20/02/2006	Overnight emergency placement
2	21/02/2006-11/04/2006	With carer 1
3	11/04/2006-29/06/2007	With carer 2

<sup>57</sup> This is detailed in section 14.3 below.

<sup>58</sup> The information in the following table is compiled from the report of witness 1 at pp.2-5 together with material in the list provided as document on D5 on 26/05/2008 and additional material in relation to names & addresses. The latter was provided by witness 1 at my request and I have not disclosed it to counsel or any of the parties.

3A	March/April 2007	Over 40 days with one other primary carer and two other respite carers <sup>59</sup>
4	29/06/2007 to 18/03/2008	With carers 3 & 4
5	18/03/2008 to present	With carer 5 <sup>60</sup>
<b>WB &amp; JB</b>		
	<b>DATE</b>	<b>PLACEMENT</b>
1	30/08/2007 to present	With carers 3 & 4

Witness 6 was the Ozchild social worker supporting the placement of KB & TG from 20/02/2006 until February 2007. Witness 1 is the Ozchild social worker supporting the placement-

- of TG from 17/07/2008 to 18/03/2008,
- of KB from 17/07/2008 to the present time; and
- of the twins from their discharge from the Royal Women's Hospital on 30/08/2007 to the present time.

The placement with carer 1 ended on 11/04/2006 because she was "unable to provide long term care"<sup>61</sup>.

The placement of KB & TG with carer 2 ended on 29/06/2007. Witness 1 gave 3 reasons for this:

1. "Carers unable to provide long term care until permanent placement decision. Carers applying for therapeutic fostercare program.
2. KB displaying aggressive behaviours.
3. Carers did not have emotional attachment to the boys, preference was for girls."<sup>62</sup>

Witness 1 was unable to explain definitively why the boys were placed with carer 2 if she and her husband (name removed) had a preference for girls. She hypothesized: "I don't know if it was their opinion at the time of the placement. It probably wasn't."<sup>63</sup>

<sup>59</sup> This quite disruptive period for TG was caused by his full-time carer, carer 2, having to move temporarily to a caravan park while her new house was being built: see evidence of witness 3 at p.33 of my notes.

<sup>60</sup> Also described as 'name removed'.

<sup>61</sup> See report of witness 1 dated 31/03/2008 at p.3.

<sup>62</sup> *Op.cit.*, pp.3-4.

<sup>63</sup> In cross-examination by counsel for the mother at p.10 of my notes.

## 10.2 CARERS 3 & 4

Carers 3 & 4 are a gay couple who have been accredited foster carers for Ozchild for about 4 years. During that time they have fostered over 40 children on short term placements.<sup>64</sup> Carer 3 is the “prime carer” for KB and the twins.<sup>65</sup> Although carer 4 is in full-time employment during the day, it was he who accompanied KB & TG to the assessment at the Children’s Court Clinic on 13/08/2007.

It was witness 22’s impression that “KB appeared to be at ease with his carers”<sup>66</sup> even though he had only been in their care for 7 weeks at that stage. There appears to be no issue that KB is continuing to thrive in their care. That much was impliedly conceded in the following questions asked of witness 23 by counsel for the mother-

Mr Gelfand- “From your observations of KB during those 2 assessment sessions [on 14/03/2008 & 19/02/2008] it seems that KB has made significant progress over 2 years.

Witness 23- That’s how it would seem.

Mr Gelfand- Significant amounts of regular access [with his mother] has been a feature of those past 2 years?

Witness 23- That’s correct.

Mr Gelfand- And that access seems to have not prevented him from developing safe and secure relationships?

Witness 23- That’s true. He has developed a strong relationship with his carers and it would seem that access hasn’t prevented that significantly.”<sup>67</sup>

Nor was there any criticism made by the parents in this hearing about the quality of care provided by carers 3 & 4, care which I am satisfied is excellent.<sup>68</sup>

Witness 26 met carers 3 & 4 together with the twins on 17/03/2008. I have no reason to doubt the very positive impression which he gained of them:

“Carers 3 & 4 [*sic*] are a couple who have been together for many years, and had decided to foster children some four years ago. Carer 3 is the primary carer, having given up his employment to look after children fostered full-time. Carer 4 goes out to work in a regular nine to five job. They spoke thoughtfully and with deep reflection about their commitment to foster care and to raising

<sup>64</sup> See report of witness 1 dated 31/03/2008 at p.4 and information provided by carer 4 to witness 22 at the Children’s Court Clinic on 13/08/2007 (p.237 of my notes).

<sup>65</sup> Evidence of witness 1 at pp.11 of my notes.

<sup>66</sup> Children’s Court Clinic report witness 22 at p.7.

<sup>67</sup> At p.163 of my notes. See also witness 1’s interesting observations of KB’s attachment to his carers in her report dated 31/03/2008 at p.13.

<sup>68</sup> The parents said to witness 22 on 13/08/2007 that they were happy with the then care situation of KB & TG and were confident that carers 3 & 4 were “competent and loving carers”. However, from time to time both parents have been critical, in an ignorant homophobic way, of carers 3 & 4. For example the mother said to witness 15 during an access visit on 04/04/2008: “The poofters can’t even look after TG who is a mild problem. How can they look after twins?” See p.101 of my notes; see also p.4 of document D33. Two other examples are the father’s pathetic comments on 13/09/2007 about WB’s swollen penis [p.39 of document D30].

children as best they can. They appear to have a real capacity to reflect on the emotional and developmental needs of the children for whom they are providing care...

Carers 3 & 4 talked about KB and TG who were also in their care at that time, and that they were looking forward to the support that would come from the workers from the Take Two program. TG had found the adjustment to the arrival of his twin brothers difficult and his behaviour was hard to manage. Carers 3 & 4 were aware that the parents of JB and WB wished to have their care returned to them, but they indicated that they would be very happy to continue to care for JB and WB as long as possible. If necessary, they felt they could commit themselves to lifelong relationships with the boys. Their interaction with the boys was warm and affectionate and attuned and sensitive. Their description of the day to day care of both boys, for example, in respect of feeding and sleeping routines, seemed appropriate and informed. They discussed their relationship with the maternal and child health nurse whose advice they found very helpful. They also seemed to have a good understanding of the medical needs of JB and WB and sensitive to the impact on self-esteem that WB's lymph-oedema problem may have later on.

Both WB and JB seemed well attached to carers 3 & 4 during the interview I observed.’<sup>69</sup>

The only concern I have about the children's placement with carers 3 & 4 is the residual uncertainty about whether they will need to be moved to yet another care placement if they are not ultimately returned to their mother's care. The evidence is ambiguous about carers 3 & 4's intentions and wishes in this regard. I would have preferred to have heard evidence from either carer 3 or carer 4 than from several of the marginally relevant witnesses who were called. I do not understand why the Department seems to regard foster carers as fragile figures who must be protected from the rigour of cross-examination at all costs.<sup>70</sup> The reality is that foster carers are much more likely – of their very nature - to be robust people capable of giving more than they get. First-hand information from one of these fine caregivers would have been useful for me in determining this case.

Carer 4 said to witness 22 on 13/08/2007: “We are short term carers”, leading witness 22 to ask rhetorically: “I understood when I spoke to carer 4 they were not

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<sup>69</sup> Infant Mental Health Report of witness 26 dated 30/03/2008 at pp.5-6. See also his *viva voce* evidence at p.216 of my notes where he said he believed the twins have developed an appropriate level of attachment with the foster carers whom it was likely they perceived as their primary attachment figures.

<sup>70</sup> See for example comments by Judge Coate in *NM, DOHS v BS* [Children's Court of Victoria, unreported, 21/12/2004] at pp.17-18.

in for the longer term so why set them up as primary carers?”<sup>71</sup> On the other hand, by March 2008 they were speaking to witness 26 about “lifelong relationships”. Witness 24 gave evidence that: “Carers 3 & 4 are saying they are interested in being permanent carers”. However, she conceded that they have not yet been approved as permanent carers.<sup>72</sup> Witness 30’s evidence was somewhere between these two positions but she did not give me great confidence that carers 3 & 4 would ultimately be approved as permanent carers for the twins or for KB-

Ms Athanasopoulos- “Carers 3 & 4 may not be long-term carers?”

Witness 30- It’s my understanding they have indicated if that was an option they would look at being considered but it’s in its infancy at the moment. We haven’t explored that as yet. That’s in relation to JB, WB & KB and obviously separate to TG and part of any permanent care case planning would need to consider that needs to happen for the four siblings. That is one option we would need to explore if that was on the table at that time.

Ms Athanasopoulos-Are you in a position to say whether there will be a placement change for KB or not?

Witness 30- No. I’m not.”<sup>73</sup>

### 10.3 CHANGE OF TG’S PLACEMENT ON 18/03/2008

The various medical problems experienced by the twins after their discharge from hospital as well as the very frequent parental access visits ordered by the Court proved very demanding for the carers and required a great deal of balancing, as witness 1 observed:

“Finding the balance between daily routines, appointments, meetings, quiet times, social activities, court ordered access involves a lot of time, energy, coordination and organization. Carers 3 & 4 have provided all four children with a safe, caring environment in which the individual needs of each child is considered and balanced against the needs of the carers as well as the priorities of what is required. Social interaction is valued and there is a sharing with friends and families and a celebration of events e.g. Grand Final Day, birthdays.”<sup>74</sup>

TG’s challenging behaviours during that period proved to be the straw which broke the camel’s back. Examples of these behaviours included-

- An incident on 21/11/2007 when TG was being defiant and had hit and kicked carer 3 when he had tried to get him & KB dressed for child care and school;<sup>75</sup>

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<sup>71</sup> In cross-examination by counsel for the mother at p.237 of my notes. In her report at p.4 witness 22 described carers 3 & 4 as “carers who were not available for permanent care but who were happy to have the children for as long as they needed placement”.

<sup>72</sup> At p.182 of my notes in answer to questions by counsel for the mother and from me.

<sup>73</sup> At p.286 of my notes.

<sup>74</sup> See report of witness 1 dated 31/03/2008 at p.5.

<sup>75</sup> *Ibid.*

- TG is very defiant and needed constant monitoring in order to check what he was doing was safe for him, witness 1 observing that-  
 “TG is very interested in how things work and will just run off, go somewhere if he sees something that he is interested in looking/playing with e.g. as soon as seat belt removed goes to the front of the car to see what buttons he can try.”<sup>76</sup>  
 “He’ll see something that will distract him and he will just go for it.”<sup>77</sup>
- Although TG is very loving and affectionate, he often kicked, punched, spat and screamed at carer 3 without there being any apparent trigger to his behaviour.<sup>78</sup>

Ozchild provided additional supports, including attendance at child care 4 days per week, and when these proved insufficient tried various other options but to no avail:

“Back in November 2007 [carer 3] said to me that TG needed one on one care and with the placement of the twins and their medical needs he wasn’t able to provide one on one care...It was decided additional support was to be given to the carers. We provided respite for them and we ensured they had more support around when there were medical appointments. I would actively pick up the children or arrange babysitting if necessary. That didn’t alleviate the carer’s concern. He still felt TG needed one on one care, a carer who could give more attention to TG.”<sup>79</sup>

“Consideration had been given to placing the twins elsewhere so that more attention could be given to TG...but the carers said that wasn’t an option. They felt the twins were attached to them and they were providing good care and support to the twins and it would be detrimental for the twins to be shifted...Although they liked and enjoyed TG they felt they couldn’t continue working with him and his needs. Consideration was also given to the twins remaining with the carers and KB & TG being moved elsewhere but based on KB being attached to carers 3 & 4 and he was attending a school he had become quite involved in and was enjoying, if he was shifted there were also concerns about him having to shift school.”<sup>80</sup>

On 18/03/2008 TG was moved from the placement he shared with his siblings to what has been described as a “therapeutic fostercare placement” under the Ozchild Circle program. This is a pilot program which is supported by the Australian Childhood Foundation and entails regular care team meetings involving social workers, DOHS, the carers and in some other cases the parents at which the subject child’s development, growth and wellbeing is discussed. The Ozchild social workers supporting this placement are witness 3 from 14/03/2008 to 20/04/2008 and witness 2 from 14/04/2008 and continuing. Though the change of placement was carefully

<sup>76</sup> *Op.cit.*, p.16.

<sup>77</sup> Evidence of witness 1 in cross-examination by counsel for the mother at p.11 of my notes.

<sup>78</sup> See report of witness 1 dated 31/03/2008 at p.16.

<sup>79</sup> Evidence in chief of witness 1 at p.8 of my notes.

<sup>80</sup> *Ibid.*

planned and involved a gradual introduction of TG to his new carer<sup>81</sup>, the timing was unpropitious. It followed a period of 6 weeks in which TG had had no face to face contact with his mother. It was also complicated by the fact that in the previous few months TG had become more and more affectionate towards the carers, as witness 1 reported:

“TG was initially unsure and unsettled when first with carers 3 & 4, eg. [witness 1] would bring TG to the carers’ house or to childcare centre and he would look at the building as though he was not sure where he was and would have a sad look on his face. However, in the last few months TG has indicated his attachment to the carers talking about them at childcare, hugging them when he returns from childcare, seeking their attention.”<sup>82</sup>

It is tragic that TG had to be separated from his three siblings, a state of affairs deplored by s.10(3)(q) of the *CYFA*. Witness 3 said that there had been a lot of discussion at care team meetings “about the previous placement and also about splitting the siblings. Not everyone was satisfied or on the same page about the decision”.<sup>83</sup> However, for my part I am satisfied that there was no better alternative. Had TG remained with carers 3 & 4 the placements of the other 3 boys may also have broken down. To have removed the twins or KB to another carer would not have been in their best interests. I am satisfied that all appropriate options were considered and then properly rejected. So, sad as the separation of TG is, I am not at all critical of it nor am I in any way critical of the decision of carers 3 & 4 that caring for the 4 boys was beyond their capacity.

#### 10.4 TG WITH CARER 5

TG’s new carer, carer 5, is an accredited therapeutic foster carer. She is said to have “a history of almost instinctive response of therapeutic parenting”.<sup>84</sup> She is also caring for an 8 year old child who has been with her for over 2 years and is on a permanent care case plan.<sup>85</sup> It took TG about a week to settle with her.<sup>86</sup> Commenting on his period working with carer 5 and TG, witness 3 said:

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<sup>81</sup> See evidence of witness 3 at p.30 of my notes.

<sup>82</sup> See p.13 of my notes.

<sup>83</sup> At pp.31-32 of my notes.

<sup>84</sup> See evidence of witness 2 in cross-examination by counsel for the father at p.31 of my notes.

<sup>85</sup> Evidence in chief of witness 3 at p.28 of my notes.

<sup>86</sup> See evidence of witness 2 in cross-examination by counsel for the mother at p.22 of my notes.

**“He appeared to be developing a relationship rather quickly and positively with the carer including the other child in the carer’s home which was very encouraging to see.”<sup>87</sup>**

**In the course of her evidence on 06/05/2008 witness 2 was asked “How is TG going in his placement?” She replied:**

**“Well, quite well. He is a very active 3 year old boy. It was his birthday on Monday. They had a party for him. He is keeping up to date with health appointments. Today he is seeing the Maternal & Child Health Nurse for a 3 year old assessment. He gets phone contact with his siblings. He is living on a property. He has a lot of contact with animals which he enjoys.”<sup>88</sup>**

**But TG does remain a handful for his carer:**

**“A significant concern is around TG’s constant attention seeking. The level of supervision has to be very high. His personality is very experimental and he is a bit of a risk taker and likes to push boundaries. When he is given a direction not to do something he’ll continue to do so.”<sup>89</sup>**

## **10.5 OZCHILD RESPITE CARE PLACEMENTS**

**Witness 3 was very open about the inadequacies of the provision of respite care generally and in particular in this case:**

**“The thing that is very distressing for me is the high number of respite carers they had with different carers. I think 15 or 16 respite carers they have had which is very distressing to see rather than having a consistent person as a respite carer. That’s unfortunately the current limitations of our fostercare system.”<sup>90</sup>**

**Neither witness 24 nor witness 30 were aware that TG & KB had had 15-16 different respite care placements until they heard witness 3’s evidence in these proceedings.<sup>91</sup> They were concerned at the high number. Witness 24 had understood that Ozchild was using a respite carer named (name removed) for all four boys.<sup>92</sup> Witness 30 agreed that the situation was “not ideal” and added: “The Department tries to provide consistency. I don’t understand why there were so many, whether it was availability or not.”<sup>93</sup>**

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<sup>87</sup> Evidence in chief of witness 3 at pp.27-28 of my notes.

<sup>88</sup> At p.20 of my notes. Witness 24 noted (at p.179) that it is “too early to speak of real attachment between TG & carer 5 but the signs were positive. Carer 5 has talked positively of her interaction with TG.”

<sup>89</sup> Evidence in chief of witness 3 at p.28 of my notes.

<sup>90</sup> Evidence of witness 3 in cross-examination by counsel for the father at p.31 of my notes.

<sup>91</sup> Admission by her in cross-examination by counsel for the mother at p.180 of my notes.

<sup>92</sup> Evidence of witness 24 in cross-examination by counsel for KB at p.194 of my notes.

<sup>93</sup> Evidence in chief of witness 30 at p.268 of my notes. At witness 30’s request Ozchild, which is responsible for decision-making on respite care, provided DOHS with the chart of placements for KB & TG which was tendered as document D35.

Sections 8(2) & 10(3)(f) of the *CYFA* put an obligation on the Department to try to ensure continuity and stability in the child's care. Though these sections do not specifically bind the non-government agencies which provide services to children in this State on behalf of the Department, I would have hoped that they would consider themselves to have the same obligations.

I asked witness 21 about the likely impact on TG of this discontinuity in caregiving:

Mr Power- "If I was to tell you that TG, who has just turned 3, has been in 5 or 6 different fostercare placements and 15-16 different respite placements, you would say he would be well and truly behind the eight-ball?

Witness 21- Indeed this is the topic of my Ph.D. and no doubt this kind of discontinuity is fragmenting to the core. The reports through my clinic have urged planning and putting in place permanent arrangements for children for that reason."<sup>94</sup>

So, if in fact TG's hugging of witness 3 after a gap of 8-9 months was indeed evidence of TG's unawareness of 'stranger-danger', rather than simply a response to someone he remembered and had liked, it would scarcely be surprising if more than 20 carers in 3 years had removed the label 'stranger' from most of TG's world.<sup>95</sup>

## 11. CHILD A & CHILD B – CHILD C & CHILD D

### 11.1 CHILD A & CHILD B

The mother began a relationship with Mr D and at the age of 16 years fell pregnant with child A. When she was 6 months pregnant she returned home to her parents for support and assistance with her pregnancy and baby. When child A was 8 months old the mother moved out of her mother's home and took up residence with Mr C.<sup>96</sup> She soon fell pregnant "accidentally" with child B to whom she gave birth when she was 18 years old. The mother reported that she and Mr C had conflict regarding money issues and although he never struck her in a violent manner he would throw objects in the home and smashed her belongings.<sup>97</sup> When child B was 5½ weeks old he was assaulted by Mr C and sustained a fractured clavicle and bruising. It is not alleged that the mother was present or responsible

<sup>94</sup> At p.137 of my notes. The emphasis is mine.

<sup>95</sup> See evidence of witness 3 on this issue of 'stranger-danger' at pp.27-31 of my notes.

<sup>96</sup> DOHS' Application report re child A dated 19/05/2000 co-signed by witness 8 at p.5.

<sup>97</sup> See DOHS' Application report re child A & child B dated 27/06/2002 co-signed by witness 8 at p.12.

for the injuries. Mr Cain subsequently admitted that he caused the injuries.<sup>98</sup> He was found guilty of recklessly causing serious injury and received a gaol sentence.<sup>99</sup>

The mother left Mr C immediately she found out that he had injured child B, as witness 8 fairly acknowledged in good cross-examination by counsel for the mother:

**Mr Gelfand-** “Detailed [in the report] is an incident in which child B had sustained a fractured clavicle?

**Witness 8-** That’s correct. From his father.

**Mr Gelfand-** The mother took child B to the doctor as a result of concerns about his crying?

**Witness 8-** Yes.

**Mr Gelfand-** The mother says she noticed he was crying and she called her mother who asked her how she tried to comfort child B and then said to take him to the doctor.

**Witness 8-** I understand that’s what occurred.<sup>100</sup>

**Mr Gelfand-** On the doctor’s recommendation the mother took child B to hospital and that’s where the extent of the injury was found out.

**Witness 8-** That’s correct.

**Mr Gelfand-** The mother says when she found the injury was non-accidental she was in shock.

**Witness 8-** Yes, that’s what I understand.

**Mr Gelfand-** And when it became clear Mr C made admissions to causing the injury that was a terrible blow to the mother?

**Witness 8-** Yes.

**Mr Gelfand-** Are you aware the mother was subsequently in the period after that treated for depression?

**Witness 8-** No. I have no knowledge of that. It is not recorded certainly in the reports. The only knowledge I have of her mental health state is a few years later when antidepressants were prescribed.

**Mr Gelfand-** Would you agree that the whole incident was extremely traumatic for the mother?

**Witness 8-** I would.

**Mr Gelfand-** And you are obviously aware she was 16 when child A was born and 18 when child B was born?

**Witness 8-** Very much so, yes.

**Mr Gelfand-** And the incident with child B occurred when he was 5 ½ weeks old so she was only 18 at the time?

**Witness 8-** Correct.

**Mr Gelfand-** In relation to child B the mother voluntarily agreed with the placement with her parents?

**Witness 8-** She did, yes.

**Mr Gelfand-** In relation to Mr C you would agree that the mother didn’t at any time reunite with him?

**Witness 8-** That’s correct.

**Mr Gelfand-** And that was immediately after she became aware of this incident?

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<sup>98</sup> Amended DOHS’ Addendum report of witness 30 dated 12/10/2007 at p.5. See also report of witness 29 dated 27/08/2007 at p.13.

<sup>99</sup> DOHS’ Application report re child A & child B dated 27/06/2002 co-signed by witness 8 at p.7 together with Magistrates’ Court Courtlink records.

<sup>100</sup> There is a suggestion in the old materials that the mother did not take child B to the doctor as quickly as she should have: see for instance DOHS’ Addendum report of witness 30 dated 12/10/2007 at pp.5 & 19. That does not sit well with witness 8’s answers in cross-examination by counsel for the mother. In any event it is always easier to be wise after the event and I do not give any weight adverse to the mother in any delay in attending the doctor if there was any such delay. I do not have enough evidence to make a finding on this issue.

Witness 8- That's correct."<sup>101</sup>

On 08/05/2000 the Children's Court at location 1 found a protection application in relation to child A proved on the "neglect" grounds in s.63(f) of the *CYPA* and placed child A on a guardianship to Secretary order for 12 months. On 04/07/2000 the Children's Court at location 1 found a protection application in relation to child B proved on the "physical abuse" grounds in s.63(c) of the *CYPA* and placed child B on a guardianship to Secretary order for 12 months. DOHS placed both boys in the care of their maternal grandparents. The guardianship to Secretary orders were subsequently extended. Child A is still on a guardianship to Secretary order. However, on 16/06/2003 child B's guardianship to Secretary order was revoked and he was placed on a permanent care order in the care of his maternal grandparents, with a condition providing that the mother may have access at times and places as agreed between herself and her parents.

I have not been advised of any ongoing problems in relation to child B but child A is quite another matter. In August 2007 it was said of him:

"Child A displays violent behaviours and has a history of self harm attempts. He is linked into Take Two and has a recreational worker work with him daily. Child A has had no contact with the mother for more than 12 months. DOHS in location 1 have assessed that child A displays ambivalence towards his mother, who has blamed him for negative things that have happened in her life."<sup>102</sup>

In the Clinic assessment on 13/08/2007 the mother reported to witness 22:

"My [step-]mum and dad want to take care of child A. He has an attachment disorder. I cant handle him. I've tried to have him back three times, but he's just too violent. He's knocked me out. I don't see him, but I always send presents for his birthday."<sup>103</sup>

In her *viva voce* evidence witness 8 conceded that child A's behaviour had been an issue right from the outset and didn't cease to be an issue when he was in the care of his maternal grandparents although he did become more stabilized in his behaviour once routines were put in place.<sup>104</sup> Coincidentally witness 8 had had some contact with child A when she was Residential Care Manager at St Luke's in about 2004:

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<sup>101</sup> At pp.57-58 of my notes.

<sup>102</sup> DOHS' Application & Disposition report dated 20/08/2007 at p.18.

<sup>103</sup> Children's Court Clinic report of witness 22 at p.9.

<sup>104</sup> Evidence of witness 8 in cross-examination by counsel for the mother at p.58 of my notes.

**“He was at St Luke’s for a couple of weeks when he came into residential care when his grandfather couldn’t control his behaviours again...Residential care is essentially for adolescents and it was extremely difficult for the staff to contend with someone so young. It was locked down because he was ‘off the wall’ with his behaviours and there was a lot of aggression and taking him to school in the car was very difficult. There was an assault in the car. St Luke’s provided support for the grandfather and child A ultimately went home to the grandfather with supports provided.”<sup>105</sup>**

**In my view it would be extremely dangerous to extrapolate from child A’s ongoing aggressive behaviours that the mother is responsible for it or that it provides evidence from which it could be inferred that KB, WB or the twins are likely to display similar out of control behaviours should they be placed in the mother’s sole care.**

## **11.2 CHILD C & CHILD D**

**The mother & the father lived together on and off from 1998 to 2000. In the latter part of that time they lived in a caravan park in suburban Melbourne. Two of the father’s children, child C & child D, were living with them. The mother reported to the psychologist witness 29 that this time of her life was difficult, since she was in effect “living two lives”, on the one hand looking after child C & child D and on the other travelling back to location 1 on a regular basis to see child A & child B.<sup>106</sup> The father expressed a similar view to witness 29:**

**“[T]he early years of their relationship were quite difficult and stressful as they were living in a caravan park at one stage with his two children (child C and child D). He stated that there had been ongoing problems with child D’s behaviour and that the mother had been continually stressed over this, and that he had been trying to discipline child D as a result. However, on one occasion, he reported that he ‘snapped’ and hit child D repeatedly, which resulted in both child C and child D being removed from their care.”<sup>107</sup>**

**The Department’s records indicate that the father assaulted and injured both child C and child D:**

**“The children suffered significant bruising and injuries after being assaulted and belted by the father.”<sup>108</sup>**

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<sup>105</sup> *Ibid.*

<sup>106</sup> See report of witness 29 dated 27/08/2007 at p.13.

<sup>107</sup> *Op.cit.*, p.4.

<sup>108</sup> Amended DOHS’ Addendum report of witness 30 dated 12/10/2007 at p.5.

As a consequence of this the father was charged with two counts of recklessly causing injury to his children. On 22/03/2001 at Sunshine Magistrates' Court he was convicted and sentenced to 6 months imprisonment suspended for 2 years.<sup>109</sup>

On 13/12/2000 the Children's Court at Melbourne found protection applications in relation to child C & child D proved on the "physical abuse" grounds in s.63(c) of the *CYPA* and on the "emotional abuse" grounds in s.63(e) of the *CYPA* and placed both children on interim protection orders for 3 months. These orders contained conditions requiring the children to live where DOHS directs and providing for the father to have supervised access a minimum of twice per week for two hours. The access conditions contained a rider: "If the children are distressed by the father's presentation access is to be terminated." When the cases returned to court on 09/03/2001 the Court made no further order, the children having gone to New South Wales to reside with their mother.<sup>110</sup>

## **12. OBSERVATIONS OF KB, TG & THE TWINS**

Though there have been some significant concerns about certain aspects of the physical health of each of the boys – especially of the twins - I do not consider that these would be a bar to any of the boys being placed in the care of their mother if the major protective concern about their exposure to violence within the family were able to be addressed satisfactorily.

There have also been concerns about the psychological health of both KB & TG which have led to – and will to continue to require - the involvement of service agencies such as Take Two & Specialist Children's Services. In my view, these latter concerns would not prevent KB being placed in his mother's care if the other protective concerns were resolved although they would probably have slowed down any process of reunification of TG with his mother.

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<sup>109</sup> Information put to witness 22 by counsel for DOHS at p.154 of my notes and also obtained by me from Magistrates' Court Courtlink records.

<sup>110</sup> Information provided by counsel for DOHS at my request: see p.189 of my notes.

## 12.1 PAEDIATRIC ASSESSMENT OF KB

KB, described by witness 25 as “an endearing little boy”<sup>111</sup>, was said by witness 22 to be “easy to engage when seen alone” and to have “a rich imagination”.<sup>112</sup> KB was seen by a paediatrician, (name removed), on 22/01/2008:

“I saw him with both foster parents. He was in...primary school, grade 1 and apparently had made friends at school well. His reading and writing were of concern; he often got frustrated with his school work during 2007. Emotionally, he is withdrawn and quiet and takes a while to settle in. He is quite shy and has a lot of mood swings.<sup>113</sup> The more consistent and stable his [foster] family, though, in recent times the more he has improved.

Physically, he has been very well. He was growing well, 70<sup>th</sup> centile at 24kg, 116.5cm on the 40<sup>th</sup> centile. He had some features on a heart examination, which I had reviewed by a cardiologist.<sup>114</sup> He was felt to have a trivial aortic stenosis and incompetence, which would not stop him undertaking normal physical activity. He should be reviewed for this yearly. Given his emotional state and past history of multiple family moves, I would strongly suggest that he be watched for behavioural and learning problems over the ensuing years.”<sup>115</sup>

## 12.2 CAMHS & TAKE TWO INVOLVEMENT WITH KB

KB was diagnosed with Post Traumatic Stress Disorder [‘PTSD’] by (name removed) & (name removed) of the Child and Adolescent Mental Health Service [‘CAMHS’] in June 2006 and long-term individual psychotherapy was recommended for him.<sup>116</sup> In August 2007 Witness 22 recommended that KB begin an intervention with Take Two as soon as possible.<sup>117</sup> There has been significant – and only partly justified – delay in adopting these recommendations.<sup>118</sup>

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<sup>111</sup> Report of witness 25 dated 29/06/2006 at p.6.

<sup>112</sup> See her report at pp.6-7. That part of her report which discusses KB’s “rich imagination” and draws inferences from his Red Riding Hood story needs to be treated with considerable caution as in his story he was merely reciting – unbeknown to witness 22 - the plot of a movie ironically titled ‘Hoodwinked’.

<sup>113</sup> In his letter to witness 30 dated 22/01/2008 (name removed) also noted that KB “can be quite sulky, angry and sad, but...he is improving.”

<sup>114</sup> The paediatric cardiologist was (name removed) who assessed KB on 22/02/2008: see evidence of witness 24 at p.194 of my notes. In his letter dated 22/01/2008 (name removed) described these features as “a loud second heart sound and a murmur of the aortic area”.

<sup>115</sup> Report of (name removed) to DOHS dated 24/03/2008 at pp.1-2.

<sup>116</sup> See DOHS’ report dated 27/05/2007 at p.4. witness 25 made the same diagnosis independently in her assessment of KB on 30/05/2006: see her evidence at p.196 of my notes and her report at p.7.

<sup>117</sup> See Children’s Court Clinic report of witness 22 at p.13.

<sup>118</sup> Witness 30 gave an explanation for the delay: see pp.284-285 of my notes. Given that DOHS correctly rejected witness 25’s recommendation on access it is understandable that it did not adopt her recommendation on psychotherapy for KB either. But in retrospect I think DOHS was unwise not to have focused on psychotherapy for KB more quickly after witness 22’s recommendation. With the wisdom of hindsight, witness 30 conceded as much.

Witness 23 & (name removed) of Take Two completed two assessment sessions with KB on 14/03/2008 & 19/03/2008.<sup>119</sup> I asked witness 23 whether from her assessment of KB the delay was concerning to her. I agree with her reply:

“I think it is concerning that the recommendations were not followed up in a more timely way but based on the current assessment I wouldn’t say that has been a significant problem for him given what we now know. He is presenting in a significantly better way now than he appeared to be presenting in an earlier time in care.”<sup>120</sup>

Then, after a delay of nearly 2 years, the psychotherapy commenced. On 21/05/2008 witness 23 gave evidence that the therapy was to commence that very afternoon:

Ms Athanasopoulos- “Is KB commencing psychotherapy?

Witness 23- He has an appointment today. His first therapy appointment is today after school.

Ms Athanasopoulos- How often?

Witness 23- He will be attending sessions with his foster carer fortnightly.

Ms Athanasopoulos- For how long?

Witness 23- For one hour and we’ll review that continuously with a formal review at the end of 6 months.

Ms Athanasopoulos- What time will it take place?

Witness 23- It is an after school session.

Ms Athanasopoulos- Whose role is it to communicate that to the parents because they don’t know about it?

Witness 23- The parents have not engaged with Take Two and we haven’t had contact with the parents face to face and they have indicated they didn’t want to be involved but they have given consent for us to be involved with the children.

Mr Power- Isn’t their consent a consent to do an assessment of the children?

Witness 23- No. It’s a general consent form which covers assessment and ongoing work.

Ms Athanasopoulos- Do you speak with the DOHS’ protective worker about KB’s assessment?

Witness 23- (Name removed) is going to be doing therapeutic work with KB and she will be attending the care team meetings which are monthly and the allocated protective worker will also attend those care team meetings...

Ms Athanasopoulos- You don’t know whether (name removed) has informed DOHS about the session today?

Witness 23- DOHS is aware therapeutic work is commencing. They may not be familiar with the date and time but it has been discussed in professionals’ meetings. That’s a recommendation from our assessment. A specific date probably wasn’t given. It was communicated with the foster carer and agency because that was relevant in ensuring KB attended but we wouldn’t ordinarily let DOHS know of every appointment.

Ms Athanasopoulos- Who is KB attending with?

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<sup>119</sup> KB was seen individually, with his primary caregiver carer 3 and with the twins. The mother & the father met with Take Two on 29/02/2008 but subsequently notified DOHS that they did not wish to attend further sessions with Take Two. See report of witness 23 dated 29/03/2008 at p.2.

<sup>120</sup> At p.159 of my notes.

**Witness 23-** He is attending with carer 3. Carer 4 is going to attend when he can. The therapy is intended to be dyadic developmental psychotherapy – (name removed) – and involves developing and enhancing the attachment relationship between the child and his primary carer carer 3.”<sup>121</sup>

**So there it is! I am presiding over a 15 day contested hearing, a central issue of which is to determine whether or not KB should be reunited with his mother & the father, and this crowd is running off on a frolic of its own based on the assumption that he won’t. It really is disgraceful. To be fair to the Department, it appeared to be as shocked as I was. Counsel for DOHS made a fulsome apology:**

**“DOHS were never aware there was to be any attachment-based therapy conducted with KB...DOHS apologizes for the breakdown in communication. DOHS had thought the proposed therapy was to process residual trauma from PTSD. It wasn’t aware until the evidence was given [by witness 23] that it was to be attachment-based therapy or was to be commenced today at all. The therapy will still continue this afternoon but so as not to pre-empt the decision of the Court it will be a general therapy session but not attachment-based. Some thought was given to cancelling the session but because it is due in 2 hours time, it was thought best to continue but to do it with general therapy.”<sup>122</sup>**

**The preliminary impressions of witness 23 & (name removed), which I accept, are:**

- **“KB’s past presentation, behaviour and disclosures strongly indicate that on his arrival into care, and during the early stages of placement, he was experiencing trauma symptomology consistent with his diagnosis of Post Traumatic Stress Disorder.**
- **KB has formed a strong and important connection with his foster carers, and in particular his primary caregiver carer 3. An attuned and mutually enjoyable interaction has been observed between KB and carer 3. KB demonstrated that he experiences protection and safety within this relationship. He is also able to use the carers to express his feelings and to find comfort, and there was emerging security observed in their interactions.**
- **During structured play and drawing activities, KB depicted threatening or frightening situations being resolved through asking for help, receiving assistance and being offered protection. KB was not overwhelmed by traumatic themes, but rather displayed a belief that safety is possible within relationships.**
- **It would appear that the support afforded by an attuned and responsive caregiving relationship has enabled KB to process some of his past trauma to the extent that he is not currently inundated with intrusive recollections of danger and threat.**

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<sup>121</sup> At pp.248-249 of my notes.

<sup>122</sup> At p.249 of my notes. However, it must be noted that DOHS’ assertion that it was “never aware there was to be any attachment-based therapy conducted with KB...and had thought the proposed therapy was to process residual trauma from PTSD” does not sit easily with witness 23’s report dated 14/05/2008 in which recommendation A was that Take Two is planning to offer dyadic therapeutic work involving KB and his foster carers and child-focussed support to the carers in relation to KB’s psychological needs.

- The Trauma Symptom Checklist for Young Children<sup>123</sup> was completed by KB's carers on 17/03/2008. Of the nine clinical scales, seven were in the normal range. None were in the clinically significant range. Two scales were in the potentially problematic range: Depression and Post Traumatic Stress – Avoidance.”<sup>124</sup>

I accept witness 23's opinion that while KB is still experiencing some trauma-related difficulties, he no longer meets the DSM-IV diagnostic criteria for Post Traumatic Stress Disorder.<sup>125</sup> There is no evidence of any source of trauma sustained by KB outside his family. It is thus highly likely that the cause of his Post Traumatic Stress Disorder was exposure to traumatic events within his family.

### 12.3 PAEDIATRIC ASSESSMENT OF TG

(Name removed) has also assessed TG:

“I first met TG back in October 2007. He came with his carer, carer 3 and there was concern over the possibility of absence epilepsy. The foster carers had been with TG for four months and [had] seen five unusual episodes. TG would look vague, go unresponsive and not react well. There had been no episodes of twitching, grimacing or motor movements. There were other concerns in that he is a very active boy, into all sorts of activities and quite defiant. There were concerns with his speech and language, but physically he was well. At that point he was growing average at the 50<sup>th</sup> centile height, was mildly underweight and had a normal head circumference. I organized an EEG at Monash Medical Centre which was subsequently found to be normal. Other tests at the time found him to be iron deficient and his faeces grew Giardia Lamblia cysts. This was subsequently treated effectively and cleared. At that point he was referred for speech therapy.

At my next visit on 6<sup>th</sup> March, he had made some small, but significant steps. His speech assessment, however, showed him to be delayed in all areas of language. He is getting therapy. We had put him on Epilim, an anti-epileptic drug in spite of the normal EEG given his strong physical symptoms and on this he had in fact stopped having episodes. In spite of a normal EEG, this can occur and makes epilepsy still possible. TG had been on iron supplements and was improving in his general health. The major concerns were his behaviour, where he continues to not listen, be chaotic and is quite difficult to manage. He will obviously need ongoing behavioural management and a stable home environment.”<sup>126</sup>

<sup>123</sup> A standardized parent/caregiver report test of trauma symptoms in 3-12y olds (TSCYC; Briere, 2005).

<sup>124</sup> See report of witness 23 dated 29/03/2008 at pp.1-2.

<sup>125</sup> See report of witness 23 dated 14/05/2008 at p.2 and her *viva voce* evidence at p.158 of my notes.

<sup>126</sup> Report of (name removed) dated 24/03/2008 at p.1.

Witness 23 expressed the view that she, (name removed) & the Australian Childhood Foundation consider that TG's episodes of unresponsive behaviour were "more consistent with a child who is dissociative" and added that "it is very commonly misdiagnosed"<sup>127</sup>. In the light of (name removed)'s assessment I consider that it was bold of her to have expressed that view and I do not accept it. In any event witness 23 conceded that she was not saying conclusively that TG's episodes had been misdiagnosed as epilepsy:

"The difficulty is that no-one has seen the episodes apart from the previous carer and the [current] fostercarer hasn't despite TG not taking medication. It is a tricky complicated dilemma and I am aware there is a family history of epilepsy. The episodes were consistent with dissociative presentation. I'm not saying conclusively that's what it was."<sup>128</sup>

When TG was first placed into out of home care a General Practitioner, (name removed), suspected that he was lactose intolerant given his 'gastro-like' symptoms each time he ate dairy products.<sup>129</sup> The parents – in particular the father – felt that TG's problems were a stomach infection of some type which meant that lactose products were not helpful but that he did not have an ongoing lactose intolerance.<sup>130</sup> It turned out that the parents were right and DOHS' implied criticism of them was wrong. TG was tested for lactose intolerance by (name removed) on 23/10/2007. The tests revealed that he was not lactose intolerant and as far as witness 30 is aware "at the moment there are no special dietary requirements for TG".<sup>131</sup>

#### 12.4 SPECIALIST CHILDREN'S SERVICES & TAKE TWO INVOLVEMENT WITH TG

TG has been involved with Specialist Children's Services since October 2007 due to concerns about his speech, fine motor skills, gross motor skills, self care and behaviour. From then until his change of placement on 18/03/2008 he received individual therapy from psychologist witness 27.<sup>132</sup> After TG's placement changed it was decided that witness 27's involvement would cease and TG would be

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<sup>127</sup> In answer to a question by me at p.168 of my notes.

<sup>128</sup> *Ibid.*

<sup>129</sup> See DOHS' Application & Disposition report of the protective worker dated 05/11/2008 at p.4. See also evidence of witness 30 in re-examination at p.287 of my notes.

<sup>130</sup> Proposition by counsel for the father with which witness 30 did not disagree: see p.278 of my notes.

<sup>131</sup> In answer to a question by me at p.278 of my notes.

<sup>132</sup> Taken from Specialist Children's Services report of witness 27 & (name removed) dated 31/03/2008 at p.6.

supported by the Australian Childhood Foundation and Take Two.<sup>133</sup> I do not understand why it was thought necessary to introduce yet another change in this young boy's life. However, it appears that (name removed), who has had two visits with TG in his new placement, will continue to work with him in a speech pathology intervention.<sup>134</sup> The mother has been "very engaging" with witness 27 and (name removed) throughout their involvement.<sup>135</sup>

Witness 23 & (name removed) of Take Two observed TG with his current carer on 18/04/2008.<sup>136</sup> I largely accept two of their assessment findings:

- "TG is experiencing pronounced emotional and behavioural difficulties consistent with trauma and attachment disturbance. He has presented with impulsivity, attentional problems, aggression, dissociation, social avoidance, eating and sleeping problems, and delayed development."<sup>137</sup>
- "TG's difficulties are extreme and have necessitated individualized and specialist care that is now being provided through his therapeutic foster care placement. The interaction between TG and his carer has been observed to involve structure, stimulation, nurture, appropriate direction and empathic attunement. This care holds promise of offering TG a reparative attachment experience. He appears to be developing a sense of safety and security."<sup>138</sup>

However, the first finding must be qualified by witness 23's comment that "TG certainly didn't present with extremely concerning behaviour when we saw him on 18/04/2008"<sup>139</sup>. And I have great difficulty with their third assessment finding:

- "The emotional and behavioural disturbance observed in TG are, in all likelihood, derived from his *in utero* and early infancy experiences. The severe trauma, coupled with inadequate attunement within early attachment relationships, has impacted on all aspects of TG's development."

Witness 23 formed this opinion based on the work of (name removed), a clinical psychiatrist with a background in neuropharmacology who is a founder of the Child Trauma Academy in U.S.A. TG was removed from his mother's care when he was

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<sup>133</sup> Evidence of witness 27 in cross-examination by counsel for the mother at p.232 of my notes.

<sup>134</sup> *Op.cit.*, p.233.

<sup>135</sup> *Op.cit.*, p.231.

<sup>136</sup> In addition witness 23 and/or (name removed) conducted interviews with TG's previous carer, his current carer and other professionals and reviewed historical information about his development, behavioural presentation and experiences: see report of witness 23 dated 14/05/2008 at p.2. The mother & the father met with Take Two on 29/02/2008 but subsequently notified DOHS that they did not wish to attend further sessions with Take Two: see report of witness 23 dated 29/03/2008 at p.2.

<sup>137</sup> For the reasons set out on the next page, I am not prepared to attribute TG's developmental delay to trauma and attachment disturbance.

<sup>138</sup> Report of witness 23 dated 14/05/2008 at p.2.

9½ months old and has since had more than 20 placements, including respite placements. Witness 23 conceded that “the number of relationships and disrupted attachment would have had a significant impact” on TG’s development of attachment relationships.<sup>140</sup> Notwithstanding this, she maintained that his behaviour was consistent with trauma in the intrauterine period and leading up to the age of 6 months. Yet, as she conceded, she did not know that the number of TG’s placements had been “that high” and she did not know anything of the relationship between TG and his mother or the nature of the access between TG and his mother.<sup>141</sup> I am not aware of any evidence which would justify witness 23’s attribution of TG’s emotional and behavioural disturbance to his experiences *in utero* and in the first 6 months of his life. I would only accept that that disturbance can be causally linked to his “early infancy experiences” if one includes in such experiences his separation from his mother – his key attachment figure – at 9½ months of age.<sup>142</sup>

In her report dated 27/05/2007 the protective worker made a fairly similar sweeping statement: “TG had significant developmental delay when he was first placed into his placement and this has been attributed to poor parenting skills of the mother.”<sup>143</sup> Witness 30 was asked what evidence the protective worker’s statement was based on. She replied: “I don’t recall from my reading. There have been concerns about developmental delay for TG but I can’t remember anything that directly attributes that to poor parenting.”<sup>144</sup> I do not accept the cause and effect attributed by the protective worker. TG still has significant developmental delay and he has been out of his mother’s care for two-thirds of his life.

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<sup>139</sup> Evidence of witness 23 in cross-examination by counsel for the mother at p.167 of my notes.

<sup>140</sup> In cross-examination by counsel for the mother at p.166 of my notes.

<sup>141</sup> *Op.cit.*, p.167.

<sup>142</sup> By this I do not mean to suggest that the decision to separate TG from his mother – and the subsequent Court orders endorsing that decision – were wrong. On the contrary I do not consider any other orders could properly have been made.

<sup>143</sup> Amended DOHS’ Disposition report of the protective worker dated 27/05/2007 at p.7.

<sup>144</sup> Answer in cross-examination by counsel for the mother at p.270 of my notes.

## 12.5 THE TWINS

On 09/07/2007 the father contacted the Department and advised that the mother had been hospitalized on Friday 06/07/2007 due to complications with the unborn twins. She had had a major placenta previa and had been bleeding.<sup>145</sup>

Early in their lives both twins had significant health problems. Their medical needs required carers 3 & 4 to provide a lot more support than would ordinarily be the case.<sup>146</sup> WB was admitted to hospital from 02/11/2007 to 05/11/2007, from 13/11/2007 to 15/11/2007 & on 19/11/2007 because of concerns about interrupted and shallow breathing. JB was admitted to hospital from 21/12/2007 to 23/12/2007, 03/01/2008 to 05/02/2008 and from 23/01/2007 to 29/01/2007 because of concerns in relation to his inconsistent feeding, lack of weight gain and possible dehydration.<sup>147</sup> Those problems now appear to have resolved.

(Name removed) assessed the twins in the company of their carer, carer 3 on 21/01/2008 at which stage they were 32 weeks old. (Name removed) noted that they had been born by Caesarean section and had a relatively long course of 5 weeks in special care nursery.

While noting WB's significant past problems, (name removed) considered WB to be growing up very well:

“WB was Twin 1, born at 1625 grams and required some mild resuscitation, but otherwise progressed nicely initially. He had some severe upsets in the first few months with his apnoea and scrotal swelling. He stopped breathing on a number of occasions and this is thought to be reflux – this has improved dramatically on the reflux formula. He had a mild pulmonary stenosis on echocardiogram, but again this appears to have gone and could not be heard today. He is seeing paediatric surgery regularly for a lymphangiectasia of penis and will be reviewed again next week. Other than all these problems in the past, he is currently growing up well, feeding nicely and a very stable young man. He is developmentally normal and is in fact up to his corrected age of 6 months, which is excellent for his prematurity.”<sup>148</sup>

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<sup>145</sup> See DOHS' Application & Disposition report of the protective worker dated 05/11/2008 at p.10. See also report of witness 26 dated 30/03/2008 at p.2.

<sup>146</sup> See e.g. report of witness 1 dated 31/03/2008 at p.4.

<sup>147</sup> Amended DOHS' Addendum report of witness 24 dated 01/04/2008 at p.6.

<sup>148</sup> Letter of (name removed) to witness 30 [DOHS] dated 21/01/2008.

On 07/04/2008 WB had the operation for his lymphatic gland foreshadowed by (name removed) in his report in order to reduce the swelling around his penis and groin area. Although WB did have to be readmitted briefly to hospital<sup>149</sup>, it appears that the operation was successful. Prior to the operation, the parents had met with the paediatric surgeon (name removed) to discuss the operation and give their consent.<sup>150</sup>

In his assessment on 21/01/2008 (name removed) reported positively on JB's development save for concerns about his feeding:

“JB has had a less severe course [than WB] and no previous medical concerns. His major issue is his poor feeding. He vomits a lot and is starting to pull away from his bottles and refusing the teat. He is on Polyjoule for his poor weight gain and this seems to be successful. He is breathing well and developing normally with no neurological concerns.

On examination, he was a bright and alert young man, smiling nicely and interacting appropriately. There were no physical features of concern; in particular his hips were stable. His major concern is the feeding and I felt once again that solids would be useful to help him progress. I have done an X-ray of his chest and hips to check progress and some baseline bloods for review.”<sup>151</sup>

The X-ray and the blood tests revealed no issues of concern for JB.<sup>152</sup>

Witness 26 met with the twins and their parents on 14/03/2008 and with the twins and their carers on 17/03/2008. In *viva voce* evidence and in a report prepared for DOHS he reported fairly positively on the twins' development:

“The boys are very different with different temperaments and different approaches to the world. Within broad parameters I thought they were doing reasonably well. From interviews with the parents and carers and my observations I thought they were generally in the realm of ordinary development. With WB there will remain some question about his development. His smile response, for instance, was delayed compared with children of a similar age but in the context of his time in hospital and the various medical things that have happened to him, I thought it was not an unreasonable developmental process but it needs to be reviewed as they develop. Two very different characters.”<sup>153</sup>

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<sup>149</sup> See evidence of witness 24 in cross-examination by counsel for the father at p.185 of my notes.

<sup>150</sup> Evidence of witness 24 in cross-examination by counsel for the mother at p.178 of my notes.

<sup>151</sup> Letter of (name removed) to witness 30 [DOHS] dated 21/01/2008.

<sup>152</sup> There is no note of any issues arising from the X-ray and blood tests in (name removed)'s subsequent report to DOHS dated 24/03/2008.

<sup>153</sup> Evidence of witness 26 in answer to a question by me at p.215 of my notes.

“From my direct observation, and in discussion with (name removed), maternal and child health nurse, it appears that WB’s overall development is proceeding within normal limits. He is less vigorous and outgoing than his brother JB, but he clearly monitors the environment with his gaze and is able to respond warmly with facial expression and other bodily response. WB has passed his regular developmental checks when his age has been corrected for prematurity. His screening hearing test in September 2007 was normal. (Name removed) reported that WB was slow to smile, having started to smile at age approximately six months. WB’s social and emotional development will need to be monitored further.”<sup>154</sup>

“Although he is smaller than WB, JB’s growth velocity appears to be on track again, when corrected for his premature birth...From direct observation and discussion with (name removed) it appears that JB’s general development is proceeding well. He is able to crawl quickly and appears keen to pull himself to stand taking his own weight. He has passed his appropriate developmental screening checks administered by (name removed).”<sup>155</sup>

### 13. RELATIONSHIPS BETWEEN THE SIBLINGS

There is some evidence of occasional friction in the interaction between KB & TG.

For example:

- Witness 24 made the following observations of KB on the way to and at telephone access with his mother on 25/02/2008:

“KB followed me to the car but did not walk with me as he usually does and appeared tired. Once in the car I asked him what was wrong, he responded: ‘I hate going to the office and I hate having brothers.’ I said to him: ‘TG, WB and JB loved him and that he was their big brother’. He lowered his head.

We drove to collect TG from kinder with [me] making small talk about what he did on the weekend. KB appeared to pick up a little. We collected TG from kinder together. Once in the car, KB took a toy from TG and hid the toy. TG responded by crying in the back seat of the car. KB stated: ‘I hate TG’. I said to him that this was not very nice and that he needed to apologize to TG, which he did.

On the way to access, KB said that he wanted to talk to his mother without TG in the room. When he was saying this he was crying. I agreed to try and get someone else to come to the office to look after TG whilst we called his mother. KB was happy with this...I informed...KB that witness 1 was coming to the office for a play. KB appeared more settled and started to smile. I felt that KB’s reaction to sharing the telephone contact with TG meant that he did not get his mother’s full attention and that he often feels that TG gets more attention than him.”<sup>156</sup>

- Witness 24 has also observed that the boys’ behaviours escalated during phone contact with their mother to such an extent that it was difficult to contain.<sup>157</sup>

<sup>154</sup> Infant Mental Health Report of witness 26 dated 30/03/2008 at p.3.

<sup>155</sup> *Op.cit.*, pp.3-4.

<sup>156</sup> Amended DOHS’ Application & Disposition report of witness 24 dated 14/03/2008 at pp.16-17.

<sup>157</sup> See evidence of witness 24 in cross-examination by counsel for the mother at pp.174-175 of my notes. As a consequence the access was moved to DOHS’ location 3 office.

The access supervisor, witness 11, has observed similar behaviour but regarded each boy trying to grab the phone from his brother's hand as a positive indicator of each boy's desire to speak to his mother.<sup>158</sup>

I regard this evidence as indicative of nothing more than normal sibling irritation and/or rivalry. On the whole the evidence suggests that there is a strong relationship between KB & TG and between them and the twins. Witness 24 thinks they do have a bond with each other although KB gets frustrated with TG's lack of understanding. However, TG is especially fond of KB and looks up to him.<sup>159</sup> Some other observations supporting this are:

- After telephone access with his mother on 13/03/2008, witness 24 made the following observation:

“In the car on the way back to placement, KB started to cry and stated ‘I am going to tell witness 1 next time I see her that this is silly and TG is not leaving. We have been together for a long time.’ KB appeared clearly upset. I attempted to console KB by informing him that the decision to move TG might be really good for TG as he had someone to look after him all the time. KB responded: ‘I don’t care. He has to stay with me.’ TG did not react as he appeared unaware of the situation.”<sup>160</sup>

- The Ozchild fostercare worker, witness 1, has noted that KB said to her that he was sad about TG being removed from the house of carers 3 & 4 and placed with another carer.<sup>161</sup> Witness 1 noted in her report:

“KB is very happy to have his brothers living with him. When told that TG was leaving the house of carers 3 & 4, KB shed some tears and when told it was OK to be sad about TG going he said he was sad. Both carers talk to KB about TG and what he might be doing and confirm to KB that he will still be seeing TG. KB has also talked to the carers about his other brothers and relations.”<sup>162</sup>

- In his meeting with the Take Two psychologists, witness 23 & (name removed), on 14/03/2008 KB brought up the fact that TG was leaving the placement. He said he was feeling “really sad” and he didn’t want TG to leave the placement and he told the psychologists that his carer, carer 3 was also feeling really sad

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<sup>158</sup> See her *viva voce* evidence at p.77 of my notes which is reproduced in section 18.1 below.

<sup>159</sup> Evidence of witness 24 based on her observations at access at p.193 of my notes.

<sup>160</sup> Amended DOHS' Application & Disposition report dated 14/03/2008 at p.22. See also *viva voce* evidence of witness 24 at p.178 of my notes.

<sup>161</sup> See her evidence in cross-examination by counsel for the mother at p.13 of my notes.

<sup>162</sup> Report of witness 1 dated 31/03/2008 at p.13.

about that. Witness 23 continued: “They looked at each other and both looked quite sad. Carer 3 reassured KB [that he and TG] would see one another.”<sup>163</sup>

- The access supervisor, witness 11, noted KB’s enthusiasm to see TG when being collected for access on 03/04/2008: “KB ran to the car to greet his brother enthusiastically...He ran to him excited to see his brother.”<sup>164</sup> Witness 11 conceded that on one occasion KB said to her “I miss my brother.”<sup>165</sup>

- Witness 11 also gave evidence that since KB & TG have been separated-  
“I notice KB seems to take on a ‘big brother’ approach with TG which I hadn’t seen before and special times are on departure so I respect that and make sure they have goodbye times alone without workers before being placed in the cars. They seem to look forward to that.”<sup>166</sup>

When this observation was put to witness 22, she agreed that that would indicate a close bond to her.<sup>167</sup>

- Witness 3, the Ozchild therapeutic foster care worker involved with TG from 14/03/2008 to 20/04/2008, said that after he had ceased involvement in the case he had heard from witness 2 “there was a weekend access facilitated by the carers and TG’s reaction was one of joy when he saw the twins and KB; he found that a very positive experience”<sup>168</sup>.

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<sup>163</sup> Evidence of witness 23 in cross-examination by counsel for the mother at p.165 of my notes.

<sup>164</sup> In cross-examination by counsel for the mother at p.77 of my notes.

<sup>165</sup> In cross-examination by counsel for KB at p.86 of my notes.

<sup>166</sup> In cross-examination by counsel for the mother at p.79 of my notes.

<sup>167</sup> In cross-examination by counsel for KB at p.241 of my notes.

<sup>168</sup> In evidence-in-chief at p.28 of my notes. The emphasis is mine.

## 14. THREATS, VIOLENCE, ANGER & AGGRESSION

From time to time in the past 10 years either the father or the mother or both have been involved in a number of violent and angry incidents. Some of these occurred in public. Some occurred in private. Some were directed against members of the public, especially persons in positions of authority. Some were between themselves. Some involved some of the children, in particular child C, child D & KB. On most of those occasions the father has been the aggressor. The odds are that these are not isolated incidents but even if they were they would be very alarming.

### 14.1 KB'S ACCOUNTS OF THE FATHER'S AGGRESSIVE BEHAVIOUR

- On 03/04/2006 the Ozchild case support worker witness 6 was driving KB & TG on the short trip to access with their mother when KB engaged her in conversation about the father:

“KB likes to point out different stuff and pointed out a motor bike and said ‘My dad likes motor bikes.’ I asked his dad’s name and he said ‘(name removed)’. I wasn’t entirely sure who KB would refer to. I asked where dad lived and he said ‘With us.’ KB said to me without further questioning that his dad yells and growls a lot. I asked ‘When does your dad do this?’ and KB said ‘When he wants a drink.’ I asked KB what else dad does and he said ‘He slams doors and broke a window and when a policeman came dad punched him.’ I asked him if he misses dad and he said: ‘No and mum has to get him away from us.’”<sup>169</sup>

Witness 6 asked KB when this happened and he said: “Not now, weeks ago.”<sup>170</sup>

- On 02/05/2006 KB’s then carer, carer 2, advised the Ozchild case support worker, witness 6, of a conversation which she had had with KB that afternoon. witness 6’s evidence of this was as follows:

“I received a phone call from carer 2 at around 4pm on 02/05/2006. That morning I had done a home visit. After I left the home KB’s behaviour deteriorated. He became upset and demanding. He refused to have his afternoon nap and started yelling and tantruming. The carer asked KB to sit down and calm down. He started crying and sobbed for an hour or so and started talking about what was wrong. Carer 2 advised me that KB said he was angry at his mum because she put him there and he doesn’t know why she doesn’t want him any more. Carer 2 advised me that she told KB his mum does want him and she didn’t put him there. KB asked her who did. The carer then explained it was DOHS and that he was there because her house is a safe place for him to say. Carer 2 advised me that KB asked her ‘Why isn’t my house safe?’ She asked KB if he could tell her any reasons it wasn’t

<sup>169</sup> Evidence in chief of witness 6 at p.47 of my notes. Witness 6 was referring to notes which she believes she made either on 03/04/2006 or on the following day.

<sup>170</sup> DOHS’ Addendum report of witness 4 re KB & TG dated 07/07/2006 at p.3.

safe. KB said to her 'It's because of dad and he is always yelling and angry. Dad threw me on the couch, into the door and down the stairs.' He also said 'Dad yells all the time and he broke the window when mum locked the door.' KB also told the carer he is scared at home and her house because the 'bad man' might still find him. The carer explained to KB that only myself and the protective worker (witness 4) know he is at her house and he is safe. She also asked him how it made him feel when dad yells and he said it hurts his belly."<sup>171</sup>

- During her assessment on 30/05/2006 witness 25 asked KB what it is like to live at mum's house. KB replied:

"My dad pick up my cake and I was covered in cake and he put it over my face. He doesn't like me. He doesn't like my Mum's house. He put sauce on my hair and shoes and clothes."<sup>172</sup>

When asked what his mother does when she is cross, KB replied: "She puts me to bed." When asked the same question of the father, he replied:

"He put a chair over me. He squished me on the floor. He was on me." [*Did anything else happen?*] "He hit me in the head and he threw me down the stairs." [*Did you tell Mummy?*] "Yes, she pushed my Daddy outside and locked all the doors and put the keys in her pocket. He smashed the window. He pushed me down the stairs. That's why I don't like him."<sup>173</sup>

- On 14/06/2006 while the protective worker witness 4 was transporting him to access with his mother, KB disclosed that he was scared of the father:

"KB told [me] that he did not want his mother to come and get him because he was scared of going home. When asked why he was scared, he stated he was scared of Dad (name removed). When asked why, he states that his dad hits him, and that his father has held a knife to him and his mum before. He stated 'Once dad threw me down the stairs.'"<sup>174</sup>

- On Monday 26/02/2007 KB's then carer contacted DOHS and advised of an incident which had occurred over the weekend and had lasted 2-3 hours. The carer had asked KB to sweep the floor. He didn't want to and became violent. He threw a pedestal fan at the carer and said that he wanted to stab her, He had never exhibited violent behaviour to the carer before. The carer sent KB to his room which escalated his behaviour. He began screaming and banging on the

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<sup>171</sup> Evidence in chief of witness 6 at p.48 of my notes. See also DOHS' Addendum report of witness 4 re KB & TG dated 07/07/2006 at p.3.

<sup>172</sup> Report of witness 25 dated 29/06/2006 at p.7. See also amended DOHS' Disposition report of the protective worker dated 27/05/2007 at p.3.

<sup>173</sup> *Ibid.*

<sup>174</sup> DOHS' Addendum report of witness 4 re KB & TG dated 07/07/2006 at p.4. I do not place any weight adverse to the mother on the information which immediately preceded this in witness 4's report, namely that the carer had reported that KB had said that "he was scared that his mother was going to come and get him, and that she was going to bring a knife and hurt carer 2." All the accesses had been supervised and there is no suggestion that the mother had ever said anything like this to KB.

walls of his bedroom and said to the carer: “I will stab you with a knife, kick you in the head like my dad did to my mum.” The carer said that KB was laughing while he was threatening to stab her in the eye, break the bed and rip clothing”. The carer was eventually able to hug KB until he calmed down and then he began to cry and said, as he had every time there had been an issue in the past: “I wish my dad wouldn’t fight.”<sup>175</sup>

- During an updated CAMHS’ assessment on 29/03/2007 (name removed) noted: “[KB’s] drawings and wishes reflected a fear of making mistakes and ‘feeling bad’, a need for nurturing and consistency, and a reluctance to talk about things that disturbed him. KB appeared to have many questions about his past, but seemed reluctant to think about this. He talked briefly how his father had hurt his mother and how he feared for her safety. He told how he had been thrown on the bed several times and he wondered aloud if his father was in jail. He closed the conversation quickly by stating that he had ‘talked enough’. KB stated that he enjoyed school and had several friends. KB was noted to demonstrate a fear/startle response to loud noise several times throughout the individual interview.”<sup>176</sup>

I agree that caution needs to be exercised when relying on disclosures made by young children.<sup>177</sup> However there was a spontaneity and consistency about KB’s accounts of the father’s aggressive behaviour which make his accounts inherently believable. They are also entirely consistent with a mass of objective evidence of the father’s behaviour on other occasions. The father did not give evidence disputing any of KB’s disclosures. I am satisfied that KB’s accounts of the father’s angry and aggressive behaviour are true and accurate.

#### **14.2 OTHER EVIDENCE OF VIOLENCE IN THE RELATIONSHIP BETWEEN THE PARENTS**

In June 1998 – when she was 18 years old - the mother “became involved” with the father, a friend and flatmate of Mr C, the father of child B.<sup>178</sup> She said to witness 22 in August 2007 that they had been together “nine years on and off, the last five years straight”<sup>179</sup>. Over that time there have been a significant number of violent

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<sup>175</sup> *Ibid.* When I read this I thought to myself: “Out of the mouths of babes!”

<sup>176</sup> *Op.cit.*, p.4.

<sup>177</sup> Proposition put by counsel for the mother with which witness 30 agreed: see p.270 of my notes. The proposition is also consistent with dicta of the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pp.343 & 362. And it is especially true because disclosures made by young children are rarely capable of being tested by cross-examination.

<sup>178</sup> See DOHS’ Application report re child A & child B dated 27/06/2002 co-signed by witness 8 at p.13.

<sup>179</sup> Children’s Court Clinic report of witness 22 at p.9.

incidents between the two, some of which have been described by KB<sup>180</sup> and some detailed below. The mother does not present as being fearful of the father but a number of other people have expressed concern on her behalf. For example, speaking of that part of the case plan meeting in April 2007 which she had chaired, witness 30 said:

“I recall quite clearly because I was really concerned about what was happening. I couldn’t get a clear understanding of the mother’s circumstances at the time. I said how important it was in my assessment that she look at domestic violence counselling because I was concerned about her safety...I spent a lot of time with her at the case plan to see how we could assist her safety and the children.”<sup>181</sup>

#### 14.2.1 INCIDENTS IN 1999-2001

On 24/08/1998 child A had been returned to his mother’s care pursuant to an interim protection order and on 24/09/1998 he was placed on a 6 month supervision order. The mother began residing with the father just prior to this order being made. In December 1998 a violent incident occurred between the father & the mother which resulted in the mother leaving him and moving with child A to reside with her parents.<sup>182</sup> Subsequently the mother “rekindled her relationship with the father” but another violent incident occurred in January 1999 which involved police intervention. The mother said to DOHS that this incident was her own fault as she assaulted the father first.<sup>183</sup>

Subsequently the mother again reconciled with the father and moved to Melbourne with him. In the latter part of that time they lived in a caravan park in suburban Melbourne but she moved back to location 1 in October 2000 after the father had assaulted his children child C & child D.<sup>184</sup> The father gave a fulsome account to the psychologist witness 29 about this turbulent period of their lives:

“The father described a turbulent relationship with the mother, a great deal of stress, anger and verbal abuse, and he also admits to some minor physical abuse between them, such as pushing and shoving each other. He also reported that they were both verbally abusive to anyone who got in the way of their fights. He stated that they broke up on many occasions and had relationships with others and then invariably got back together again. On one of these occasions

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<sup>180</sup> See section 14.1 above.

<sup>181</sup> In cross-examination by counsel for the mother at p.271 of my notes.

<sup>182</sup> See DOHS’ Application report re child A dated 01/04/1999 co-signed by witness 8 at p.3 & DOHS’ Application report re child A & child B dated 27/06/2002 co-signed by witness 8 at pp.13-14.

<sup>183</sup> *Ibid.*

<sup>184</sup> DOHS’ Application report re child A & child B dated 27/06/2002 co-signed by witness 8 at pp.13-14 and see section 11.2 above.

the mother met and married a man and moved to Darwin.<sup>185</sup> He stated that she fell pregnant with this man's baby just before they finished their relationship, and that she told him that it was his child (KB). He reported that whilst he knew that KB was not his child, that he has treated him like his own anyway."<sup>186</sup>

#### 14.2.2 ANGRY INCIDENTS ON 12/04/2005

The father advised witness 29 that in 2003 DOHS became involved, asking the mother to move to secure housing to protect KB as a result of them living with friends who were committing offences. He moved back in with her once she found more stable housing and the mother became pregnant with their first child, TG.<sup>187</sup>

On 12/04/2005 the father called an ambulance to the mother's then house in location 3 because of concerns about the mother bleeding. Witness 12 was one of the ambulance paramedics who attended. Her evidence included the following:

- "As we approached the front door my partner and I heard some raised voices. We were greeted by a male who ushered us in to see his partner he was most concerned about. In the lounge room there was a female heavily pregnant standing in pyjamas with blood stains on her crotch...She was upset and crying. She didn't really want an ambulance there. I recall a young boy approximately 10 and a toddler."
- "We seated her on a stretcher and the 10 year old boy was sitting with her. We did observations, blood pressure etc and I talked to her about events which had occurred prior to our arrival. She explained she had been under a lot of stress and was arguing with her partner about being under stress and needing a break from the stress."
- "Only when we requested to transport the mother to hospital did [the male] become excitable because he wished the toddler to come with us in the ambulance. The female wanted both the toddler and the 10 year old to come and the male wanted to bring the toddler down to the hospital at a later stage once he had cleaned and clothed him. Both already seemed quite anxious and upset and when we tried to coerce her to leave the child at home she became upset and he became upset at her. He became more excited, more agitated and they proceeded to argue in front of us whether the toddler should remain at home. There was a 5 minute argument in front of the toddler and us."
- "I recall the male leaving us. At that stage I said to my partner perhaps we will need the police in attendance. The female became upset and anxious. She said she didn't wish the police to attend and wouldn't go if the police

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<sup>185</sup> This man was a soldier named (name removed) whom the protective worker, witness 8, said "appeared very mature": see her evidence in cross-examination by counsel for the mother at p.60 of my notes. Prior to this the mother was in a relationship with a man named Gary for 2 months prior to Christmas 2001 which she left as "she didn't want to lose another child due to 'things' with him": see

<sup>186</sup> Report of witness 29 dated 27/08/2007 at p.5. See also further accounts of this period which the father & the mother gave to witness 29 at pp.4 & 13 of her report and which are reproduced in section 11.2 above.

<sup>187</sup> Report of witness 29 dated 27/08/2007 at p.5.

attended...She agreed if I cancelled the police she would come to hospital with the 10 year old and her partner would bring the toddler down later.”<sup>188</sup>

Subsequently at the hospital the chaos continued. Referring to her notes a midwife, witness 13, described it as follows:

“The mother needs to be examined by a doctor. Child A (son) refuses to leave. The mother became very aggressive and verbally abusive to her son making threats of violence. The mother left with child A stating she couldn’t cope with him. A few minutes later she returned with her partner (name removed) and the other child. The mother continued to be verbally aggressive and when informed DOHS were involved she got very angry and tried to leave again.

The father was talking to the social worker and security was called. When the mother & the father saw security they both became very aggressive to the staff and left, taking the boys with them. They were observed from the window arguing in the hospital car park.”<sup>189</sup>

Later that day witness 5 made an urgent outreach visit to the mother’s home.<sup>190</sup> KB was apprehended and a protection application was issued in relation to him.

#### **14.2.3 NOTIFICATIONS BETWEEN SEPTEMBER 2005 & FEBRUARY 2006**

- On 21/09/2005 the Department received a report from (location removed) “location 6” police that they had attended an incident at the mother’s home. They reported that neighbours had heard loud noises from the residence, and the sounds of things smashing. Police attended and were confronted by what they described as “traditional and verbally abusive (name removed) who was restrained, handcuffed and taken away”. Police advised that the mother “had tried to stop them getting entrance to the house [and they] had to kick down the door to check on the wellbeing of the children”.<sup>191</sup> The mother told witness 4 that the father had just “showed up” and she didn’t know how he knew where she lived. She said that the fly screen door was not locked and he had just walked in. She was unable to stop him and an argument had broken out when she told him that he was not allowed to be there.
- On 07/10/2005 the mother left a phone message with DOHS stating that there had been an “incident with ex partner on Wednesday night, police called and he

<sup>188</sup> Evidence in chief of witness 12 at p.88 of my notes. The emphasis is mine.

<sup>189</sup> Evidence of witness 13 at p.90 of my notes reading from her own notes dated 12/04/2005 at 11.25am.

<sup>190</sup> See p.43 of my notes and her case note dated 12/04/2005 at 5pm for her evidence of the father having sworn and spat at police and then leaving when she & (name removed) arrived outside the mother’s home.

<sup>191</sup> See DOHS’ Application report of witness 4 re KB & TG dated 10/03/2006 at p.3.

was taken away. I did not stay at home. Went to friend's house, now in location 1 with grandparents. Back in Melbourne probably Monday. Will see if Salvation Army can move me. Sorry I haven't rung earlier."<sup>192</sup>

- On 20/02/2006 the Department received two separate notifications stating:
  - (i) there has been a lot of screaming and yelling coming from the mother's house on a regular basis<sup>193</sup>; and
  - (ii) the father has been living at the mother's house since September 2005 and there are regular arguments with people yelling at the tops of their voices. The parents yell all kinds of abuse at the children which "you would never even say to an adult".<sup>194</sup>

#### 14.2.4 SEPARATION IN FEBRUARY 2006 AND *SEQUELAE*

- At the Children's Court Clinic on 13/08/2007 the father & the mother told witness 22 of the events which led to KB & TG being apprehended and removed from the mother's care on 20/02/2006 and of subsequent sad events:

"The father appeared to be very anxious about the assessment, with the effect that he dominated the interview, talking volubly and confusingly about the violent altercation with neighbours that had led to police intervention and then, to arguments between themselves. As a result of the latter 'I got fed up and left...DOHS came the next day and took the children...In April 2006 the mother asked could she have the children back because she and her partner were separated. She was told to take out an intervention order against the father – 'but she didn't know where I was' the father said, so she could not take out the order. At that point, the mother, who up until then had been acquiescent with her partner's accounts, offered a different point of view. 'They asked if I was afraid of him' she said. 'I said I wasn't, so I did not have grounds for an intervention order. I tried, but it only lasted three weeks because I didn't know where (name removed) was. When I didn't get the children back, I got onto prescription drugs; I was popping pills. Then I lost the house after the children went into care...I got into detox. I got into a women's refuge...' There the reports became confused. At one point, she rang the father after finding out that he was living at the factory. It was January 2007. Later it was November 2006. According to the father, 'In October she was in detox, that's when she rang me, she needed some money'."<sup>195</sup>

Describing the interaction between the father & the mother, witness 22 said:

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<sup>192</sup> *Op.cit.*, p.4.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Op.cit.*, p.5. In cross-examination by counsel for the mother at p.270 of my notes witness 30 referred to "a couple of incidents where police and DOHS had attended at the home when the children were in the care of the mother...Police reports at the time indicated ongoing disputes with neighbours and violent altercations. In a meeting I had with the mother she said she had assisted a friend who had a drug debt. The other people came and trashed her home and she had to put the children in a cupboard."

<sup>195</sup> Children's Court Clinic report of witness 22 at p.8.

“My attempts to get them to relax, to sort out the confusion in a rising volume of the two accounts, the father became angry and left the room. He re-entered shortly afterwards. It was clear he felt he had not been treated with respect. He did not like the suggestion that he was angry and needed to relax. He did not like being told what to do.”<sup>196</sup>

- The mother informed DOHS’ workers about an incident on the evening of Saturday 18/02/2006 which had involved police attending her address and interviewing the father:

“She stated that there had been an argument between herself and the neighbours at number 13 (name removed) Street. [T]he male next door had told her to ‘suck my dick’ and she had told him to ‘fuck off’...She stated that the father had later confronted the neighbour on the street and that he had not been in the house at all, that she has only ‘bumped into him on the street’.”<sup>197</sup>

KB has some recollection of “a pole through a window and police attending” which is possibly a reference to this incident.<sup>198</sup>

#### 14.2.5 INCIDENTS ON 27/09/2007

Witness 9, a protective worker who was not and has never otherwise been involved with this case, had a chance encounter with the father & the mother in the Department’s location 3 office on 27/09/2007:

“At approximately 10.15am I was walking in from outside the building. I headed towards the elevator back up to level 1 to the office. Another woman who was unknown to me at the time was walking in at the same time as I was and she headed to the stairs. A man was waiting on the stairs and starting yelling abuse at her. I didn’t know who he was at the time. He was yelling he was going to go home and smoke all the dope and did she understand. As I was going up inside the elevator I could hear the man screaming for the woman to answer him. As I got out at level 1 there is a glass panel in the waiting area and you can see the stairwell from that area. As I got out of the lift I could see the man was pulling the woman by the upper level of the staircase by her hair. I then went inside the office, the secured area, to find (name removed), the security guard.”<sup>199</sup>

In court witness 9 identified the woman as the mother and the man as the father. Though she was lightly cross-examined on the basis that the father had not said he was going to go home and smoke all the dope and had not pulled the mother’s

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<sup>196</sup> *Ibid.*

<sup>197</sup> DOHS’ Application report of witness 4 re KB & TG dated 10/03/2006 at p.5.

<sup>198</sup> See evidence of witness 23 in cross-examination by counsel for the father at p.248 of my notes.

<sup>199</sup> Evidence in chief of witness 9 at p.62 of my notes.

hair<sup>200</sup>, I accept on the balance of probabilities that witness 9's observations are correct and accurate.

A security guard who was working in the building at the time, witness 10, was called to the stairwell but did not see any assault occurring. He left the building and saw the father speaking aggressively to the mother at the pedestrian crossing in (road name removed):

**"The father was leaning forward and speaking within inches of the mother's face. His demeanour seemed fairly aggressive. I don't know what the father was saying because I wasn't close enough to hear and he wasn't yelling but he seemed aggressive. She seemed shell-shocked. She didn't seem to know how to react. She seemed taken aback by the way the father was talking to her...I had them under observation for a few minutes from memory."**<sup>201</sup>

As a consequence of this the unit manager witness 30 advised the mother, when she returned shortly afterwards, that her access with JB would be cancelled. The mother became highly upset and distressed, stating that the father was only yelling at her and saying that they were fighting over "this – the kids".<sup>202</sup>

Later that day a DOHS housing worker, (name removed), informed witness 30 that she had been abused by the father. Witness 30's account of this is as follows:

**"(Name removed) was outside and could hear yelling. She came around the corner and observed a man and a woman. The man was walking in front of the woman and kept stopping and yelling abuse towards the woman, swearing at her and getting right up into the woman's face. (Name removed) could recall statements that the man made to the woman such as 'What are you fucking doing now?', constantly yelling and abusing the woman. (Name removed) felt concerned for the woman and approached her. As she did this she heard the man state 'Someone is coming. Don't talk to her.' (Name removed) approached and said, 'Excuse me. Are you OK?' The woman did not respond and (name removed) again asked if she was OK, woman again did not respond. (Name removed) stated to woman, 'Do you want to come with me and get a coffee or anything?' At this point the man started to concentrate his attentions on (name removed) and started yelling and screaming abuse at her, physically coming up to her and placed his face inches away from (name removed)'s face and said:**

**'You fat pig. She'll kill you before I kill you. This is none of your business. You should go get a guy. And your fucking husband is gay, he wont give you any kids you fat bitch. You should go home and suck his dick. I can see the slap mark on your face where he slapped you with his dick. Peasant. Don't put your finger in my face or I will fucking bite it off. Who would want you you fat pig. Your husband is gay.'** Ms Thomas reported that the father made these statements

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<sup>200</sup> See p.62 of my notes.

<sup>201</sup> Evidence in chief of witness 10 at p.65 of my notes.

<sup>202</sup> See amended DOHS' Addendum report of witness 30 dated 12/10/2007 at p.34.

over and over again. She explained that she was only trying to assist the woman.

The mother came up during this altercation and stated: ‘*You want to know why we are fucking fighting. We are fighting because of you people.*’ The mother then left the area. The father continued to hurl abuse and swearing at (name removed), partly walking away and then returning. Eventually (name removed) was able to leave the area. (Name removed) reported to [me] that she was frightened and scared and was highly distressed and shaking after the incident.”<sup>203</sup>

### **14.3 ANGER & THREATS BY THE MOTHER**

On four occasions in recent months the mother has made threats against the former protective worker. On the first two occasions there was a triggering incident.

#### **14.3.1 THREAT ON 15/01/2008**

On 15/01/2008 the mother was “a little bit upset during the access” and described the absent protective worker as a “slut”. After she had refreshed her memory from her case note, witness 16’s evidence continued:

“There had been a confusion with collection of car seats from the location 2 office which meant the children arrived 40 minutes late for access. JB wasn’t drinking and the mother was getting upset that she wanted to put him into a hospital of her choice and not the hospital he had been attending on a few occasions prior. She made threats of killing the protective worker, saying she would need to have more than just security because after access she was going to kill that bitch and she didn’t mind if she was to get charged for saying those things.”<sup>204</sup>

Because she was concerned for the safety of everyone, witness 16 called a supervisor, (name removed), who “observed the mother for a very, very short period of time” from the observation room and said “it was fine for access to continue”.<sup>205</sup> Shortly afterwards the mother apologized to the access supervisor, witness 14, about the inappropriateness of her words and the rest of access was fine:

“The mother said: ‘I should not have gone off like I did. If she called me to a meeting I would go. I only get wild when she speaks to me like that. I need to change workers. I am sick of getting nothing done.’...She said she wanted to see her solicitor to take the protective worker back to court to be allocated another worker because she was sick of not getting any answers, saying that the

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<sup>203</sup> *Op.cit.*, pp.34-35. Witness 30 confirmed in *viva voce* evidence that (name removed) had advised her of these matters directly on the same day just after she had been speaking to the mother in the location 3 office: see p.283 of my notes. Although (name removed) was not called to give evidence in this hearing, I accept witness 30’s hearsay evidence as I am entitled to do under s.215(1)(d) of the *CYFA* and give it significant weight as neither the mother nor the father were called to give any rebuttal evidence.

<sup>204</sup> Evidence in chief of witness 16 at p.107 of my notes. The protective worker was not present during this conversation.

<sup>205</sup> Evidence of witness 16 in cross-examination by counsel for the mother at p.113 of my notes.

protective worker wouldn't talk to her and she is left in the dark all the time which contributes to her anger."<sup>206</sup>

### 14.3.2 ANGER & THREATS ON 01/02/2008

The mother was scheduled to have access for 3½ hours with the twins on 01/02/2008. This was to follow immediately upon the father's one hour access. There was nothing untoward during the father's access. However, shortly after the mother's access commenced two workers from the Education Department came into the access room. They were witness 27, a psychologist from Specialist Children's Services and (name removed), a speech pathologist. It turned out that the arrangement for them to speak to the mother during access had been made by the protective worker.<sup>207</sup> Also present were access supervisors witness 16 & witness 15 and a security guard known as "(name removed)". Witness 15 described what happened:

"Initially the father left the room after his 1 hour access. Two workers from the Education Department came into the room. As soon as the mother saw them she got quite upset saying 'I told the bloody bitch protective worker I don't want to see you by myself. If you are not a family unit, I don't want to see you at all.'...One of the workers said 'It's not our choice that we've come. It's the manager's. And for safety reasons we have to see you by yourself.' The mother said 'I'll kill that bloody bitch protective worker. I'm going to take her to Court. I don't mind if I do 20 years in jail for my kids. I want a piece of paper. I don't want anyone to have contact with my kids.' She settled down a bit, fed and changed the twins, engaged with the Education workers.<sup>208</sup> Shortly after they left the mother got on the phone to speak to the protective worker who apparently wasn't in the office. I heard her say 'If you can't understand bloody English you shouldn't be working there' and hung up. As soon as she was on the phone she had already got hyped up and aggressive again."<sup>209</sup>

Witness 16, who had been behind the one-way mirror and had then come into the access room, gave evidence of what happened next:

Witness 16- "She threw her mobile phone. She picked up one capsule and slammed it on the table making quite a loud noise. The twin was not in it. She placed one of the twins in the capsule, I'd say with a slight force. She said: 'You won't even see her in 2 weeks. She will be buried. You'll all be going to her funeral. I will be doing 20 years smiling knowing that that cunt is no longer looking after my kids.' Then she said: 'I'm going to stab that fucking cunt.'

Mr Gipp- Who did she say those words to?

Witness 16- To myself.

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<sup>206</sup> *Ibid.*

<sup>207</sup> Evidence of witness 27 in answer to a question by me at p.231 of my notes.

<sup>208</sup> The psychologist from Specialist Children's Services, witness 27, estimated that she and (name removed) were engaged in conversation with the mother for about 40 minutes from about 11.20am to about noon: see her evidence at p.230 of my notes.

<sup>209</sup> Evidence in chief of witness 15 at p.99 of my notes.

**Mr Gipp-** She wasn't talking about you?

**Witness 16-** Yes.

**Mr Gipp-** Who was she talking about?

**Witness 16-** The protective worker.

**Mr Gipp-** What was her demeanour?

**Witness 16-** She was very angry, had quite a look of rage on her face, pointing and waving her hands around, standing close to my face. She was placing the twins in their capsule ready to leave.

**Mr Gipp-** Did the twins react in any way to what was being said in the way it was being said?

**Witness 16-** No.

**Mr Gipp-** She didn't settle down?

**Witness 16-** Not towards the end. Everyone packed up. I was helping (name removed) with the twins towards the car. The mother said she was going to wait and follow her to the carers to take the children. As the mother said this she slammed the door and left."<sup>210</sup>

Neither witness 16 nor witness 15 thought it was appropriate for the workers to have intruded on the twins' access with their mother. Neither do I. Witness 15 said in answer to questions by me:

"I didn't think it was right for them to come given she said she didn't want to see them without the father and given the fact that she was having access with the twins. They could have waited for another occasion to see her and speak to her."<sup>211</sup>

"I could have [told them to go away]. They didn't introduce themselves. I should have told them to go away and come back another time. I realize I make a mistake not asking them to leave given that was the time for the mother's access."<sup>212</sup>

Witness 16 agreed with my proposition that "access is access for the children and it is not appropriate for any protective worker to arrange for people to come and speak to parents during access."<sup>213</sup> Witness 27 said in answer to a question by me: "I realize now we had a negative impact on that access and in hindsight we never should have interfered."<sup>214</sup>

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<sup>210</sup> At pp.110-111 of my notes. Later at about 1.15pm the mother rang DOHS again complaining about the protective worker and said to the then Acting Unit Manager, witness 17, that she was going to "slit that cunt's throat": see p.116 of my notes.

<sup>211</sup> At p.99 of my notes.

<sup>212</sup> At p.104 of my notes.

<sup>213</sup> At p.109 of my notes.

<sup>214</sup> At p.230 of my notes.

### **14.3.3 THREAT ON 04/04/2008**

**During access with the twins on 04/04/2008 the mother spoke to witness 15 about the incident on 01/02/2008. Witness 15 gave the following account of the conversation, stating that this was “not said in a threatening manner, just by way of conversation”<sup>215</sup>:**

**“[The mother] said: ‘You’ll have to go to court to testify and say how I lost control.’ I said: ‘I hope I don’t have to go.’ She said: ‘You will have to go. I can’t remember a lot of what I said. Apparently they have 3 charges but I haven’t been charged yet. I said to the protective worker before I didn’t want to see them.’ I asked who the two workers were who the mother didn’t want to see, to which she responded ‘They were special needs workers.’ The mother then said: ‘I’ve been in the system since I was 17 and have had no problems but if someone pushes me...’ There was a pause then. She wasn’t aggressive. She was upset and frustrated. ‘If the protective worker is with DOHS and out she’d better watch her back for life. If I get charged I’d better get charged for something decent.’”<sup>216</sup>**

### **14.3.4 THREAT AT COURT ON 06/02/2008**

**At Melbourne Children’s Court on 06/02/2008 a security guard witness 19 heard the mother say in respect of the protective worker: “I’ll be getting her when she goes home.”<sup>217</sup>**

### **14.3.5 MOMENTARY ANGER ON 24/01/2008**

**Witness 15 gave evidence of a further minor instance on 24/01/2008 in which the mother exhibited momentary anger.<sup>218</sup> I do not understand why the Department thought this trivial incident was relevant to this case. All it does is to confirm my view that accesses between the parents and the boys detailed below<sup>219</sup> must generally have been very good for otherwise the Department could be relied on to have highlighted any negative aspect, no matter trivial it might have been.**

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<sup>215</sup> Evidence of witness 15 in cross-examination by counsel for the mother at p.105 of my notes.

<sup>216</sup> Evidence in chief of witness 15 at pp.100-101 of my notes.

<sup>217</sup> Evidence in chief of witness 19 at p.122 of my notes.

<sup>218</sup> This occurred during a supervised access at McDonald’s in location 3. At one stage the mother went to buy a “Happy Meal” for the boys and came back angry and said loudly to the access supervisor, witness 15: “The bloody bitch won’t serve me because I haven’t got a yellow ticket. I’ve been coming here 10 bloody years and buying a lot of coffee and now they won’t serve me.” The mother then went back and got another worker to serve her. The children were in the playground and were not present at what witness 15 described as “that moment in time when the mother was angry and loud. Everything was fine when she settled.” See pp.98-99 of my notes.

<sup>219</sup> See section 17 below.

### 14.3.6 IN THE AFTERMATH OF THESE INCIDENTS

Giving evidence on 22/05/2008 about why DOHS was no longer so concerned about security so far as the father was concerned, witness 30, said:

“[The mother] apologized for her behaviour and her reaction on 01/02/2008. She was very genuine and sincere in her apologies about what happened and the comments she made in relation to the protective worker and was trying to convince me of [her] circumstances. In her mind she was sorry that she had caused the protective worker so much concern.”<sup>220</sup>

Although I deplore the mother – or anyone else – threatening protective workers, I also accept her apologies since they accord with my understanding of the evidence about her personality. I therefore do not consider that any of her threats, serious as they are, were intended to be carried out or can be translated into a risk of harm by her to any of the boys. Hence I do not consider that they would bar a reunification of the boys with the mother if all other protective concerns were addressed.

## 14.4 OTHER ANGER, THREATS & AGGRESSION BY THE FATHER

### 14.4.1 ANGER ON 20/09/2007

The DOHS’ case support worker, witness 11, gave evidence of an incident involving the father on 20/09/2007 which had caused her concern:

“I approached the father in the access room where he was with the twins. There was a bit of confusion about a time on that day. Because I do facilitate accesses, I thought I had a role to go in and apologize for the time mix-up. With his hands he escorted me into the foyer outside the room and raised his voice and was angry at me. He told me that no workers were to speak in the room. I hadn’t said anything other than apologize. [*What was his demeanour?*] He was quick with his hands, red in the face, loud in voice. I felt uncomfortable.”<sup>221</sup>

### 14.4.2 ABUSE & THREAT ON 24/09/2007

During access on 24/09/2007 the father took a photograph of the twins in which a security guard, (name removed), was apparently in the background.<sup>222</sup> (Name removed) said to the other security guard, witness 10, that he wanted “to confront

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<sup>220</sup> Evidence in chief of witness 30 at p.266 of my notes.

<sup>221</sup> Evidence in chief at p.73 of my notes.

<sup>222</sup> The objectively reasonable proposition that (name removed) had been inadvertently in the background was put by counsel for the father to witness 10 at p.69 of my notes and witness 10 did not demur. (Name removed) had been one of the supervisors of that access. He was not called to give evidence although his extraordinary minute by minute STASI-style “Summary of Observations” was on the Court file and is potent testimony to the very high level of surveillance to which the parents have been subjected during their access visits at location 3 DOHS.

the father about the photo” that he believed the father had taken of him.<sup>223</sup> Witness 10, acting as the peacemaker, went and told the father that (name removed) would like the photo deleted. The father replied that if (name removed) had any concerns he could contact the police. He then appeared to take a memory card out of the camera and left the building. He subsequently returned to the hallway outside the access room where he had a conversation with witness 10, calling (name removed) “a mother fucking poof” and “continued to hurl obscenities about (name removed)” as he and witness 10 went back outside the building. The father then said to witness 10 that “he needed to remember that cunt (name removed) because if he were ever to meet him on the street he would crush his head” and demanded that (name removed) apologize for a misunderstanding about the need to change the twins which had occurred earlier in the access.<sup>224</sup>

#### **14.4.3 AGITATION & ANNOYANCE AT COURT ON 06/02/2008 & 18/03/2008**

On 06/02/2008 the father & the mother were at location 5 Children’s Court for an earlier mention of this case. At about 3.25pm a security guard, witness 18, observed an odd incident involving the father:

“I was standing on the landing of the stairwell from the Family Division of the courts with the legal representatives and witness 30. The father descended the stairwell and as he descended he stated ‘She’s fucking mental. You are lucky you have to deal with her 3 days a week. I have to deal with her all the time.’ The comment was made to no-one in particular and I assumed it was in relation to the mother. The father seemed agitated and annoyed. I had seen him earlier in the day. His demeanour varied. It would be calm and then he would appear agitated. It depended on what time of day you saw him.”<sup>225</sup>

On 18/03/2008 the father & the mother were again at location 5 Children’s Court. Two security guards, witness 18 & witness 19, observed the father abuse and threaten protective worker 1:

“At approximately 1.10pm myself and [witness 19] and the protective worker were on the way to lunch. As we were walking past the entrance to location 5 Children’s Court the father stuck his head out of the entrance way and yelled ‘You’re fucking dead, cunt’ to the protective worker. We returned to Court to notify the protective services officers and make a statement.”<sup>226</sup>

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<sup>223</sup> Evidence in chief of witness 10 at p.66 of my notes.

<sup>224</sup> *Op.cit.*, pp.66-67.

<sup>225</sup> Evidence in chief of witness 18 at p.119 of my notes.

<sup>226</sup> *Ibid.* Witness 19 gave evidence to like effect although he was wrong about the time: see p.121 of my notes.

Witness 18 described the father's demeanour as "extremely agitated". Later that day witness 19 was standing on the stairs on the other side of the Court and saw another incident involving the father, whom he described as "very angry":

"I heard a lot of shouting. The protective services officer was telling him to go down the stairs and he wouldn't go. They escorted him down the stairs and pushed him out. There was just a lot of swearing and yelling. I couldn't hear what he said in particular."<sup>227</sup>

#### 14.4.4 FOUL ABUSE AT DOHS OFFICE ON 12/03/2008<sup>228</sup>

On 12/03/2008 the mother & the father attended the DOHS office to discuss the highly sensitive issue of the pending change of TG's placement. The meeting lasted less than 5 minutes. The father became aggressive and threatening, yelling and pointing his finger at staff in an intimidating manner and making crude and disgusting comments to the Assistant Manager, accusing her of performing fellatio on a male member of staff and cunnilingus with female staff.

#### 14.5 THE FATHER'S INTIMIDATING *PERSONA*

Several of the witnesses in this case appear to have been at the very least intimidated by the father's *persona*. It appeared clear to me that witness 1 was frightened of him and curiously it seems that the father may have had no real idea of the traumatizing effect he had on her:

Ms Aitken- "The father says that [the "Looking After Children" meeting on 03/10/2007] was a very positive meeting, a lot was achieved in relation to addressing the issues and discussing the various concerns and requests.

Witness 1- I perhaps didn't feel as positive as the father...because at the end of the meeting I was concerned for my physical safety. I felt at the end of the meeting the father had changed in a threatening manner. His facial expression and his words. I was sitting opposite him.

Ms Aitken- What were his words?

Witness 1- It was his manner. He continued pressing on with the issue about a tooth. Something a DOHS worker had said about a tooth and the father got upset.

Ms Aitken- What was it about the tooth that was talked about?

Witness 1- I think it was a bit confusing but I felt it was of cultural importance to the father. Some importance about the tooth which wasn't clear to me but I had a feeling he felt it was very important the tooth was kept. It was unexpected. We were discussing other issues and the father became what I felt was threatening towards the end of the meeting...To that point we had been sort of sharing and discussing...I think fairly shortly after that the meeting terminated...I felt he was very upset, very intimidating."<sup>229</sup>

<sup>227</sup> Evidence in chief of witness 19 at p.121 of my notes.

<sup>228</sup> See DOHS' Application & Disposition report of witness 24 dated 13/03/2008 at p.5 and her *viva voce* evidence at p.188 of my notes.

<sup>229</sup> At pp.15-16 of my notes.

**In my view witness 29 summed up the father very well:**

**“The father presented as cooperative for the most part, but very loud and domineering, to the point where he would aggressively state his opinion. At no time did I believe he would become physically violent, but it is evident that he would present as quite intimidating to some people. For example, his voice got louder and louder as he got more and more upset, he became agitated and his face became red, he stood up and left the room and then came back to yell some more, he started yelling from the waiting room, and this behaviour was so loud and disruptive that other people in the office became concerned about the volume and his behaviour. He also presented as very black and white in his thinking (which was evident in his inability to separate the need for monitoring from counselling), with a tendency to be intolerant of anything or anyone that he deems as being ‘against him’. At times he was so focused on getting his point across and becoming angry over a perceived injustice that he was not in fact listening to what was being said. The biggest theme in his demeanour is that no-one cares about him and that no-one understands him.”<sup>230</sup>**

**Even the indomitable witness 22 found the father a handful:**

**“It was difficult getting both parents to focus on the issue that brought their children into care which was, quite specifically, the way they dealt with conflict. The father initially denied he had an issue with anger. He had done anger management (AM). ‘If I have to do AM again’, he shouted, ‘well she can do it too.’”<sup>231</sup>**

**“There were some tense moments in the assessment of the father. It was difficult to keep track of what he was saying, or to take notes. In situations where he was seen alone, or with his partner, his ideas tumbled out under pressure of speech in a confused and, at times, incoherent state. The more time was spent with him, though, the more it became obvious to [me] that his agitation was related to the anxiety he felt about the procedure – about whether he would be listened to, whether he would be taken seriously, or whether he would be pre-judged. In the face of all this resistance, however, he impressed as more forthcoming about his own history than his partner was about hers.”<sup>232</sup>**

#### **14.6 THE FATHER’S ASSAULTS OF CHILD C & CHILD D <sup>233</sup>**

**I am satisfied that in 2000 child C & child D “suffered significant bruising and injuries after being assaulted and belted by the father”<sup>234</sup>. As a consequence the father was convicted on two counts of recklessly causing injury and sentenced to 6 months imprisonment wholly suspended for 2 years.**

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<sup>230</sup> Report of witness 29 dated 27/08/2007 at p.6.

<sup>231</sup> Children’s Court Clinic report of witness 22 at p.8.

<sup>232</sup> *Op.cit.*, pp.9-10.

<sup>233</sup> See also section 11.2 above.

<sup>234</sup> See amended DOHS’ Addendum report of witness 30 dated 12/10/2007 at p.5.

## 15. THE FATHER'S BACKGROUND & FUNCTIONING

As the father himself recognizes, he grew up in an abusive family environment.

Witness 22 said of this:

“He was the second of four children. He felt that the two middle ones, himself and his sister (name removed) to whom he was closest, ‘copped the worst’. He remembered going to Travancore as a child, aged six, because he had autistic traits. Then, at age seven, he was involved in a motor vehicle accident in which he sustained ‘massive head injuries with frontal lobe involvement; the accident made me go from being withdrawn to the opposite’. He was insightful enough to realize the implications of the frontal lobe injury. His ‘opposite’ behaviour made attendance at school problematic.<sup>235</sup> He was disruptive and could not concentrate. Once he arrived at adolescence, he was soon in conflict with the law. ‘I got into trouble at school – drugs, heroin – when I was 14, armed robbery and into Pentridge at age 15.’<sup>236</sup>

Although the father was not working at the time of witness 22’s assessment, he had been employed in a factory manufacturing machinery parts for about 18 months but had lost his job in about March 2007. He gave witness 22 permission to speak to his former employer, (name removed), who confirmed that the father was a good worker and said that in the 18 months he had employed the father-

“I had not seen him be physically aggressive, but he does have a short fuse. It was because he was verbally abusive and intimidating towards another worker that he finished with us. [I feel] that the kind of relationship the father had with his wife was based on a similar style of relating. [I have] never witnessed a physical attack on the father, but they are the sort that let fly at each other, screaming and yelling, then five minutes later it’s kiss and make up.

[I feel] that the father dearly loved his children. When his children were sick and in hospital, he would go great distances by public transport to see them. I know he went into debt last Christmas [2006] to take his children to Queensland to see his sister and her children.”<sup>237</sup>

The brunt of the abuse in the father’s childhood came from his father. Witness 29 related what he told her:

“The father reported a ‘pretty traumatic childhood’, with his dad being very angry and violent towards him as well as his mother and siblings, although he states that he and his middle sister took the brunt of his father’s anger and violence since his older sister was the ‘first-born’ and his younger brother was the ‘baby’ of the family. The father reported that his father would ‘go off at anything’, to the point where he would throw hot food or drink at them, would chase them down the street with a gun or meat cleaver, and would hit or punch

<sup>235</sup> He attended (location removed) Primary School until grade 4, (name removed) Catholic School, thereafter (name removed)’s College for a short time until he was expelled for threatening a teacher.

<sup>236</sup> Children’s Court Clinic report of witness 22 at p.10.

<sup>237</sup> *Ibid.*

them for no reason. For example, on one occasion the father stated that he was physically and verbally abused for getting run over by a car...

The father left home at 13 years of age because of his father and the violence he endured, and moved in with a group of older friends who were in their mid twenties and were committing offences such as armed robberies, and abusing substances such as amphetamines, cannabis, alcohol and a range of 'pills'. The father soon became involved in the offending and substance abuse as well, and at the age of 15 years was arrested and incarcerated in Pentridge Prison (an adult prison). He reported being released from gaol in 1988, but was incarcerated again soon after, after getting involved with a lady who was on heroin, taking up the habit himself, and then committing an offence to gain money to fund his heroin addiction.”<sup>238</sup>

To his credit, the father no longer appears to be addicted to any substances.

On a referral from DOHS (name removed) did a neuropsychological assessment of the father on 01/10/2007. He presented as friendly and cooperative throughout the assessment,<sup>239</sup> interacted appropriately and performed very well on the battery of 10 tests<sup>240</sup> which (name removed) administered:

“Overall, the results of the current neuropsychological assessment indicate that the father has performed very well. His strengths were within the high average to superior range and included-

- perceptual intellectual skills
- higher level attention skills (multiple task processing, focussed attention)
- perceptual processing speed
- immediate memory span and working memory
- visual new learning and memory
- perceptual executive skills (visual logical thinking, planning and organization)
- verbal executive skills (fluency, planning and organization, abstract thinking).

Educationally based skills (vocabulary, general knowledge, reading, arithmetic) were within the average range, which is consistent with his education history.

The only areas of mild difficulty (low average to average) were:

- complex verbal learning
- verbal processing speed
- structured verbal new learning and memory
- delayed verbal memory.

The father did not present clinically with an obvious mood disorder or behavioural disorder. There was no evidence of problems with impulse control, rule breaking or low frustration tolerance.”<sup>241</sup>

The referral document had requested (name removed)’s opinion on 9 specific questions. I accept all of Mr Jackson’s opinions. His answer to question 1 is set out above. Other answers are as follows:

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<sup>238</sup> Report of witness 29 dated 27/08/2007 at p.4.

<sup>239</sup> See Neuropsychological report of (name removed) dated 10/10/2007 at p.3.

<sup>240</sup> These tests are detailed at p.5 of (name removed)’s report.

QUESTION	OPINION <sup>242</sup>
Does the father have an acquired brain injury?	Unlikely. It is more likely that the mild verbal learning difficulties are long standing either due to a specific learning difficulty or educationally based.
What is the impact of any cognitive problems on his day to day functioning and his capacity to parent?	His mild verbal learning difficulty would have no impact on his day to day functioning or his capacity. His problem solving, planning and organization, abstract thinking, attention and perceptual learning are all of a very high level.
Does the father have a mental health problem?	There is no evidence of a diagnosable DSM-IV Axis 1 problem (depression, psychosis etc). He may have a diagnosable DSM-IV Axis 2 problem (personality disorder) but this was not formally assessed and would require an opinion from a psychiatrist or clinical psychologist.
What is the father's level of insight into his own behaviour and how it affects his children and other people?	He does not have problems with awareness or insight that are caused by organic or cognitive problems. He does have awareness of his own behaviour, although he tends to justify the appropriateness or impact of it as being caused by others, response to injustice etc. However this is psychosocial in origin.
Does the father have the capacity to change his behaviour?	He does have the cognitive capacity & flexibility to change and the cognitive ability to listen to other people. Any problems in these areas are psychosocial or personality based.
Does he have the flexibility to change?	
Does he have the ability to listen to other people?	

The referral document had also requested an opinion on the best way for DOHS workers to communicate with the father. Mr Jackson's opinion was:

**“The father clearly has the cognitive ability to process, learn and use any information given to him by workers. Any problems in this area are not cognitive in nature and are due to psychosocial or personality issues.**

**The father does need clear information about things he is required to do and what is acceptable and not acceptable behaviour. This should be in both written and oral form. Previous reports have suggested that he should be given clear consequences for not cooperating or following guidelines. However, it is also important that there should be a strong focus on ‘rewards’ and specific outcomes. Any ‘hurdles’ that need to be achieved need to be very specific so that it is clear whether they have been reached or not.**

**I would also strongly recommend giving the father some level of control in the decision making process, so that there is less likelihood of ‘confrontational’ or**

<sup>241</sup> Neuropsychological report of (name removed) dated 10/10/2007 at p.11.

<sup>242</sup> *Op.cit.*, pp.12-13.

‘injustice’ anger. This does not mean letting him decide what the outcomes will be, but giving him a range of opinions of ways to achieve a goal from which he can choose and therefore, have some ‘ownership’.”<sup>243</sup>

Witness 29 performed a psychological assessment of the father & the mother based on interviews and tests on 21/08/2007. She agreed that (name removed)’s opinions dovetailed with her observations: “I think it is more a learned behaviour issue for him rather than cognitive.”<sup>244</sup>

Witness 29 expressed the view in evidence in chief that anger management wasn’t going to be enough to cure the father’s long-standing anger problems-

Witness 29- “Given the long history I don’t think an anger management course is going to be successful. I think his childhood has left him vulnerable given what he has experienced from his father and other adults in his childhood...I don’t think he will be able to get to a point where he will be able to control and manage it in a way that the children will be able to deal with it. Part of the reason for that is that on the day he came in to see me he became quite angry and verbally abusive to the point where he did walk out. Everyone in the office stopped and a few were quite fearful and they were adults. That’s why I say children wouldn’t be able to understand they were not under threat.

Mr Gipp- Can nothing be done to address it?

Witness 29- I’d never say never. He has a long history of anger control issues and has attempted to manage it to his credit. To a certain level. Whether he can continue in the future I can’t comment on. Unless he has long-term counselling which he wasn’t really open to. My understanding from what he said on the day he really doesn’t think he has much of a problem. He externalizes the blame. Outside things make him behave in the way he does. You cant stop outside things happening. I don’t think he can control outside influences and manage his verbal aggression whilst he does manage his physical aggression.

Mr Gipp- Currently he is having access with the twins who are 10 months old and this court case is to determine what level of access is appropriate and to determine whether access should occur with the older boys. DOHS’ workers need to communicate with the father in the future. Can you give any advice as to how to reduce the possibility of aggressive, domineering and verbally abusive behaviour?

Witness 29- From my interviews I recommended anyone connected to DOHS shouldn’t probably be involved with him and DOHS should use an intermediate body because in his mind DOHS have caused his problems.”<sup>245</sup>

Witness 29’s very insightful evidence continued in cross-examination by counsel for the father:

Mr Power- “At a very superficial lay level I have some difficulty understanding how a person who has the cognitive strengths that the father has appears unable to control his angry behaviour.

Witness 29- From my understanding all of this is about his learned behaviour as a child. The way a child is treated and views the world and lives the world and develops their personality and how they cope with the world in later life, the way they understand. An individual may be cognitively able to understand things but socially

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<sup>243</sup> *Op.cit.*, p.13.

<sup>244</sup> At p.258 of my notes in answer to a question by me in which I summarized and read to her the contents of pp.12-13 of (name removed)’s report.

<sup>245</sup> At pp.254-255 of my notes.

unable. The tests I did<sup>246</sup> showed a range of cognitive distortions and some issues with his coping abilities. A learned hopelessness. A tendency to externalize blame and to react rather than think things through. From what I understand it is something his father used to do as well.

**Mr Power-** When I think it through there are all sorts of examples I have encountered in life where IQ does not equate to coping ability generally.

**Witness 29-** Yes. Exactly, because how they cope in life is just as important as cognitive capacity, how they adapt to changes. And all this is learned from a very young age. It is not impossible but difficult to change that childhood learning.

**Ms Aitken-** Anger management is not the complete answer for the father?

**Witness 29-** It is always going to help and he has attended and learned strategies which certainly helped him on the day [of my assessment]. By walking away that stopped him from being aggressive which is great.

**Ms Aitken-** How would what the father learned in childhood be able to be unlearned?

**Dr Witness 29-** He needs to accept the way he is behaving. Not externalize it. If he can understand he is behaving that way he can change it.

**Mr Gipp-** What type of therapy is necessary?

**Witness 29-** Some type of intensive therapy and focussed on his childhood issues and how he has developed into who he is because of interactions with family. Focussed on his actual behaviour and how it has been learned. Taking responsibility for that behaviour all throughout his life.

**Mr Gipp-** Is there a specific therapy?

**Witness 29-** A very good clinical psychologist who has had experience in those areas in the past. Nothing specific but needs to be focussed on those areas.

**Mr Gipp-** If it doesn't occur and the father doesn't attend therapy, do you agree it is a case of managing his behaviour. Hence your recommendation for a third party to be involved.<sup>247</sup> That's the only way for the situation to be contained?

**Witness 29-** My impression is that is very important. Concerns are in other situations where children or other people may do something which may annoy him. While I don't believe he would be physically violent, he may possibly still be verbally violent. [in a way in which the] children are not able to cope. The potential is to create in the children the same type of issues he is having in himself and that's what we are trying to prevent.<sup>248</sup>

**I do not share witness 29's optimism that the father would not be physically violent. To me the history strongly suggests the contrary. And I would reclassify the likelihood of him being verbally violent from "possibly" to "probably". However, I entirely agree with her last sentence in which she has distilled the essence of this whole case: "The potential is to create in the children the same type of issues he is having in himself and that's what we are trying to avoid."**

**One thing that came out very strongly in the evidence is that in order to minimize angry outbursts from the father he must be treated with respect and not patronized. That much was said by both witness 20<sup>249</sup> and by witness 22<sup>250</sup> among others. And**

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<sup>246</sup> The formal tests administered by witness 29 to the father & the mother and their test results are detailed in her report at pp.8-12 & pp.16-19 respectively.

<sup>247</sup> This is a reference to an opinion witness 29 expressed in evidence in chief at p.255 of my notes in an extract reproduced on the previous page.

<sup>248</sup> At pp.258-259 of my notes. The emphasis is mine.

<sup>249</sup> In answer to a question by me at p.129 of my notes.

that is clearly what (name removed) had in mind when he recommended giving the father some ‘ownership’ in the decision-making process.<sup>251</sup> But in my view witness 29 was correct in her insightful view that “respect” is only part of the key to the father’s anger:

Ms Aitken- “There is evidence that the father does respond to a particular way of being handled. If he feels he is being treated with respect and a person follows up and doesn’t patronize him there is much better communication.

Witness 29- Correct. I agree with that. I still had to keep managing his behaviour and bringing it back to issues and taking away from blame and criticism of DOHS’ involvement. There were still some anger issues he was unable to control on the day.

Ms Aitken- Would you have been able to establish communication if there was more time?

Witness 29- If it is not a threat to him in any way that’s a possibility but as soon as you tell him something he doesn’t like I think his anger is likely to flare up. Anyone who has to manage behaviour with his children and [has to] say something he doesn’t like, I think that may be an issue.”<sup>252</sup>

And therein lies the problem. The father cannot control his whole world. He is never going to be able to escape from adults or even his children telling him from time to time something that he doesn’t like. No matter how respectful I may be to the father – and I hope during the running of this case I have been respectful both to him and to the mother – I cannot in this case refrain from making certain findings which I expect he will not like.

## 16. THE MOTHER’S BACKGROUND & FUNCTIONING

The mother grew up in an intact family. She has described her childhood to DOHS as “fine”, that she was spoiled by her parents and got everything she wanted.<sup>253</sup> A fairly recent psychological assessment report says of her background:

“The mother describes a ‘pretty good childhood’, stating that they ‘probably got too much’, but reported that although she got along well with her mother, that her father was ‘very strict’. The mother stated that she and her father ‘never really got along’ because they were ‘too much alike’, and describes an incident when she was 14 years of age, whereby he hit her across the head. She stated that DOHS got involved as a result of this incident after she phoned them herself, and that she stayed at a relative’s house for a few weeks, before returning to the family. The mother reported that this was the only incident of violence she can remember, and that her father was usually a non-violent man who didn’t even swear.”<sup>254</sup>

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<sup>250</sup> In cross-examination by counsel for the father at p.236 of my notes.

<sup>251</sup> See Neuropsychological report of (name removed) dated 10/10/2007 at p.13.

<sup>252</sup> At p.258 of my notes.

<sup>253</sup> See DOHS’ Application report re child A dated 19/05/2000 co-signed by witness 8 at p.5.

<sup>254</sup> Psychological Assessment Report of witness 29 dated 27/08/2007 at p.12.

The mother acknowledged that she had a number of problems as an adolescent and was very defiant of her parents.<sup>255</sup> In year 7 she was diagnosed with dyslexia. She is not aware of any family history of dyslexia or other developmental disorder except for her maternal great grandmother who was deaf and mute.<sup>256</sup> She left school during her third year of secondary school and acknowledged that she has deficits in her reading and writing as a result of leaving school early.<sup>257</sup> She “still experiences very considerable difficulties with reading and writing.”<sup>258</sup> Her counsel advised that the mother has instructed that she has enrolled in an adult literacy and numeracy course. Asked about this, witness 28 said:

“She’d have capacity with continuing application to adult literacy to achieve an educational level rather better and through that with appropriate assistance with her emotional issues, especially in relation to her children and family functioning in general, could indeed improve her functioning level. How much is an open question.”<sup>259</sup>

The mother also said to witness 22: “Growing up, I had a pretty good life. I went to school to Year 9 but didn’t achieve well. I had child A when I was 16.” In light of this I share witness 22’s bewilderment:

“Having had good early experience, it was hard to know how her relationships were so heavily encoded in violence, to the point where her 11 year old son could knock her unconscious, where she could find herself drawn to violent partners and where the current protective issues were about the violence in her present relationship.”<sup>260</sup>

On a referral from DOHS, witness 28 performed a neuropsychological assessment on the mother involving 3 appointments, totaling 4½ hours, on 28/02/2008, 13/03/2008 & 20/03/2008.<sup>261</sup> The assessment process consisted of about 15% interviews and 85% use of various test instruments.<sup>262</sup> Witness 28 described the mother “as a quiet, shy person [who] initially was reticent, uncertain and anxious about this assessment but gradually engaged fully in the assessment activities”<sup>263</sup>. Witness 28 considers that the mother’s application to the various assessment

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<sup>255</sup> See DOHS’ Application report re child A dated 19/05/2000 co-signed by witness 8 at p.5.

<sup>256</sup> See Neuropsychology report of witness 28 dated 01/04/2008 at p.2.

<sup>257</sup> See DOHS’ Application report re child A dated 19/05/2000 co-signed by witness 8 at p.5..

<sup>258</sup> Neuropsychology report of witness 28 dated 01/04/2008 at p.2.

<sup>259</sup> Evidence of witness 28 in cross-examination by counsel for the mother at p.243-244 of my notes.

<sup>260</sup> Children’s Court Clinic report of witness 22 at p.9.

<sup>261</sup> Evidence of witness 28 in cross-examination by counsel for the mother at p.242 of my notes.

<sup>262</sup> The various test instruments used are listed in witness 28’s report dated 01/04/2008 at p.2.

<sup>263</sup> Neuropsychology report of witness 28 dated 01/04/2008 at p.2.

activities was such that it was felt that the following data is a good representation of her various abilities and qualities:<sup>264</sup>

FUNCTIONING	PERCENTILE	DESCRIPTION
Overall Cognitive	FSIQ 7 <sup>th</sup> percentile	Borderline impaired
Visuospatial & Visuo-perceptual	23 <sup>rd</sup> percentile	Low average
Information processing speed	18 <sup>th</sup> percentile	Low average
Language	3 <sup>rd</sup> to 12 <sup>th</sup> percentile	Borderline to below average
Memory & Learning	18 <sup>th</sup> percentile	Low average
Executive functioning	Test results mixed	Mild deficit to poor

In relation to the mother’s emotional functioning, witness 28 said:

“[I]t is evident that the mother has suffered great distress at the loss of the care of her children, with major consequences on her mood for periods of time. It was also apparent that the mother has poor self-esteem and struggles with articulating and asserting what she believes is the right or correct thing to do...[I]t does seem that she experiences periods of considerable emotional vulnerability and needs support.”<sup>265</sup>

Witness 28 explained in evidence-in-chief that the support to which he was referring was “psychological support preferably by a clinical psychologist with knowledge and skills in neuropsychological matters” and added that he believed “it would need to be fairly frequent and at times of stress and difficulty it might need to be at least weekly, at other times it could be less frequent.”<sup>266</sup> Unfortunately he is doubtful that any such treatment is available in the public health system.<sup>267</sup>

Witness 28’s overall opinion was as follows:

“The mother has some cognitive limitations and also some cognitive resources. Across the range of cognitive functions relevant to child care she varies from the impaired range, as in her reading, to just below her age average, as in her arithmetic skills and verbal learning with repeated presentations.

Her problems in reading are long standing and very substantial. The implication of this impairment is that she should have all important documents and written communications explained to her and steps should be taken to ensure that she fully understands the content of important documents. In the past she has relied on her partner for this assistance however this is not a satisfactory arrangement.

In addition her major weakness with tasks that have a high executive functioning load will present very considerable obstacles to her achieving

<sup>264</sup> Taken from *op.cit.*, pp.2-4.

<sup>265</sup> *Op.cit.*, p.4.

<sup>266</sup> At p. 241 of my notes.

<sup>267</sup> In answer to a question by me at p.242 of my notes.

particular goals, even when she understands the nature of the goals to be achieved.

The mother has good intentions but struggles with complex tasks and her own emotional vulnerabilities. I feel that she has the potential to be overwhelmed by the combination of her cognitive limitation and her lack of emotional robustness. In these circumstances it is my opinion that she is likely to lose emotional control however with appropriate emotional and cognitive support the likelihood of such events occurring would be markedly reduced.”<sup>268</sup>

I am not persuaded that the mother’s cognitive limitations to which witness 28 referred are sufficient to prevent the boys being returned to her care – with appropriate supports - if the major protective concern about their exposure to violence from the father was able to be resolved.

## **17. PAST ACCESS BETWEEN CHILDREN & PARENTS**

### **17.1 FREQUENCY & LOCATION OF ACCESS**

Both the mother & the father have had regular ongoing access with the twins from the date of their birth to the current time save that the father’s access was suspended by the Department from 28/09/2007 to 22/10/2006<sup>269</sup> and the mother’s access was suspended by Court order between 05/02/2008 & 19/03/2008.<sup>270</sup>

Apart from the period of 6 weeks from 05/02/2008 to 18/03/2008 when face to face contact was suspended by the Court and was replaced by telephone contact, KB & TG have had regular access with their mother since they were removed from her care on 20/02/2006.

All of the accesses have been supervised by DOHS or its nominee.

Both parents have presented as dedicated to their boys over a long period of time in a way which is comparatively uncommon for non-custodial parents. Access is rarely cancelled. The parents’ dedication is evidenced by their regular attendance at access and by the way in which each has interacted with the boys during access, notwithstanding that most of the twins’ accesses since being discharged from hospital have been held in heavily supervised and far from ideal surroundings.

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<sup>268</sup> Neuropsychology report of witness 28 dated 01/04/2008 at p.4.

<sup>269</sup> See evidence of witness 30 in answer to a question by me at p.276 of my notes.

<sup>270</sup> See sections 2.4 & 2.8 above.

## **17.2 DOHS' FAILURE TO COMPLY WITH COURT ORDERS RE ACCESS**

The Department has failed to comply with orders of this Court in relation to access in two separate ways for significant periods of time.

The interim accommodation orders in relation to the twins made on 31/08/2007 allowed for the parents and the twins to have access for 4 hours each day. On or about 28/09/2007 DOHS administratively suspended the twins' right to access with the father under this Court order. I asked witness 30 why. She said:

“Part of the order was that DOHS needed to be able to supervise the father's access and due to worker-safety issues we couldn't provide that in a safe way and until we could do that his access wasn't being reinstated.”<sup>271</sup>

Access between the father and the twins was not reinstated until a further Court order was made on 17/10/2007 allowing for access 3 days per week for the first hour of the mother's access.

The custody to Secretary orders for KB & TG made on 18/09/2006 allowed for the boys and their mother to have access a minimum of 3 times per week. Less than a month later at a case plan meeting the Department and the mother agreed to change that to twice per week. I asked witness 30 why:

Mr Power- “Were KB & TG present at the case plan meeting and consenting?”

Witness 30- No.

Mr Power- How can it be that some of the parties agree to a variation of a Court order without coming back to Court?

Witness 30- I agree.

Mr Power- That presumably is the case planner's – (name removed) – decision?

Witness 30- We spoke to the mother in June [2007] and it was going back to three times a week for 1 hour. The mother was then hospitalized and it was put on hold for that period until the twins were born. My understanding at the time the twins were in hospital prior to being discharged in August. It was negotiated all the way through. The day she was admitted to hospital in July we had set up access with KB & TG at their great grandparents. We were trying to work through everything that was happening so the children could see the twins. The clear intention was to put it to 3 per week for 1 hour on each occasion.

Mr Power- Later, after the twins were born, the mother's only recourse was to seek to vary the order given that Parliament clearly assumes – wrongly in this case – that DOHS would never breach a Court order and hence she cannot bring breach proceedings. Two months later and still nothing happens!

Witness 30- That's correct.”<sup>272</sup>

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<sup>271</sup> At p.276 of my notes.

<sup>272</sup> At p.277 of my notes.

I am generally greatly troubled when a government employee decides not to comply with a Court order for that is a foundation of anarchy. In the unusual circumstances of this case I am not critical of the Department's decision to suspend the father's access in the first half of October 2007 because of worker-safety concerns. But I am highly critical of (name removed)'s decision to vary administratively a final order of this Court 3 weeks after it was made. It was a disgraceful decision. Subsequently it was reasonable enough to vary KB's & TG's access with the mother because of the mother's pre-birth health problems and then her need to visit the twins almost every day. But once that had settled down it was wrong of the Department not to have reinstated access in accordance with the Court order until after the mother's solicitor had initiated quasi-breach proceedings on 28/09/2007.

### **17.3 POSITIVE OBSERVATIONS BY WITNESS 14 & WITNESS 15**

A case support worker, witness 14, has supervised some 10-20 access visits between the mother and KB & TG and some 80-100 access visits between the twins and their parents.<sup>273</sup> With the twins she was supervising 5 days per week until about January 2008 when she commenced job sharing with witness 15. Although witness 14 is not as yet highly qualified, she is quite experienced in child care and I found her a very good witness, thoughtful, honest and calm. I accept her evidence, which was very favourable to the parents, without hesitation.

When witness 14 commenced with McArthur Management Services in July 2007, she started supervising access with KB & TG 2 days per week. Her evidence was unequivocally positive:

Mr Gelfand- "KB & TG seemed happy to be at access with their mother?"

Witness 14- Yes.

Mr Gelfand- In a general way how was the time spent? Initially it was twice a week for 2 hours per visit. What would take place?

Witness 14- With KB & TG normally we would meet mum at a specified place, usually at Chelsea, and depending on the weather we would go to a local park or McDonalds. The kids would play with mum. Mum would buy them a meal. Generally everything was fine. The kids were happy to see mum. Mum was happy to see the kids.

Mr Gelfand- In relation to the safety of the children, you never saw anything which would indicate that the mother put the children at risk?

Witness 14- Not that I saw, no

Mr Gelfand- During the whole period you were involved until January-February, they took place outside the office?

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<sup>273</sup> See p.91 of my notes.

Witness 14- Yes.<sup>274</sup>

It was not until access resumed in March 2008 that KB's & TG's access was conducted in DOHS' offices under the same supervisory regime as with the twins.<sup>275</sup>

After the twins were discharged from hospital witness 14 was initially supervising their access 5 days per week. She was usually in the access room rather than on the other side of the one way glass mirror. This was a deliberate decision by DOHS based on witness 14's calm demeanour and pleasant personality.<sup>276</sup> For the last 4 months, since she commenced job-sharing with witness 15, she has only been supervising the twins' access on Wednesday and has not been supervising KB & TG's access at all.<sup>277</sup> She was asked by counsel for DOHS: "In general terms are there any incidents you have witnessed which cause you any concern during the long period you have supervised access with these children?" and she replied: "No."<sup>278</sup> She agreed with counsel for the mother that "the general interaction between the parents and the children was appropriate" and that there was "a clear love from the parents towards their children".<sup>279</sup> She later elaborated:

"Only once or twice I have made a suggestion about feeding or sleeping in relation to the twins. The way they have cared for the children has been completely appropriate. They have been focused on the needs of the children during access."<sup>280</sup>

Her answers in cross-examination by counsel for the father painted a positive picture of his interaction with his twin sons:

Ms Aitken- "The father is generally polite?"

Witness 14 – Yes.

Ms Aitken- Smiling?"

Witness 14- Yes.

Ms Aitken- Cooperative?"

Witness 14- Most of the time.

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<sup>274</sup> At pp.91-92.

<sup>275</sup> See evidence of witness 30 in cross-examination by counsel for the mother at p.275 of my notes.

<sup>276</sup> In evidence in chief at p.265 witness 30 said: "We needed to preserve witness 14's relationship with the parents...Part of her role was to facilitate a calm and conducive access."

<sup>277</sup> The mother was "a little bit upset" when witness 14 told her that she would be dropping back her hours because she & the father "had grown to have a comfortable situation" with witness 14: see p.93 of my notes. I can understand both parents' disappointment with largely losing an access supervisor with whom they had a very good rapport. As witness 16 said (at p.113 of my notes): "The mother and father liked witness 14. They felt she was quite professional." On the other hand, I also understand witness 14's rationale (at p.97 of my notes expressed in response to an observation by me): "I just want to do other families as well and be not quite so involved in this case. I have no problems doing it but I think it would be better for me personally not to do it 5 days per week."

<sup>278</sup> At p.91 of my notes.

<sup>279</sup> *Ibid.*

<sup>280</sup> In cross-examination by counsel for the mother at p.93 of my notes.

**Ms Aitken**- Appropriate with the children?

**M Witness 14**- Yes

**Ms Aitken**- Very hands-on?

**Witness 14**- Yes.

**Ms Aitken**- Very involved with the children's routine?

**Witness 14**- Yes.

**Ms Aitken**- Involved with nappy changes and feeding and play time?

**Witness 14**- Yes.

**Ms Aitken**- What is the relationship between the father and the twins in relation to whether you have observed any bond?

**Witness 14**- I'm not a professional in that way at all but from what I've seen in access, the relationship between the babies and the father is fine.

**Ms Aitken**- Does he sometimes take photos of the children at access?

**Witness 14**- Yes.

**Ms Aitken**- Does he say why?

**Witness 14**- No.

**Ms Aitken**- He hasn't mentioned a photo album he is putting together?

**Witness 14**- No.

**Ms Aitken**- Generally all accesses you have been involved in with the father have been positive accesses?

**Witness 14**- On most occasions they have been positive, yes."<sup>281</sup>

In re-examination it became clear that witness 14's qualification of "most occasions" was a reference to one occasion on which the father had become upset when the twins were given a sip-a-cup rather than a bottle<sup>282</sup> as well as her general impression that the father gets upset easily:

"In my experience with the father I've not had him become upset at me personally during my time with the twins. I have not really witnessed it but I know he can become upset quite easily. I've not witnessed him becoming aggressive towards me. From what I can see he can upset quite easily. My job is to try to keep the situation as smooth as possible. I try not to get involved in anything he gets upset about."<sup>283</sup>

Witness 15 started supervising access late in 2007 and has been job-sharing with witness 14 since January 2007. She has supervised about 4 accesses with KB & TG and substantially more with the twins. Notwithstanding two occasions on which she had observed the mother being angry about other adults<sup>284</sup>, her evidence was also generally positive about the interaction between the parents and the boys. For instance she agreed that:

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<sup>281</sup> At p.96 of my notes.

<sup>282</sup> See pp.95 & 97 of my notes.

<sup>283</sup> In re-examination by counsel for DOHS at p.97 of my notes.

<sup>284</sup> As to which see section 14.3 above.

- “In general terms the mother reacted appropriately with KB & TG and catered to their needs and ensured they were not in any harm. She was in constant eye view of the children. She was always aware of where they were going.”<sup>285</sup>
- “[The parents] have been generally OK: feeding, changing, playing, engaging with the children...It has been an ongoing thing I’ve noticed in their accesses.”<sup>286</sup>  
The accesses had been “quality accesses for the twins”.<sup>287</sup>
- The observations which she had made on 29/02/2008 that “The father arrived with smiles, was friendly and polite, was feeding the children, watching them play on the floor, packing up appropriately and responding appropriately to the twins” were typical.<sup>288</sup>
- The father’s accesses with the twins had been consistent, he had been enthusiastic and hands-on with the children and she had not had any concerns about the accesses she had supervised between the father and the twins.”<sup>289</sup>

#### 17.4 ACCESS BETWEEN THE MOTHER AND KB & TG

The evidence is replete with observations of the access with their mother being a positive time for the older boys. For example:

- Writing on 07/07/2006, at a time when KB & TG had been out of their mother’s care for some 4½ months, the then protective worker witness 4 said:

“The mother has had access regularly with KB and TG. This access is positive time for the mother and the children. The mother has been cooperative and helpful in arranging accesses. The mother is keen that access should not interfere with TG’s routines and KB’s kinder...

When the children were at a placement in Dandenong, access was occurring at Ozchild’s office in Dandenong, which has toys and play equipment. Since the children have moved to Mornington, access now occurs around Southland shopping centre. A worker from DOHS meets the mother, and then decides what to do for the day. The mother is given quite a bit of freedom to make these choices, provided the worker can go with them. The mother tries to do interesting things with the children while on access. She has taken the children to the park for a BBQ, she has taken them to the movies, shopping, and most recently to an indoor play centre.

<sup>285</sup> In cross-examination by counsel for the mother at p.102 of my notes.

<sup>286</sup> At p.105 of my notes.

<sup>287</sup> In cross-examination by counsel for the father at p.106 of my notes.

<sup>288</sup> *Op.cit.*, pp.105-106.

<sup>289</sup> *Op.cit.*, p.106.

Both children appear to enjoy access and it is a positive time for them. There have been a few accesses missed. The reasons for these have been mainly due to miscommunication between the mother and DOHS and a few occasions when the mother has cancelled access. Witness 6 reports that KB has become upset on days when access has been scheduled but has not occurred.<sup>290</sup>

- The Ozchild social worker, witness 6, was present during “somewhere between 10 & 20, possibly more like 20”, access visits of KB and his mother. She agreed with counsel for KB that generally the accesses were positive.<sup>291</sup>
- A DOHS case support worker, witness 11, has supervised access between the boys and their mother “recently”. She was asked about an access which she supervised on 03/04/2008 and agreed it was representative:

Mr Gelfand- [QUOTING FROM CASE NOTE] “During the access the mother greeted the boys with excitement in her voice. The mother was greeted warmly by KB with smiles and hugs. TG seemed very happy and allowed his mother to hug him as well.” Was that consistent with the way access went generally?

Witness 11- Yeah. Positive.

Mr Gelfand- Ups and downs...but overall it has been positive from what you have been saying?

Witness 11- Yes.<sup>292</sup>

The evidence also contains a number of examples of KB & TG exhibiting distress and their behaviour being adversely affected when access with their mother did not occur. Writing on 14/03/2008, witness 24 noted an escalation in the boys’ behaviour which coincided with the period of suspension of maternal access but was loath to attribute a cause:

“KB & TG’s behaviour has escalated over the past weeks in which they have not been having physical contact with their mother. However, it is unknown as to whether reinstating physical contact would be the best decision for the boys as this behavioural reaction may be due to the frequency and intensity of telephone access.”<sup>293</sup>

Giving evidence on 16/05/2008 witness 24 conceded that the boys’ accesses had been “generally appropriate” following the reinstatement of face to face access and that KB’s behaviour seems to have settled down since he saw his mother again: “[At] one or two care team meetings after that the other professionals stated it had calmed down and had been a lot better”.<sup>294</sup>

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<sup>290</sup> DOHS’ Addendum report of witness 4 re KB & TG dated 07/07/2006 at p.4. The emphasis is mine.

<sup>291</sup> See p.53 of my notes.

<sup>292</sup> At p.77 of my notes.

<sup>293</sup> See DOHS’ Application & Disposition report of witness 24 dated 13/03/2008 at p.5.

<sup>294</sup> Evidence of witness 24 in cross-examination by counsel for the mother at p.178-179 of my notes.

I am satisfied on the balance of probabilities that the escalation in the boys' behaviour was causally related to the suspension of face to face access with their mother for a period of 6 weeks. The timing was especially unfortunate given that the suspension of access also coincided with TG's removal from the placement with his siblings into yet another new foster care placement.

## 17.5 ACCESS BETWEEN BOTH PARENTS AND THE TWINS

### 17.5.1 AT ROYAL WOMEN'S HOSPITAL

The parents had regular and frequent contact with the twins and the hospital from the time of the twins' birth on 28/07/2007 until 26/08/2007:<sup>295</sup>

28/07	Dad x 3	08/08	Mum & dad x 1	19/08	Mum & dad x 1
29/07	Mum x2 Dad x 1	09/08	Mum & dad x 1	20/08	Mum rang
30/07	Mum & dad x 2	10/08	Mum & dad x 1	21/08	Nil recorded
31/07	Mum & dad x 1	11/08	Mum & dad x 2	22/08	Mum & dad
01/08	Mum & dad x 2	13/08	Mum rang	23/08	Nil recorded
02/08	Mum & dad x 2	14/08	Mum & dad x 1	24/08	Mum & dad
03/08	Dad x 1	15/08	Dad x 1	25/08	Mum rang
05/08	Dad rang	16/08	Dad rang	26/08	Mum & dad visit
06/08	Mum & dad x 2	17/08	Mum & dad x 2		
07/08	Mum & dad x 2	18/08	Dad x 1		

The Royal Women's Hospital staff member who prepared the above schedule also noted: "All written reports by Nursing staff indicate that the parents are loving, appropriate and attentive in caring for their babies."<sup>296</sup> Witness 20, a social worker who occupies the role of Direct Service Co-ordinator at the Royal Women's Hospital, provided support and assistance to the parents in July & August 2007. She found the parents receptive to her support which involved advocating for the family, assisting them through the process, liaising with child protection, liaising with the ward and health professionals and coordinating the discharge planning meeting.<sup>297</sup> On average she saw the parents once or twice a week. She considered that the family presented as "pretty self-sufficient"<sup>298</sup>. However she noted that both

<sup>295</sup> This information is contained in document C3, a handwritten sheet dated 24/08/2007 and updated 28/08/2007 which was on the Royal Women's Hospital file for the twins.

<sup>296</sup> *Ibid.* See also evidence of witness 20 at p.125 of my notes.

<sup>297</sup> See her evidence in chief at p.124 of my notes.

<sup>298</sup> In cross-examination by counsel for the mother at p.125 of my notes.

parents had “expressed their frustration in working with the protective worker, in particular calls not being returned. They expressed their concerns that the protective worker would cancel access and reschedule at the last minute and that was frustrating for them.”<sup>299</sup> Though witness 20 acknowledged that there had been an issue between the parents and staff during the mother’s preliminary admission from 11/07/2007 to 14/07/2007 “due to their aggressive presentation on the ward”<sup>300</sup>, her overall evidence was very favourable to the parents:

Mr Gelfand- “You were not aware of any issues identified in relation to parenting capabilities?”

Witness 20- My discussion with case managers was that parenting and care was very appropriate and a couple of times I went to see the parents they were up there and they were nursing the babies. They were fine and very appropriate.”<sup>301</sup>

...

Mr Gelfand- Did either yourself or (name removed) [the Manager of the Special Care Nursery] express a view of how the admission had been at Royal Women’s Hospital?

Witness 20- We had provided feedback to DOHS that the family were doing well, the father & the mother.”<sup>302</sup>

#### 17.5.2 AT DOHS’ OFFICES

After the boys were discharged from hospital on 30/08/2007 the parents were having daily supervised joint access with the twins at the DOHS’ office in location 3.<sup>303</sup> This required a great deal of co-ordination on the part of the carers and DOHS’ staff. There have generally been 3 supervisors, one in the access room and two others behind a one-way mirror. Witness 30’s access chronology for September<sup>304</sup> suggests that the parents appeared “focused towards the needs of the children”<sup>305</sup> and “handled the children in a supportive and appropriate way”<sup>306</sup>. However, their relationship with DOHS’ staff remained tense, with the father in particular presenting as aggressive and/or agitated and/or anxious on a number of occasions.<sup>307</sup>

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<sup>299</sup> Witness 20 said (at p.126) that she too found “trying to contact the protective worker was difficult at times and communication wasn’t great with child protection.”

<sup>300</sup> Evidence of witness 20 in re-examination at pp.131-132 of my notes relaying information which had been told to her by ward staff and which mainly involved the father’s “aggressive presentation” in a dispute about “the quality of the food and also the hygiene of the food”. Witness 26 noted at p.2 of his report dated 30/03/2008 that the mother had discharged herself from hospital against medical advice.

<sup>301</sup> At p.126 of my notes.

<sup>302</sup> At p.128 of my notes.

<sup>303</sup> Apart from the first 2 accesses which were held at DOHS’ Location 2 office.

<sup>304</sup> See DOHS’ Addendum report of witness 30 dated 12/10/2007 at pp.36-44.

<sup>305</sup> See, for instance, *op.cit.*, p.36.

<sup>306</sup> See, for instance, *op.cit.*, p.37.

<sup>307</sup> On 06/09/2007 (p.38), 13/09/2007 (p.39), 17/09/2007 (p.40), 18/09/2007 (p.41), 24/09/2007 (p.42).

Eventually DOHS made an administrative decision that it could no longer facilitate access between the twins and the father because of worker-safety concerns<sup>308</sup> and between 28/09/2007 & 22/10/2007 there were 19 accesses which occurred with the mother on her own with the twins.<sup>309</sup> Despite the fact that during that period “the mother was fragile and emotional because of the medical issues for the twins”<sup>310</sup>, witness 30 said that from her direct observation and from her reading of all of the reports, these accesses proceeded “very well”:

Mr Gelfand- “When you say very well are you referring to the mother’s interaction with the staff?

Witness 30- A number of things. The staff, be it myself or the supervising worker, would be able to have very calm conversations when required, including prompting, which is very different from when the mother and the father had access together. In my assessment she was more relaxed and engaged in conversation with the worker which was different from her presentation at the majority of times. Ultimately everyone was at ease during this time.”<sup>311</sup>

I interpose to say I noticed the same thing very strongly during the 17 days of this hearing on those few occasions when the mother was in court and the father was not. The atmosphere was markedly less tense.

On 22/10/2007 the father’s access was resumed for 1 hour on 3 days per week, this hour coinciding with the first hour of the mother’s access. Although DOHS & the father have continued to have “issues outside access...there has been a greater sense of comfort in access for the father, the twins and the supervising McArthur worker...It appears things are a lot calmer.”<sup>312</sup> Witness 30 conceded that in more recent times “the accesses between the father and the twins have appeared to go really well and very different to what we were experiencing in September to December 2007”.<sup>313</sup> She nominated two factors which may have contributed to this-

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<sup>308</sup> See section 17.2 above.

<sup>309</sup> Evidence of witness 30 in cross-examination by counsel for the mother at p.276 of my notes.

<sup>310</sup> *Ibid.*

<sup>311</sup> At p.275 of my notes.

<sup>312</sup> Evidence of witness 30 in cross-examination by counsel for the father at p.279 of my notes. See also p.283 of my notes where witness 30 said: “Access is occurring differently now and from my reading of it, it has gone very well for the twins.”

<sup>313</sup> *Ibid.*

**“From my reading of the files the parents’ accesses are separate which is one of the contributing factors. [This has been so since the mother’s access was reinstated on 18/03/2008]. There seems to be not as many contentious issues with the father and DOHS and I think that’s based on the medical status and wellbeing of the children having settled somewhat compared with 2007. The twins are a bit older so the regime of sleeping, feeding etc is not as strictly applied. That hasn’t required the prompting we needed to do last year. I think it’s been a process over time where for various reasons there has been an agreement and understanding of what’s required and there hasn’t been as much conflict.”<sup>314</sup>**

**Witness 16 has supervised more than 15 access visits involving the twins, generally from behind the one-way mirror at DOHS’ location 3 office. On 06/03/2008 she supervised and case noted an access between the twins and their father: “Dad feeding one twin, other twin playing on floor. Changed nappies. Placed boys in capsule before thanking everyone and leaving.” She agreed that this was a fairly typical access:**

**“As the children have gotten older more floor time is involved with encouragement of crawling, rolling etc but the one you read out is typical. It’s an example of the pattern the father’s access has developed into.”<sup>315</sup>**

**Witness 11 has supervised access between the parents and the twins on a large number of occasions. She considers that in general access between the father and the twins has been satisfactory although there was one incident in the absence of the twins on 20/09/2007 which caused her some concern.<sup>316</sup> She agreed that during access between both parents and the twins “in general everything went smoothly without too much of a trouble”<sup>317</sup>. Counsel for the father cross-examined witness 11 at some length about accesses which she had supervised between 05/12/2007 & 30/04/2008.<sup>318</sup> In summary these accesses were positive and involved good interaction between the parents and the twins. The following table summaries some of the interactions observed between the father & the babies:**

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<sup>314</sup> *Ibid.*

<sup>315</sup> See p.114 of my notes during cross-examination by counsel for the father.

<sup>316</sup> Evidence in chief of witness 11 at pp.72-73 of my notes. This incident is detailed in section 14.4.1 above.

<sup>317</sup> Proposition put by counsel for the mother at p.76 of my notes.

<sup>318</sup> Counsel for the mother wanted to tender copies of case notes for these accesses but I would not accept them because they seemed to me to be prior consistent statements. Counsel then took witness 11 in some detail through her observations at accesses on 05/12/2007, 12/12/2007, 19/12/2007, 23/01/2007, 06/02/2008, 07/02/2008, 13/02/2008, 27/02/2008, 29/02/2008, 05/03/2008, 12/03/2008, 19/03/2008, 26/03/2008, 04/04/2008, 10/04/2008, 12/04/2008, 16/04/2008, 17/04/2008, 18/04/2008, 23/04/2008, 24/04/2008 & 30/04/2008 so I suppose it serves me right. Since she was intent on engaging positive comments which scarcely varied from one access to another, it would have been more economical to have asked more a much smaller number of general questions.

<b>DATE</b>	<b>OBSERVATIONS BY WITNESS 11<sup>319</sup></b>
12/12/2007	Hugging with babies. Parents acted appropriately and involved in the feeds. At end kissed boys goodbye.
13/02/2008	The father picked up each child in turn. Offered baby rusks to the boys. Changed the nappies and checked the nappies when he was leaving.
27/02/2008	The father appeared positive and greeted the babies with smiles on arrival. Attended to babies' feeds and nappy changes. Placed them in capsules at the end of access and kissed babies goodbye.
05/03/2008	
29/02/2008	The father bought along a bouncer the children could sit in. Friendly & polite. Attended to children and watched them play on the floor. Fed children and changed their nappies. Towards end of access packed up at an appropriate time.
19/03/2008	The father arrived with smiles. Enthusiastic and looking forward to the access. Fed the boys tinned food.
04/04/2008	The father took each baby in turn out of capsule and spoke quietly to the babies as they sat on his knee. Shook a rattle while JB was on his knee and WB was crawling on the rug. Picked up WB and made some noises and WB reacted with a smile. Packed up and left with smiles after feeding the children.
16/04/2008	When WB was being fed he gagged on a piece of potato. The father lifted him up immediately and lay him across his lap and checked that everything was OK. WB gave a cheeky smile. He was calm and coughed up the potato.
24/04/2008	The father played with the babies and offered them water. They were smiling and happy. He fed them, changed their nappies and tried on various outfits for the children.

Witness 11 agreed that generally the father is-

- very enthusiastic about access with his children;
- polite, smiling, pleasant and cooperative;
- very hands on with the twins and very involved in their routines; and
- appropriate in his responses and interactions with the babies.

She was not prepared to say whether or not there was a strong bond between the twins and their father but did say: "The babies respond to the father when he is in the room with them. They look in his direction when he walks in and they smile. When he speaks to them they respond."<sup>320</sup>

## **18. THE MOTHER: ATTACHMENT & PROTECTIVE ISSUES**

### **18.1 ATTACHMENT OF KB & TG TO THEIR MOTHER**

A number of the professionals who have been involved in this case appear to have considered there was a good attachment between KB & TG and their mother or at

<sup>319</sup> This is compiled from pp.80-85 of my notes.

<sup>320</sup> Evidence of witness 11 in answers to propositions put by counsel for the father at p.81 of my notes.

least have made observations consistent with there being a good attachment between them. For instance:

- Witness 4, who was the allocated protective worker for KB & TG from July 2005 to October 2006<sup>321</sup> said in a report in March 2006:

“Both children appear to have a close bond with their mother.”<sup>322</sup>

“KB wishes to live with his mother. It is clear that he loves his mother and has a very clear bond with her. KB becomes upset at the end of each access. He also speaks warmly about his mother to the carer.”<sup>323</sup>

In *viva voce* evidence witness 4 elaborated on this:

Mr Gelfand- “Did you observe any of KB’s behaviour throughout his placement changes?”

Witness 4- I did, yes.

Mr Gelfand- Did he seem unsettled?

Witness 4- A little unsettled, yes.

Mr Gelfand- You made your observations during access once per fortnight?

Witness 4- Yes.

Mr Gelfand- Did you have a conversation with KB about what he was going through?

Witness 4- I wouldn’t lead KB intentionally into what he was going through. If he raised something we might have a conversation about that.

Mr Gelfand- Access was very positive for KB during that turbulent time?

Witness 4- Yes.

Mr Gelfand- And that was a constant for KB during that time?

Witness 4- Yes.

Mr Gelfand- KB was having phone contact with his mother on the days he wasn’t having access with her?<sup>324</sup>

Witness 4- Yes.

Mr Gelfand- He looked forward to that?

Witness 4- I don’t recall asking KB about it. From what witness 6 said to me the carer thought KB thought it was positive because when he didn’t have that contact he would become upset. It would have been positive. I don’t know whether it would have been a constant.”

Mr Gelfand- You say in your report the children appear to have a strong bond with their mother. What’s the basis of that?

Witness 4- It is based on observations of myself during access and what DOHS was informed through the carer and witness 6.

Mr Gelfand- What were your observations?

Witness 4- They interact with their mother willingly, they look to their mother, smile at her, want her attention at all times.

Mr Gelfand- Was it your observation that KB gets upset when access ends?

Witness 4- That was my observation, yes.

Mr Gelfand- What is the basis of the comment in your report that KB has a bond with TG?

Witness 4- From my observations and from what the carers have reported.”<sup>325</sup>

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<sup>321</sup> See p.36 of my notes.

<sup>322</sup> DOHS’ Application report of witness 4 dated 10/03/2006 at p.10.

<sup>323</sup> *Op.cit.*, p.12.

<sup>324</sup> Mr Gelfand referred the witness to p.8 of his report dated 10/03/2006 in which he had said: “The mother has also had regular phone contact with KB and TG. It has been arranged with the carer that the mother call KB and TG on the days when she does not have access. Reports are that this has been occurring and has been positive for the children.”

<sup>325</sup> At pp.41-42 of my notes.

- Witness 22, who assessed the parents and KB & TG at the Children’s Court Clinic on 13/08/2007 has described the mother as the boys’ “key attachment figure”<sup>326</sup>. Describing the introduction of the boys to the mother at the Clinic, witness 22 said:

“Both children appeared to be very pleased to see their parents, but TG reacted with delight when he saw his mother. KB immediately sat at the table to draw a page of hearts ‘for you’ he said to his mother and then, nodding to his step-father ‘and for you’.”<sup>327</sup>

Asked whether there was an attachment between KB and his mother, witness 22 said: “I would say this is where his primary attachment is. In spite of all he has been through, somehow he has managed to hold on to this image of his mother...His mother was very attuned. Her son was delighted to see her and she likewise”<sup>328</sup> In relation to TG, witness 22 considered that he had had “an awful lot of disruption” and showed “an odd feature of his language” which she opined might be based on him maintaining an image of his mother which had become more real than his experience of her.<sup>329</sup>

- Witness 11, who has supervised many accesses, agreed with counsel that “there seems to be a very close bond between the boys [KB & TG] and their mother.”<sup>330</sup> Witness 11’s observations of a close bond were not only based on her observations when the boys were in the company of their mother. She also drew her conclusions from her observations when the boys were only able to have telephone contact with their mother:

Mr Gelfand- “Moving forward to phone access. For children of that age it would be quite a challenge for the children?

Witness 11- Yes, well together it was.

Mr Gelfand- TG was very young and with his verbal skills it was difficult to talk on the phone to mum?

Witness 11- There were some positives there as well.

Mr Power- Describe the positives.

Witness 11- Either boy reaching out to grab the phone off one another to speak to their mother. The concentration on TG watching him speak to his mother on the phone and trying to say the words he was trying to express and also with KB he seemed to like the phone contact because at times he would snatch the phone off TG to talk to his mother.”<sup>331</sup>

<sup>326</sup> In cross-examination by counsel for DOHS at p.150 of my notes.

<sup>327</sup> Children’s Court Clinic report of witness 22 at p.5.

<sup>328</sup> In cross-examination by counsel for the father at p.238 of my notes.

<sup>329</sup> See her report at p.5 and her *viva voce* evidence at p.237 of my notes.

<sup>330</sup> In cross-examination by counsel for the mother at p.76 of my notes.

<sup>331</sup> At p.77 of my notes.

- The access supervisor, witness 14, agreed that there is “a positive relationship between KB & TG and their mother”.<sup>332</sup> In each of the 4 access visits which she supervised witness 15 observed that on greeting between KB & TG and their mother there “would be hugs & kisses” and she observed “a positive interaction generally between the mother and the children”.<sup>333</sup>
- The Ozchild social worker, witness 1, who has been supporting KB’s fostercare placement since 17/07/2007 said in her report that:

“KB is attached to his mother and talks to the carers about her. His attachment is indicated by his on-going requests to know when he is going to see his mother and his willingness to attend access.”<sup>334</sup>

In *viva voce* evidence witness 1 elaborated on this:

Mr Gelfand- “In your report at page 12 you say ‘KB is attached to his mother and talks to the carers about her.’ Is that what the carers have told you?

Witness 1- Yes.

Mr Gelfand- Has that been consistent over the whole period of the placement?

Witness 1- I don’t ask every time I see the carer but he hasn’t said otherwise.

Mr Gelfand- What’s your personal observation?

Witness 1- KB will talk about his mother, not every time but he will talk about his mother.

Mr Gelfand- And he says he wants to see his mother?

Witness 1- In the past few months I haven’t asked him and he hasn’t said but he will still happily talk about her. Some incident will remind him and he’ll say when he was with his mother he did such and such.

Mr Gelfand- That indicates a strong attachment to his mother?

Witness 1- He certainly has an attachment to his mother.

Mr Gelfand- On page 13 of your report you say that ‘KB appeared stressed when contact with his mother changed from physical to telephone contact.’

Witness 1- Yes. That was observed by the carer. He felt that KB was angry and he was experiencing that. He was more angry. He was more up and down, more emotional.”<sup>335</sup>

The lone exception is witness 25 who assessed the boys and their mother on 30/05/2006. She alone considered that there were problems in the attachment between KB and his mother:

“The mother’s caregiving representations were impoverished and emotionally disconnected, particularly when reflecting on times when the children’s attachment needs were highest. Nonetheless, it was clear that the mother loves the boys and has a deep desire to be reunited with them. This desire, however, was egocentric, more about her own needs than the children’s needs. In expressing her joy at being TG’s mother she said: ‘*He makes me happy. The kids keep me going, every day a new day.*’ While her joy was clear, it was

<sup>332</sup> In cross-examination by counsel for the mother at p.93 of my notes.

<sup>333</sup> In cross-examination by counsel for KB at p.106 of my notes.

<sup>334</sup> Report of witness 1 dated 31/03/2008 at p.12.

<sup>335</sup> At pp.12-13 of my notes. See also her answers in cross-examination by counsel for KB at p.18 of my notes.

egocentric, lacking a resonance with TG's experience. She was more able to attune to KB's experiences, for example, when speaking of her joy in him, she was able to relate to his experience, *'He rode around the whole park without stopping. He made it a challenge for himself. I was raving on; he likes it when you praise him.'* However, this attunement did not extend to sensitivity to either boy's mind during challenging times.

When asked what she finds painful or difficult in caring for KB, the mother referred to his tendency to *'back chat'*. When asked how this behaviour made her feel, she said *'He's a rude one. I never done that to my parents'*, and when asked how she manages her feelings about this she said *'I get over it. Doesn't really worry me. Can't let it get to you.'* The mother was not able to attune to KB's experience during these times, nor was she able to think about the underlying meaning of his behaviour. Instead of reflecting on these experiences, she denied their importance. This style of emotional detachment leaves the mother vulnerable to repetition of unwanted behaviour.”<sup>336</sup>

Witness 25 was very well cross-examined by counsel for the mother to try to find out what she meant by this passage and how her conclusion that the mother had “some sort of attachment difficulty”<sup>337</sup> was justified by the mother's responses to the “frameworks”<sup>338</sup> questions which witness 25 was asking her:

**Mr Gelfand-** “At page 4 of your report you refer to the mother expressing joy at being TG's mother. If someone is asked to express their joy, surely that's an appropriate response?

**Witness 25-** The role of the parent is to attune to the mind of the child so it can't be about the parent's joy, it has to be about the child's joy.

**Mr Power-** Why can't it be both of their joy?

**Witness 25-** Well I suppose it can but my concern is it has to be about the child's.

**Mr Gelfand-** [In the second paragraph reproduced above] you asked her how the behaviour makes her feel? You haven't asked how it makes KB feel?

**Witness 25-** Her pain needed to be in his pain.

**Mr Gelfand-** But you asked how does the behaviour make her feel?

**Witness 25-** Yes.

**Mr Gelfand-** Leaving aside your assessment frameworks

**Witness 25** [INTERRUPTING]- I don't. That's what the whole thing is based on.

**Mr Gelfand-** You are expecting her to answer on behalf of a third party.

**Witness 25** [ANGRILY]- It's not a third party, it's a child. I'm trying to explain it is the parent's capacity to attune to the experience of the child that is important.

**Mr Gelfand-** In relation to that paragraph you asked her how does KB's behaviour make her feel and then how she manages her feelings about this?

**Witness 25-** I agree.”<sup>339</sup>

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<sup>336</sup> Report of witness 25 dated 29/06/2006 at p.4.

<sup>337</sup> See p.201 of my notes.

<sup>338</sup> By this I mean that witness 25's questioning was based on what she described to me as “frameworks considered to be the gold standard world-wide for these sorts of cases”: see p.199 of my notes. Those “frameworks” are listed at p.2 of her report as follows: “Zeanah's working model (1999), Marvin and Britner's caregiver Behaviour Rating Scale (2001), George and Solomon's Caregiver Interview (2005), and an adaptation of the Emotional Availability Framework (Dean, 2003).” These frameworks are either from U.S.A. or Britain. Witness 25 could not remember which came from which. I then asked her why she thought a framework about human behaviour in the U.S.A. is relevant to human behaviour in Australia and she answered: “It's the best we have.”

<sup>339</sup> At pp.197-198 of my notes. The emphasis was Mr Gelfand's.

I simply did not understand witness 25's reasoning and was left with the clear impression that the mother was assessed negatively by witness 25 because she had answered questions in an "egocentric" way when the questions themselves were phrased in a way that called for an egocentric response. Counsel for DOHS tried valiantly in re-examination to elicit a rationale from witness 25 which was comprehensible to me but to no avail.<sup>340</sup> Since I do not understand her reasoning, I am bound to say that I did not find witness 25 to be a compelling witness. I also found some of her answers to be arrogant and dismissively condescending, for example:

Ms Athanasopoulos- "[In his report the protective worker, witness 4] said that both children appear to have a strong bond with their mother. Did you observe that?"

Witness 25- I observed the attachment I described in my report.

Ms Athanasopoulos- Does 'bond' equate to 'attachment'?

Witness 25- 'Bond' is a more colloquial term. 'Attachment' has meaning and that's what I've assessed. Lay people use the words interchangeably.

Ms Athanasopoulos- But it means the same thing?

Witness 25- I'm not going to speak for what witness 4 means by 'bond'. I don't know.

Ms Athanasopoulos- If someone is using the word 'bond' they are ignorant of what 'attachment' means?

Witness 25- Yes.

Ms Athanasopoulos- But it means the same thing?

Witness 25- Without an understanding of what an attachment is, yes."<sup>341</sup>

And most importantly of all, it appears to me almost certain that witness 25 did not appreciate the limitations of the mother's cognitive functioning<sup>342</sup> when she expressed the view that the mother was engaging in a "defensive strategy" during the assessment:

"The mother presented in an anxious, highly defensive state and found it extremely difficult to engage in reflective dialogue. When placed under pressure, the mother reacted to rather than processed the material and blamed others including DOHS, carers and her partners when challenged. When the mother was asked questions she found difficult to answer, she claimed she was unable to express herself adequately, rather than engage in reflective thought – a defensive strategy to avoid engaging in difficult and threatening content."<sup>343</sup>

Counsel for the mother put this passage to the neuropsychologist, witness 28, and asked him to comment on witness 25's observation that the mother was employing a "defensive strategy". I entirely agree with witness 28's response:

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<sup>340</sup> See pp.207-209 of my notes.

<sup>341</sup> At p.204 of my notes.

<sup>342</sup> These limitations are detailed in the Neuropsychology report of witness 28 dated 01/04/2008 and are discussed in section 16 above.

<sup>343</sup> Report of witness 25 dated 29/06/2006 at p.4.

**“I would be extremely doubtful about that to be honest. The other thing is that the mother has a long-standing and significant reading disability and that combined with executive functioning problems...could present quite major organizational thinking difficulties for her which will affect how she answers. Also she suffers from fairly low self-esteem so in some circumstances she will be unable to tackle such important and complex matters.”<sup>344</sup>**

**While I do not have any doubt about the accuracy of any of witness 25’s factual evidence, I do not accept any of her opinions unless they are supported by other evidence. I am satisfied that there is a strong attachment between KB & TG and their mother as described, *inter alia*, by witness 22, witness 4 and witness 1.**

## **18.2 THEIR MOTHER SEEN THROUGH KB’S & TG’S EYES**

**Over the years I have noticed that a favourite expression of witness 22 – in her reports and in her evidence – is to “take the cue from the children”<sup>345</sup>. It is a view with which I strongly agree. Perhaps KB was having a bad day on the day he was seen by witness 25 in May 2006 for she did not observe him demonstrate affection towards his mother when he first arrived at her Clinic.<sup>346</sup> Instead he told his mother it was not his fault that he and the carer had arrived late. Witness 25 said:**

**“I would expect a kid to bolt down the corridor, to wrap arms around mother and say ‘Mummy, mummy, I’ve missed you’ and later comment on being late. I’d expect that sort of response from a securely attached child.”<sup>347</sup>**

**However, the evidence is that the vast majority of access visits between KB & TG and their mother commence and conclude with warm displays of affection on both sides. And even witness 25 observed that the mother “responded appropriately to KB’s play and they shared mutual joy in the activities”<sup>348</sup>.**

**There is a great deal of evidence that the mother remains a key attachment figure in the eyes of both KB & TG. To give a few more examples<sup>349</sup>:**

- During her assessment at the Children’s Court Clinic on 13/08/2007, at which time KB had only been in the care of carers 3 & 4 for some 7 weeks, KB made a strong statement about wanting to return home to his parents:**

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<sup>344</sup> *Viva voce* evidence of witness 28 in cross-examination by counsel for the mother at p.243 of my notes.

<sup>345</sup> See for instance her answer to a question by counsel for DOHS at p.156 of my notes.

<sup>346</sup> Evidence of witness 25 in cross-examination by counsel for the mother at p.200 of my notes.

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid.* The emphasis is mine.

<sup>349</sup> To add to those referred to in section 18.1 above.

“KB appeared to be at ease with his carers, so it came as some surprise when I asked him at one point if he wanted me to say anything to the judge for him and he replied ‘*I just wanna go home*’. Did he mean he wanted to go home now, with carer 4? He was emphatic: ‘*No, I mean I wanna go home to mum and dad.*’ It was still early days with his carers. Perhaps he was expressing his impatience with the changing nature of the care arrangements and wanted some certainty. In his mind, it was apparent that he hoped the end result of all the changes would be a return home to his parents.”<sup>350</sup>

Since he made that emphatic statement a further 8 months have elapsed and the evidence suggests that he is thriving in his placement with carers 3 & 4. Yet his first wish – his instructions to his solicitor Mr McGregor – is still to “go home to mum and dad”.<sup>351</sup>

- When being collected for access on 03/04/2008, TG blurted out: “My home. I want mummy’s home.” KB looked at witness 11 for direction and she said: “Do you want to speak to your brother?” And KB did. He comforted TG.<sup>352</sup> During the subsequent access the mother greeted the boys with excitement in her voice. She was greeted warmly by KB with smiles and hugs. TG seemed very happy and allowed his mother to hug him as well. That was consistent with the way that access generally went.<sup>353</sup>
- It was reported by KB’s then carer that KB was very excited about attending school and was also excited that the mother attended on his first day at school.<sup>354</sup>
- On 14/03/2008, at a time when face to face contact with the mother had been suspended, KB said to witness 11 that he was sad because he wanted to see his mother.<sup>355</sup>
- On many occasions during phone access in February 2008 & March 2008 the children said to the mother that they loved her and she said she loved them as well.<sup>356</sup>
- At the end of an access on 10/04/2008 KB informed his mother that he didn’t spend enough time with her.<sup>357</sup> During the next access on 17/04/2008 KB

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<sup>350</sup> Children’s Court Clinic report of witness 22 at p.7. The emphasis is mine.

<sup>351</sup> See p.3 of my notes and see section 4.3 above.

<sup>352</sup> Evidence of access supervisor witness 11 at p.77 of my notes.

<sup>353</sup> *Ibid.*

<sup>354</sup> See DOHS’ Disposition report of the protective worker dated 27/05/2007 at p.4.

<sup>355</sup> In cross-examination counsel for the mother put to witness 24 that KB had said this to her but she believed it had been said to witness 11 who communicated it to her: see p.175 of my notes.

<sup>356</sup> Evidence of witness 24 in cross-examination by counsel for the mother at p.175 of my notes.

frequently cuddled his mother and at one point he said to her: “I can’t wait for things to be normal again.”<sup>358</sup>

- Giving evidence about TG on 06/05/2008 witness 3 said:

“On the first night [in his new placement] he was distressed and more recently he has been asking for his mum.”<sup>359</sup>

Paradoxically witness 3 is also aware that there have been a number of occasions when TG has refused to get into the car to see his mother and the case aide and the carer have had to encourage him to do so.<sup>360</sup>

### 18.3 PROTECTIVE CONCERNS IN RELATION TO THE MOTHER

The mother allowed the Clinician witness 22 to contact (name removed), her former Maternal & Child Health Nurse who had been involved in the care of TG. Witness 22 reported of this:

“[Name removed] felt that the mother used the service (of MCHN) very well. ‘She certainly tried hard; she would always attend appointments, she came to the mother’s group, she came to playgroup; then they moved. TG did well in her care.’ [Name removed] had not met the father and she did not know what had become of the family after they moved.”<sup>361</sup>

Witness 4, a former allocated protective worker for KB & TG, said in a report in March 2006:

“Concerns are only in relation to the father. It is the assessment of child protection that in every other way, the mother is a caring, loving and capable mother.”<sup>362</sup>

“The mother clearly loves the children and does her best to provide for the children’s day-to-day needs, apart from allowing the children contact with the father.”<sup>363</sup>

This was confirmed in a DOHS’ case plan meeting held on 06/03/2006 and chaired by witness 7. At that meeting:

“Witness 7 stated that he would need to see evidence of the mother not having contact with the father. This will be monitored through the police and visits to the mother by protective workers. Professionals at the meeting were pleased with all

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<sup>357</sup> Evidence of witness 11 in cross-examination by counsel for KB at p.87 of my notes.

<sup>358</sup> *Ibid.*

<sup>359</sup> In cross-examination by counsel for the mother at p.33 of my notes.

<sup>360</sup> Evidence in chief at p.28 of my notes. See also evidence of witness 2 to like effect during cross-examination by counsel for the mother at p.24. of my notes. To confuse the situation even further, TG’s previous Ozchild worker, witness 1, said at p.13 of my notes: “TG goes to access happily.”

<sup>361</sup> Children’s Court Clinic report of witness 22 at p.9. See also her *viva voce* evidence at p.239 of my notes.

<sup>362</sup> DOHS’ Application report of witness 4 dated 10/03/2006 at p.10.

<sup>363</sup> *Op.cit.*, p.11.

other aspects of the mother's parenting, in that she clearly loves the children and looks after their needs well."<sup>364</sup>

The current unit manager, witness 30, conceded that there had been no issues raised in witness 4's reports about the mother's parenting capacity<sup>365</sup> and concurred with Witness 4's assessment of her:

"When [the mother] did have services and when she did have KB & TG in her care and was not residing with the father, I'd concur with witness 4's assessment and report for her. That shows in all the discussions we have had in relation to the children's connection with their mother. She was able to provide good parenting and safety and make good decisions for the children at that time."<sup>366</sup>

I agree with their assessments and consider that the only present protective concern which would prevent reunification of any of the boys with their mother is her ongoing domestic relationship with the father.

## 19. RELATIONSHIP BETWEEN TWINS & PARENTS

Witness 26, an infant psychiatrist, performed an assessment of the twins and their parents on 14/03/2008. He reported positively on the interactions he observed:

"Throughout the interview JB and WB seemed comfortable and curious in the presence of their parents. JB and WB settled readily when their parents put them in the stroller at the end of the assessment session and did not show any distress as the parents left and the carers transporting them returned. [My] overall impression [was that] the parents were pleased to see their sons and were able to engage and play with them appropriately. The father was more actively engaged in playing with the boys, and the mother seemed somewhat sad, preoccupied and flat.<sup>367</sup> Both parents appear to have a positive relationship with JB and WB."<sup>368</sup>

"Both boys responded to the father particularly, who was able to elicit smiles and giggles from them. He did not appear overly intrusive although he was very keen to engage with them and have them use the toys which they had brought...WB played a peek-a-boo game with his father."<sup>369</sup>

"It seems clear that both the mother and the father love their children JB and WB and have developed a positive relationship with them, visiting in hospital in the first month of life and regular visits since then."<sup>370</sup>

<sup>364</sup> *Op.cit.*, p.9.

<sup>365</sup> In cross-examination by counsel for the mother at p.269 of my notes.

<sup>366</sup> *Op.cit.*, pp.271-272.

<sup>367</sup> The mother had not had any contact with the twins or any face to face contact with KB & TG for nearly 6 weeks before witness 26's assessment. I do not know whether she would have had the same "flat" presentation had the assessment been done at a time when she was in a regular access routine with her sons. Nor did witness 26: see p.217 of my notes.

<sup>368</sup> Infant Mental Health Report of witness 26 dated 30/03/2008 at p.5.

<sup>369</sup> *Op.cit.*, p.4.

<sup>370</sup> *Op.cit.*, p.7.

**Witness 26 elaborated on this in *viva voce* evidence:**

Ms Aitken- “There is evidence from access supervisors that on a number of occasions when the father has responded to one or other of the twins when they were upset for some reason, crying perhaps, and he has managed to calm them by stroking, holding them close to him and on occasion they falling asleep in those circumstances.

Witness 26- ...It wouldn't be inconsistent with what I saw in my session.

Ms Aitken- You gave an example of a similar type of situation where the carer had the child on his shoulder and calmed him?

Witness 26- Yes.

Ms Aitken- You saw that as evidence of attachment between the carer and the child?

Witness 26- Consistent with that, yes. Children are able to form connections with a number of figures and there are different types or qualities of attachment. I don't believe my direct observation provides enough data to make a formal classification of the attachment relationship.

Mr Power- But is it fair to say that your observations were not inconsistent with some sort of attachment relationship between parents and child?

Witness 26- Certainly in relation to the father and I think with the mother too although on the day I met them it was harder for her to be interacting with the boys. I'm sure there is a relationship there. One uses the attachment paradigm more specifically. There are different types of attachment relationships – broadly secure and insecure – and these attachment relationships apply to a specific dyad rather than just the child in all circumstances. I don't have sufficient data to say whether attachment relationships between the boys and the carers and between the boys and the parents are secure or insecure. I know there is a relationship but I don't know the precise quality. There is a particular set of procedures which one follows: the behaviour of the infant on reunion with the person after separation. This is the main piece of data one uses to see the quality of attachment. It is true to say I didn't see with the twins – with parents or carers – evidence of a severely disordered attachment relationship.

Ms Aitken- Hypothetically speaking, if there was a secure attachment between the children and parent and a secure attachment between the children and the carers what, if any, potential would there be for conflict – from the children's point of view – conflict if attachment had been formed with both carers and parent and was secure in both places?

Witness 26- That's a slightly different angle. When John Bowlby talked about attachment and attachment relationships he had the view there was one key relationship, the foundation on which other attachment relationships were able to build, and I believe that's the case. A child can have a secure relationship with mother or father, might have insecure relationship with mother but secure with father if father is primary caregiver at times of anxiety or threat. Although a child can have a range of attachment relationships, I believe the child has a primary relationship on which to build.

Ms Aitken- Providing the attachment with the primary carer is secure, there should be no disruption to that relationship if

Witness 26- Other relationships are established? Certainly.”<sup>371</sup>

**I accept witness 26's analysis of the attachment paradigm. I also accept that the observations made by witness 26 on 14/03/2008 & 17/03/2008 are consistent with there being attachment relationships between each twin and each parent and between each twin and each carer. I also accept that there is no evidence of any of those attachment relationships being severely disordered.**

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<sup>371</sup> At p.226-227 of my notes. For details of the twins-carers relationship see section 10.2 above.

## **20. ARE PARENTS UNACCEPTABLE RISK TO THE BOYS**

Unlike many cases in this Court, this is essentially a case with a single protective concern. Are any or all of the boys at unacceptable risk of physical and/or emotional harm from exposure to violence by the father?<sup>372</sup>

### **20.1 THE RISK TO YOUNG CHILDREN OF EXPOSURE TO PERSISTENT DOMESTIC VIOLENCE**

Witness 26 has outstanding qualifications and enormous experience in the field of infant psychiatry.<sup>373</sup> I accept his opinion that-

“There is an increasing body of evidence that the exposure of very young children to persistent domestic violence has a significant deleterious effect on their emotional and mental health development. It can be disruptive of emotional development and attachment relationships for very young children who are unable to speak for themselves about what is at times the terrifying experience of helplessly witnessing violence and intense conflict between their caregivers.”<sup>374</sup>

Some of this evidence is summarized in the Research Materials on the website of the Children’s Court of Victoria in references to and extracts from the work of Dr Danya Glaser (London), Dr Louise Newman (NSW), Dr Sharon Goldfield (Victoria), Jack Shonkoff & Deborah Phillips (U.S.A.), Dr Joy D. Osofsky (U.S.A.), Dr Bruce Perry (U.S.A.) & Dr Sharne A. Rolfe (Victoria).<sup>375</sup> I provided witness 26 with the 5 page summary of this material. After reading it he said: “I would agree with it in relation to children and their exposure to emotional/psychological abuse.”<sup>376</sup>

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<sup>372</sup> The central “best interest” principle is therefore that in s.10(3)(g) of the *CYFA*.

<sup>373</sup> Witness 26 graduated in medicine from the University of Melbourne at the end of 1975. Three years later he started training in psychiatry, the bulk of which was undertaken at the Royal Edinburgh Hospital. He returned to research in 1980 and studied for membership of the Royal Australian & New Zealand College of Psychiatrists. Then he undertook training in child & adolescent psychiatry through the Royal Children’s Hospital and has the relevant certificate. He has been working at Royal Children’s Hospital since 1980. He has developed a special interest in infant mental health and has been very involved in that field. He was the convenor of the World Congress on Infant Mental Health held here 4 years ago and was on the scientific organizing committee for 3 congresses at around that time: see p.209 of my notes.

<sup>374</sup> Infant Mental Health Report of witness 26 dated 30/03/2008 at p.7.

<sup>375</sup> See paragraph 5.2 of the Research Materials on the Children’s Court website [www.childrencourt.vic.gov.au](http://www.childrencourt.vic.gov.au).

<sup>376</sup> At p.222 of my notes.

## **20.2 THE MOTHER ALONE DOES NOT POSE AN UNACCEPTABLE RISK**

As I have held above, the mother is the key attachment figure for KB & TG and has developed a positive relationship with the twins.<sup>377</sup> There are no issues about her parenting capacity or about her ability to make good decisions for the children other than her decision to remain in a domestic relationship with the father.<sup>378</sup> I accept witness 21's evidence about the importance of the "regular, consistent, predictable, reliable and responsive presence of the primary caregiver".<sup>379</sup> In my view the mother is capable of providing this to her 4 youngest boys. On her own she does not pose an unacceptable risk of harm to her boys.

## **20.3 THE FATHER POSES AN UNACCEPTABLE RISK**

I would not have given the father's history of past anger and aggression, past involvement with the police and past imprisonment as a young man great weight if there was evidence that his volatility, violence, anger and aggression were indeed in the past. But that is not the case. Although I accept that the father & the mother were living in a pressure-cooker atmosphere at the time that he assaulted child C & child D, the fact that he has seriously assaulted his children & KB and continues to display unpredictably violent, angry and/or aggressive behaviour towards those whom he perceives are not treating him with adequate respect or with whom he disagrees<sup>380</sup> leads me to the strong view that the Department and the various professionals on whose opinions it has relied are correct in believing that the father would pose an unacceptable risk of both physical and emotional harm if he was to have any unsupervised contact with KB, TG or the twins at the present time. The father's behaviour continues to be the opposite of witness 21's paradigm. It is neither regular, consistent nor predictable. He is like a time bomb who has managed to have the majority of the professionals required to be working with him tiptoeing around him on eggshells, if not downright scared of him.

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<sup>377</sup> See sections 18.1, 18.2 & 19 above.

<sup>378</sup> See section 18.3 above. See especially evidence of witness 30 in cross-examination by counsel for the mother at p.269 of my notes.

<sup>379</sup> Evidence in chief of witness 21 at p.134 of my notes.

<sup>380</sup> See my findings in section 15 above based in part on evidence detailed in section 14.

Further, it is clear that the father does not acknowledge that he has much of a problem with anger. As witness 29 said, he externalizes the blame.<sup>381</sup> Witness 26 agrees:

“The parents said they felt badly done by through the actions of DOHS at many levels. They said they don’t get any help from DOHS, and it was very difficult making ends meet at the moment.<sup>382</sup> Because of the access arrangements as determined by the Department<sup>383</sup>, the father said he had to stop his job and it was very difficult to live on the benefits they currently receive. He said the Department has a plan but it doesn’t include reunification with the boys, and the Department workers never sat down to talk with them. He said that he and the mother had to arrange their own couple counselling which they got at Families First.<sup>384</sup> The father said that he was not a violent man, and that many lies have been said about him. He said: ‘*Where are the charges?*’ The parents denied that they had been bad parents. He also said it was difficult for him to tell me certain things, implying that it might be information that would be unhelpful in his quest to have the boys returned to his care.’<sup>385</sup>

Further I accept evidence of witness 29 that any change to the father’s behaviour learned in childhood is likely to be difficult and to require intensive, long-term counselling/therapy.<sup>386</sup>

Witness 30 was not prepared to say that appropriate change could never happen.<sup>387</sup> However it is clear that even if the father were minded to attend counselling/therapy to effect any such change, it is likely to take a long time, in my view a much longer time than any of the 4 boys should be required to spend in limbo waiting for the father to change to such an extent that they would be safe in his unsupervised full-time care.<sup>388</sup>

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<sup>381</sup> See her evidence at pp.254-255 of my notes reproduced in section 15 above.

<sup>382</sup> I interpose to say that the Department’s primary responsibility is the welfare of the children. This family has cost the Department an enormous amount of money and will continue to do so into the foreseeable future. It is not the responsibility of the Department to act as a financial backstop for either of the parents. In any event there is evidence of the Department providing the parents with train tickets on various occasions: see for example evidence of witness 11 at p.81 of my notes.

<sup>383</sup> I interpose to say that I thought it was the generous Court ordered access arrangements which had been incompatible with the father’s work arrangements and I thought that the father had wanted access at that frequency.

<sup>384</sup> I interpose to say I have no evidence about the nature, extent, progress or prognosis of this counselling.

<sup>385</sup> Infant Mental Health Report of witness 26 dated 30/03/2008 at p.5.

<sup>386</sup> See her evidence at pp.254-255 & 258-259 of my notes reproduced in section 15 above.

<sup>387</sup> Agreeing with a proposition put by counsel for the father at p.284 of my notes.

<sup>388</sup> Under s.10(3)(p) of the *CYFA* I am required to give consideration to the possible harmful effects of delay in making any decision or taking any action in respect of the boys.

## 21. THE DEPARTMENT'S CASE PLANS

At my request the most recent protective worker, witness 24, provided me with the following summary of the Department's case plans for the boys:

DATE	CASE PLAN DETAILS FOR KB & TG
21/10/2005	Statutory Case Plan meeting chaired by witness 7 in regards to the making of the supervision orders on 30/06/2005. The case plan was set to support the mother with the care of KB & TG. <sup>389</sup> There was clear discussion of the need for the mother not to allow the father to reside in the family home or have contact with either child. The mother agreed with this and said that she was not having contact with him.
06/03/2006 <sup>390</sup>	Unscheduled Case Plan meeting chaired by witness 7 brought about by the breach of supervision orders. This case plan was for the mother to work towards reunification of the boys in her sole care. She was required to demonstrate that she was not having any contact with the father. A Family Transitions assessment was completed as well as an assessment of the mother's ability to remain away from the father. Reunification was the ultimate goal should the mother demonstrate that she was able to remain away from the father.
12/10/2006	Statutory Case Plan meeting chaired by (name removed) following the making of custody to Secretary orders on 18/09/2006. (Name removed) set a time limited assessment in regards to the long-term care needs for the boys and the mother's ability to remain away from the father given the significant history of violence. This assessment included reunification plans and set out goals and tasks to occur in order for reunification plans to occur. (Name removed) assessed that this plan should be reviewed in February 2007 to assess the likelihood of reunification and future harm if the boys were in their mother's care or whether permanent care planning should take place.
April 2007	The case plan was reviewed and a decision was made to apply for the extension of the custody to Secretary orders in relation to both boys. There were two separate meetings and the chairpersons were witness 30 & (name removed). A decision was made for permanent care planning given the history of family violence and also given that the mother had said that her intention was to reconcile with the father and that the Department's concerns about domestic violence were incorrect.

No formal case plan has been established for the twins but a draft case plan is in place for permanent care planning in line with that for KB & TG due to the history of violence and likelihood of future harm in the care of their parents.<sup>391</sup>

<sup>389</sup> This is an amendment, document C2 having incorrectly stated that TG was not yet born.

<sup>390</sup> This meeting was described by witness 24 as having occurred on 17/02/2006 but the evidence of witness 7 (at p.54 of my notes) and the amended DOHS' Application report of witness 4 dated 10/03/2006 describes it as having occurred on 06/03/2006

<sup>391</sup> See the last paragraph of document C2.

**The goals of the current case plans are set out in the Department's most recent Addendum report:**

- 1. "For KB, TG, WB and JB to be placed in long term/permanent placements out of the care of the mother & the father.**
- 2. For KB, TG, WB and JB to reside in a safe, stable and nurturing environment that will ensure that their emotional, physical, psychological, educational and social needs and development are met.**
- 3. To address the attachment, nurturing issues and behavioural issues through counselling in order for them to feel safe and secure.**
- 4. For KB, TG, WB and JB to meet all of their developmental milestones.**
- 5. For KB, TG, WB and JB to feel confident and secure within themselves allowing them to interact appropriately with each other and others.**
- 6. For KB, TG, WB and JB to have safe, predictable and quality access with the mother.**
- 7. For WB and JB to have safe, predictable and quality access with the father.**
- 8. For KB, TG, WB and JB to be provided with medical services to address their respective health issues."<sup>392</sup>**

**Given the Department's position in this hearing in relation to access between KB & TG and the father, it seems that goal 7 should be amended to read:**

- 7. "For KB, TG, WB and JB to have safe, predictable and quality access with the father."**

**The Department opened and ran its case on the basis that in order for the Court to determine the appropriate level of access between the boys and the parents it was necessary for the Court to determine whether its permanent care case plans were in the best interests of each of the boys.<sup>393</sup> At the outset I was not absolutely sure that this was necessary but as the case unfolded it became quite clear that it was.**

**In the goals, objectives and tasks set out in the current case plan<sup>394</sup> and in the draft best interest case plan of April 2007<sup>395</sup> there is no mention of any support services to be provided to the mother to address the protective issues. In cross-examination**

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<sup>392</sup> Amended DOHS' Addendum report of witness 24 dated 01/04/2008 at p.12-13.

<sup>393</sup> This was a refreshing reverse of the position which the Department has not infrequently adopted in this Court that the Children's Court has no business at all examining the Department's case planning decisions. See for instance the judgment of Judge Coate in *NM, DOHS v BS* [Children's Court of Victoria, unreported, 21/12/2004] where this submission was raised and rejected. While it is certainly true that under Part 4.3 of the *CYFA* the preparation and review of a case plan is the sole responsibility of the Secretary (see especially ss.166-168 of the *CYFA*), it is also true that in making its decisions and orders the Court has to act independently of DOHS and on the basis that the best interests of the child must always be paramount: see s.10(1) of the *CYFA*. In order to do this the Court must sometimes examine the basis of the Department's case planning decisions.

<sup>394</sup> Amended DOHS' Addendum report of witness 24 dated 01/04/2008 at p.12-13.

**Witness 30 was asked about this. I agree with most of the reasoning underpinning her answers but I differ marginally from her on the question of time-lines:**

**Witness 30-** “My conversations with the mother in the arrangement for the case plan in April 2007 the only thing she would agree to is if we supplied relationship counselling for the purpose of the children coming home. One concern at the caseplan [meeting] is where do we go from this. In some service systems you need to recognize something in order to work on forward. The mother wasn’t willing to do anything save for relationship counselling for her and the father in the context of reunification with a denial of any harm from domestic violence. We didn’t make decisions that she wasn’t willing to consider at that time which would be a reflection of the draft case plan.

**Mr Gelfand-** Was any other assistance or support specifically offered up to May 2007?

**Witness 30-** At the caseplan in April 2007 I recall quite clearly because I was really concerned about what was happening. I couldn’t get a clear understanding of the mother’s circumstances at the time. I said how important it was in my assessment that she look at domestic violence counselling because I was concerned about her safety. I believe she was working with a housing worker at the time and she said that was sufficient. I spent a lot of time with her at caseplan to see how we could assist her safety and the children. I was aware that at the last caseplan in Location 3 there had been talk about the time being limited. There was concern she wasn’t able to do that.

**Mr Gelfand-** Why wouldn’t DOHS support relationship counselling?

**Witness 30-** For the purposes of reunification? We wouldn’t support it. The assessment was that the father was a concern if the children were in his care. Apart from the children I also had concerns for the mother’s safety with him anyway. We had been looking at reunification at that point for 18 months. The children couldn’t wait any longer. Even though the mother made promises and agreed to goals in previous case plans it was clear that she didn’t follow through which is why I spent so much time with her. When she did have services and when she did have KB & TG in her care and was not residing with the father I’d concur with witness 4 assessment and report for her. That shows in all the discussions we have had in relation to the children’s connection with their mother. She was able to provide good parenting and safety and make good decisions for the children at that time.”<sup>396</sup>

**The mother has been given many opportunities over a period of over 8 years to comply with case plans for various of her children and she has failed to do so. Not only were there reunification case plans made for KB & TG on 21/10/2005, 06/03/2006 & 12/10/2006 which the mother did not comply with, there were also similar plans for child A & child B in 1999 & 2000<sup>397</sup> which met the same fate. Mostly they failed because the mother was not prepared to separate from the father.**

**So it is very understandable that the Department now says enough is enough. In DOHS’ first report after the birth of the twins, the writers say:**

**“DOHS have attempted over many years to assist the mother to be able to parent her children and have informed the mother that this needed to be without her being in a relationship with the father. The mother has at times not**

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<sup>395</sup> See amended DOHS’ Disposition report of the protective worker dated 27/05/2007 at p.15.

<sup>396</sup> At pp.271-272 of my notes.

<sup>397</sup> See for example the case plan for child A developed at a case plan meeting held on 02/03/2000 which is referred to at p.5 of DOHS’ Application report dated 19/05/2000 co-signed by witness 8. See also *viva voce* evidence of witness 30 at p.269 of my notes.

been truthful with DOHS about her continuing relationship with the father, informing DOHS that they have separated so she can work towards reunification with KB and TG, but DOHS have discovered that the parents have remained in a relationship and the domestic violence between them has continued and consequently permanent care case plans have been made for her older 4 children.”<sup>398</sup>

On the evidence I have heard in this case it is unlikely the mother & the father will separate. They certainly presented as a “united front” during this lengthy court hearing as they did to witness 22 at the Clinic assessment on 13/08/2007.<sup>399</sup> They generally came in and left the courtroom together. When the mother went to location 1 on the afternoon of 12/05/2008 for a family function to commemorate what would have been her mother’s 50<sup>th</sup> birthday, the father did not go but was a half hour late back at court.<sup>400</sup> When the mother left court in the early afternoon of 08/05/2008 to attend a scheduled access visit with KB & TG – this was close to KB’s 7<sup>th</sup> birthday – the father left with her “to buy presents” even though he was not allowed to attend the access.<sup>401</sup> The father had a fall in the street during the lunch break on 15/05/2008 and was taken to hospital.<sup>402</sup> The mother did not come back to court. Neither parent was present in court during the afternoon of 19/05/2008.

Accordingly the Department’s permanent care case plans have a strong factual basis. If it was not for the evidence<sup>403</sup> of the strong bond between KB & TG and their mother, the boys’ extremely positive view of her and KB’s clear and long-standing wish to live with her, I would have approved the Department’s permanent care plans without hesitation.

If one asks the question “Does the mother deserve another chance at having the children reunified with her?” the answer is “No. She has had enough chances over 8 years.” But if the question is turned around and viewed with the children as its subject “Do KB & TG deserve another chance to have a family life in the care of their mother?” I think the answer is “Yes, one last tightly time-limited chance.” And if KB & TG deserve that chance so do the twins.

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<sup>398</sup> DOHS’ Application and Disposition report of the protective worker & (name removed) dated 20/08/2007 at p.11.

<sup>399</sup> At p.7 of her report witness 22 said: “The parents presented a united front on assessment day.”

<sup>400</sup> See p.115 of my notes.

<sup>401</sup> See p.64 of my notes.

<sup>402</sup> See p.165 of my notes.

## 22. THE PARENTS' DIFFICULT CHOICE

# **!! ANYTHING ??**

The mother told witness 4 on 03/03/2006 that her relationship with the father was over and that she was intending to get a restraining order against him. The mother stated that her priority is the children and that she will do anything required in order for the children to return to her care.<sup>404</sup> The question is “Will she?”

The mother told witness 25 on 30/05/2006: “I can’t handle being away from my children. I go to counselling for that.”<sup>405</sup>

It is clear that the mother has been told many times by the Department that she will never get the children back in her care unless she separates from the father.<sup>406</sup> I do not know whether she has ever been told this by an independent Court. I am telling both of the parents this now. For the reasons I have set out above<sup>407</sup> the evidence is overwhelming that the father would pose an unacceptable risk of both physical and emotional harm if he was to have any unsupervised contact with KB, TG or the twins now or in the foreseeable future. Nor can the boys be kept in limbo waiting for the father to change. That means that if the father & the mother want their boys to have any chance of living in the mother’s full-time care, they must separate now and no longer live in a domestic relationship with each other.

The choice is theirs. I know it will be viewed by them as a terrible choice, almost as a “Sophie’s Choice”<sup>408</sup>. But one or other or both of them will have to make it. There is no longer any alternative. Which is more important to them, their relationship or their children’s welfare?

They will also need to understand that the fact that this difficult choice has to be made is their fault. They have both been very blaming of the Department but it is

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<sup>403</sup> See especially sections 17.4, 18.1, 18.2 & 18.3 above.

<sup>404</sup> See DOHS’ Application report of witness 4 dated 10/03/2006 at p.9. The emphasis is mine.

<sup>405</sup> Report of witness 25 at p.5.

<sup>406</sup> See, for example, DOHS’ Application and Disposition report dated 20/08/2007 at p.11.

<sup>407</sup> See especially in section 20.3.

<sup>408</sup> A novel by WB Styron (1979) whose plot involves a choice between two unbearable options.

not the Department which assaulted several of their children or put them all at serious risk of physical harm or emotional harm from exposure to violence. In a conversation with witness 15 at access on 04/04/2008 the mother said: “They are doing to us just what they are doing to the aboriginals, taking our kids away from us.”<sup>409</sup> The mother needs to understand that her case is about as different from the “Stolen Generation” as you can get. The Stolen Generation children were taken from aboriginal families simply because they were aboriginal. It would be like me taking the children away from the mother because she has Albanian forebears or from the father because his father was Maltese. That is completely different from a case where I am satisfied the children are at significant and unacceptable risk of harm were they to be placed with their mother while she was continuing to live in a domestic relationship with the father.

It would be possible for the mother to make a decision to cease her domestic relationship with the father on her own but it would be better if the mother & the father were to make a joint decision so that both have “ownership” in it.<sup>410</sup>

I will set conditions on the custody to Secretary orders which will allow a greater frequency of access between the mother and each of the boys commencing in 4 months time if she and the father cease living as a couple on a genuine domestic basis within the next 2 months and remain living separately and apart. If these preconditions are met, I believe a final attempt at reunification is in the boys’ best interests.

## **23. CUSTODY TO SECRETARY ORDERS FOR THE TWINS**

The Department is now seeking that the protection applications for the twins be proved on the grounds set out in ss.162(1)(c) & 162(1)(e). It is no longer pursuing proof on the grounds in s.162(1)(f) of the *CYFA*. 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)'

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<sup>409</sup> Evidence in chief of witness 15 at p.101 of my notes. See also document D17 at p.13 where there is a reference to the mother saying she was being “punished” by having her children removed.

<sup>410</sup> See the recommendation by (name removed) to give the father some “ownership” in decision-making which is referred to in section 15 above.

actions or inactions - and is to be determined as at the time when the protection application was issued.<sup>411</sup>

The protection applications in relation to the twins were taken out two days after they were born. There is no evidence that either of the twins have suffered any actual harm – whether physical or emotional – as a consequence of actions or inactions by anybody, let alone by either of their parents. There was a bold assertion in the first report of witness 23 that JB’s feeding difficulties in January 2008 were “associated with significant emotional and psychological distress”<sup>412</sup> but in cross-examination she resiled – correctly in my view - from asserting a causal connection. The significant improvement in JB’s feeding coincided with the introduction of solids, as had been recommended by (name removed) in his report to DOHS dated 21/01/2008. It also coincided to some extent with the suspension of maternal access. Witness 23 admitted: “With the reduction in access and introduction in solid foods, it is not clear what the cause of the improvement was.”<sup>413</sup> Witness 26 had also rather boldly asserted that “with JB in particular the frequency of access was quite disruptive to his confidence in feeding and his growth”<sup>414</sup>. I said to witness 26 that given the material in (name removed)’s report and the cross-examination of witness 23 it was not my present view that one could safely draw that causal connection. Witness 26 then also largely resiled:

“I can do no other than rely on what others have said. You are right to be cautious about that interpretation as I should be but my understanding is that the frequency of contact at that time with multiple handling by multiple people was disruptive to the self-regulatory process part of which ensures feeding. Perhaps I should step back from my statement and say that’s a possible cause. When I had seen [JB] he had turned the corner from whatever the problem was and was feeding well.”<sup>415</sup>

I am not satisfied on the balance of probabilities that JB’s feeding difficulties were associated with any emotional/psychological distress.

The Department’s case is based on the likelihood of the twins suffering significant harm from physical injury and significant psychological harm in the absence of

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<sup>411</sup> 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}.

<sup>412</sup> See Take Two report of witness 23 dated 29/03/2008 at p.3.

<sup>413</sup> In cross-examination by counsel for the mother at pp.169-170 of my notes.

<sup>414</sup> In cross-examination by counsel for the mother at p.224 of my notes.

intervention by it. The relevant test of 'likelihood' is that set out in *re H. & Others (Minors)(Sexual Abuse: Standard of Proof)*<sup>416</sup> by Lord Nicholls of Birkenhead. In relation to the broadly similar provision in s.31(2)(a) of the *Children Act 1989* (Eng), Lord Nicholls (with whom Lord Goff of Chiefly & Lord Mustill agreed) held:

**“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.”<sup>417</sup>**

His Lordship went on to provide guidance on the way in which likelihood of harm may be proved, noting that the section contains "the language of proof, not suspicion"<sup>418</sup>:

**“A decision by the Court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom....[A] court's conclusion that the threshold conditions are satisfied must have a factual base, and...an alleged but unproved fact, serious or trivial, is not a fact for this purpose. Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened.”<sup>419</sup>**

**“The range of facts which may properly be taken into account is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed changes within the membership of a family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, when taken together may suffice to satisfy the court of the likelihood of future harm.”<sup>420</sup>**

Counsel for both parents conceded proof of the protection applications on the likelihood limb of s.162(1)(e) but opposed proof on either limb of s.162(1)(c), submitting: “As the twins have never been in the parents’ care and access is to be supervised, the applications should not be proved on likelihood of physical harm.”<sup>421</sup> I disagree. That is not the correct test. What I have to decide is whether on 30/07/2007 there was a possibility that could not sensibly be ignored that the twins

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<sup>415</sup> At p.224 of my notes.

<sup>416</sup> [1996] AC 563.

<sup>417</sup> At p.585. The emphasis is mine.

<sup>418</sup> At p.590.

<sup>419</sup> At pp.590-591.

<sup>420</sup> At p.591.

would suffer the requisite physical harm in the future had the Department not intervened.

The historical and ongoing incidents of threats, violence, anger and aggression involving the father which I have detailed above<sup>422</sup> - when read in conjunction with the research referred to by witness 26 about the risks associated with exposure of very young children to persistent trauma<sup>423</sup> - make it clear beyond all argument that in the absence of Departmental intervention there was a possibility which could not sensibly have been ignored that the twins would have suffered significant harm of the type referred to in ss.162(1)(c) & 162(1)(e) of the *CYFA*. The protection applications are proved accordingly.

Under s.10(3)(a) of the *CYFA* the Court is required to ensure that intervention into the relationship between the parents and the twins is limited to that necessary to secure the safety and wellbeing of the twins. On appropriate legal advice the parents are not seeking that the twins be returned to their immediate care.<sup>424</sup> There is no extended family member available or nominated to be the carer of the twins. It follows that neither a supervision order nor a supervised custody order is available. The least interventions necessary to protect the twins are thus custody to Secretary orders. Given the history of the family, these orders should be for 12 months, the maximum period allowed by law.<sup>425</sup>

## **24. EXT'N OF CUSTODY ORDERS FOR THE OLDER BOYS**

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

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

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<sup>421</sup> Submission of counsel for the mother with which counsel for the father agreed at pp.287-288 of my notes.

<sup>422</sup> In section 14.

<sup>423</sup> Discussed in section 20.1 above.

<sup>424</sup> See section 4.2 above.

<sup>425</sup> See s.287(1)(c) of the *CYFA*.

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

- (a) the nature of the relationship between the child and parent, including the nature of the access between the child and the parent during the period of the order; and**
- (b) the capacity of the parent to fulfil the responsibilities and duties of parenthood, including the capacity to provide adequately for the emotional, intellectual, educational and other needs of the child; and**
- (c) any action taken by the parent to give effect to the goals set out in the case plan; and**
- (d) the effects on the child of continued separation from the parent; and**
- (e) any other fact or circumstance that, in the opinion of the Court, should be taken into account in considering the best interests of the child.**

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

**As I have said above<sup>426</sup>, I am satisfied that a final attempt at reunification of KB & TG with their mother is in the boys’ best interests if she & the father cease living as a couple on a genuine domestic basis within 2 months and do not reunite. However, reunification is not otherwise in the boys’ best interests.**

**Given this finding and the absence of any approved permanent carer for either boy, it follows that I am not presently satisfied of the matters in ss.295(2)(a) & 297(1)(d) of the CYFA and accordingly the direction referred to in s.297(1)(f) of the CYFA is not applicable.**

**However, given that-**

- on legal advice (with which I agree) the mother & the father are not seeking that either KB or TG be returned to their immediate care and are not contesting the extension of the custody to Secretary orders;<sup>427</sup> and**
- there would, in my view, be an unacceptable risk of harm to both boys if returned to the joint care of the father & the mother-**

**it is in KB’s & TG’s best interests to extend their custody to Secretary orders.<sup>428</sup>**

**The matters in ss.295(2)(b), 295(3)(b), 295(3)(c) & 10(2) and in paragraphs (e), (f) &**

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<sup>426</sup> See section 21 above.

<sup>427</sup> See section 4.2 above.

<sup>428</sup> See s.294 of the CYFA.

(j) of s.10(3) of the *CYFA* outweigh those in ss.295(3)(a) & 295(3)(d) and in paragraphs (a), (b), (d), (g), (i) & (k) of s.10(3).

The custody to Secretary orders for KB & TG have been in force since 18/09/2006. Since s.297(1)(f) is not presently applicable the maximum period for which the orders may be extended is 2 years.<sup>429</sup> The Department is seeking an extension of 12 months.<sup>430</sup> The parents are not opposing that.<sup>431</sup> KB is too young to express a view on this issue. Balancing all of the evidence I consider that an extension of 12 months is in the best interests of both children. Although it is desirable to set a period much shorter than 12 months for the parents to make their “difficult choice”<sup>432</sup>, this can be achieved by limiting the duration of certain conditions rather than by limiting the duration of the extension. And although the Court is mindful of the possible harmful effect of further delay on the two boys<sup>433</sup>, the reality is that if the mother chooses the father and the permanent care case plans accordingly progress, it is highly unlikely that DOHS would be in a position to seek permanent care for KB in less than 12 months and highly likely that any permanent care application for TG is likely to be much further than 12 months away.

## **25. LIMITATIONS OF THE EXPERT EVIDENCE**

Several clinical psychologists [witness 21, witness 25 & witness 22] and an infant psychiatrist [witness 26] were called to give expert evidence in this case. Part of their questioning related to the ultimate issue, namely the frequency, duration and nature of access between the family members. However, a major limitation of their evidence is that each of their observations involved only part of the overall factual matrix. Witness 21 assessed the mother, child A & child B in March 2003 and made incidental observations of the very young KB but has never met the father or the twins. Witness 26 assessed the mother, the father & the twins in March 2008 but has never met or assessed KB or TG. Witness 25 assessed the mother, KB & TG in May 2006 but has never met or assessed the father or the twins. Witness 22 assessed

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<sup>429</sup> In these circumstances s.296(2)(b) of the *CYFA* prevails over s.297(1)(e).

<sup>430</sup> See section 4.1 above.

<sup>431</sup> See section 4.2 above.

<sup>432</sup> See section 22 above.

<sup>433</sup> See s.10(3)(p) of the *CYFA*.

the mother, the father, KB & TG in August 2007 but has never met or assessed the twins.

Though the Court is pleased to hear evidence from experts of the calibre of witness 26, witness 21 & witness 22, it is important to note the limitations of their evidence. To do so is not to be critical of any of these experts in any way. In *Re W (Sexual Abuse: Standard of Proof)*<sup>434</sup> the trial judge had accepted the evidence of a child psychiatrist who was appointed by him as a Court expert to enquire into and report, *inter alia*, on the nature and quality of the investigation into the allegations of child sexual abuse made in the case. That psychiatrist gave evidence that while he had some criticisms of the procedures followed, it was his view that on the balance of probabilities there was sufficient evidence to have significant concerns that the father had sexually abused his daughter. However, he had not seen either the parents or the children. A Full Court of the Family Court of Australia, comprising Kay, Holden & O’Ryan JJ, described the trial judge’s reliance on the evidence of the psychiatrist as “particularly troublesome”<sup>435</sup> and it concluded that the psychiatrist’s “evidence concerning the probabilities of something untoward having occurred should have been given very little weight”<sup>436</sup> especially as he had not seen the family members:

[38] “In *Re W Abuse Allegations; Expert Evidence* (2001) FLC 93-085 Nicholson CJ and O’Ryan J (with whom Kay J agreed on this point) warned of giving weight to expert evidence of a psychiatrist who had not seen the parties nor the children but had reviewed the material. Their Honours said at [147] ‘...there are grave dangers in reliance upon expert evidence given in such circumstances’.

[39] Whilst much of their Honours’ rejection of the evidence of the psychiatrist in *Re W* appears to turn on the fact that he was retained by one side and must have brought unconscious bias to his task, in our view the criticism of relying upon an opinion about the ultimate issue from a witness who has not seen the parties nor the children remains just as valid when the witness is called by the court. If an expert witness still purports to give an opinion as to the ultimate issue then such opinion would be expected to be heavily qualified by the expert having regard to the fact that the expert had not seen the parties nor the children.”

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<sup>434</sup> [2004] FamCA 768.

<sup>435</sup> At [37].

<sup>436</sup> At [40].

Applying this dicta, I give little weight to the opinion – admittedly a heavily qualified opinion – of witness 21 as to the appropriate level of access between the parents and the twins.

Part of the evidence of witness 21 and witness 26 involved a discussion of the research and literature relating to infant development, with particular emphasis on the development of attachment in infants. I found this evidence particularly interesting and of general assistance to me in my role as a magistrate allocated to the Children’s Court. But it is important not to over-emphasize its usefulness when applied to any particular case. The research and the literature does have an important role. But it is not an independent role. It provides the framework which enables observations of the behaviour of a particular person or persons to be evaluated and predictions to be made about the likelihood of future patterns of behaviour. Absent subjective observations of a particular caregiver and/or parent and of a particular child, preferably over a period of time, the framework – standing alone – is much less useful for it exists in a factual vacuum. Absent observations or other relevant evidence of the quality of the particular interactions or the characteristics - including the resilience - of the particular individuals, prediction of risk of future harm and analysis of what is in the best interests of the particular child are inevitably much less certain. I illustrate this by reference to two particular examples from the evidence in this case-

- Witness 3 gave evidence that he had heard from the current worker witness 2 that “there was a weekend access facilitated by the carers and TG’s reaction was one of joy when he saw the twins and KB; he found that a very positive experience”<sup>437</sup>;
- Witness 1 gave evidence that KB appeared stressed when contact with his mother changed from physical to telephone contact: “the carer...felt that KB was angry and that he was experiencing that; he was more angry; he was more up and down, more emotional”<sup>438</sup>.

An opinion about appropriate levels of contact between KB & TG and their mother and siblings based on objective criteria – theoretical criteria - but made without knowledge of subjective evidence of the children’s behaviour must be treated with

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<sup>437</sup> In evidence-in-chief at p.28 of my notes.

considerable caution. This conclusion also follows from the *CYFA* itself. Section 10 requires the Court to focus on – and treat as paramount – the best interests of the child, not children generally as a group but on the particular child the subject of each application.

## **26. OPINIONS ON BOYS' FUTURE PARENTAL ACCESS**

The power to vary the custody to Secretary orders for KB & TG derives from s.301 of the *CYFA* but no specific guidelines are given as to how this power is to be exercised. It follows that the “best interests” provisions of s.10 of the *CYFA* apply just as they also do in determining appropriate conditions on the custody to Secretary orders for WB & JB.

Under s.10(2) of the *CYFA* I must protect each of the boys from harm, protect his rights and promote his development. Under s.10(3)(k) I must consider appropriate “access arrangements between the child and the child’s parents, siblings, family members and other persons significant to the child”. In determining what access arrangements are appropriate, I have to balance a number of the other matters in s.10(3), including in s.10(3)(b) “the need to strengthen, preserve and promote positive relationships between child and parent” and in s.10(3)(j) “the capacity of each parent to provide for the child’s needs and give effect to the goals set out in the case plan”. Some considerations pointing to greater access appear to be:

- (a) minimum intervention into relationship of parent and child;
- (d) KB’s wishes and TG’s implied wishes;
- (i) desirability of planning reunification of child and parent;

Some considerations pointing to lesser access appear to be:

- (e) the effects of cumulative patterns of harm on a child’s safety and development;
- (f) desirability of continuity and stability in the child’s care;
- (n) [for KB & TG] desirability of him participating in appropriate social opportunities;
- (o) [for KB & TG] desirability of allowing his education to continue without interruption.

The evidence discussed in sections 17 & 18 above strongly suggests that as between these children and these parents the accesses are now working well. Prior to his assessment on 14/03/2008 the Department provided witness 26 with a bundle of

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<sup>438</sup> In her report at p.13 and in cross-examination by counsel for the mother at p.13 of my notes.

reports in relation to observations at supervised access between the parents and the twins. Witness 26 said of these:

“Reports of the interactions [between] WB and JB and their parents make it clear that in the context of supervised access they have been able to demonstrate appropriate and loving care giving interactions.”<sup>439</sup>

Witness 26 agreed with counsel for the mother that on his reading the accesses reported on were “overwhelmingly positive”<sup>440</sup>. From time to time there has been tension between certain of the adults but there is no evidence that that has affected the quality of the parent-child interaction.

## 26.1 OPINION OF WITNESS 25 RE KB & TG AND MOTHER

Following her assessment of KB & TG and their mother on 30/05/2006, witness 25 recommended, *inter alia*:

“That contact with their mother is made dependent upon the mother’s willingness to engage in psychotherapy.

That contact with the mother is reduced from three times weekly to about once a fortnight and that access is initially supervised. Access arrangements should be reviewed according to the needs of the boys and the mother’s capacity to develop reflective thought and achieve resolution.”<sup>441</sup>

Witness 25’s recommendations were set out by the protective worker witness 4 in his report dated 07/07/2006 but were not adopted by DOHS which recommended instead that supervised access occur between KB & TG and their mother for a minimum of 3 times per week, placing no pre-condition that such access was to be dependent upon the mother’s willingness to engage in psychotherapy.<sup>442</sup> In the light of all of the evidence I have heard of the strong relationship between the boys and their mother, I consider it would be cruel to make contact dependent on their

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<sup>439</sup> Infant Mental Health Report of witness 26 dated 30/03/2008 at p.6.

<sup>440</sup> At p.217 of my notes.

<sup>441</sup> Report of witness 25 dated 29/06/2006 at p.11.

<sup>442</sup> See DOHS’ Addendum report of witness 4 re KB & TG dated 07/07/2006 at p.6. Given that DOHS was so dismissive – and correctly so in my view – of witness 25’s recommendations in 2006, it is unclear to me why she was called to give opinion evidence in this case. Perhaps the answer is that she was called to give first-hand evidence of KB’s diagnosis of PTSD and of KB’s disclosures about the father (as to which see footnote 117 & section 14.1 above) but if that was the only reason she was called it is difficult to understand why counsel for DOHS spent so much effort in re-examination in an ultimately unsuccessful attempt to have me adopt witness 25’s opinion on the boys’ attachment to their mother (as to which see section 18.1 above).

mother's willingness to engage in psychotherapy and I entirely reject witness 25's opinion on the frequency of and pre-conditions to access.

## **26.2 OPINION OF WITNESS 21 RE THE TWINS & PARENTS**

In September 2007 witness 21 had been asked by DOHS to provide an expert opinion on whether access between the twins and the parents each day for several hours was appropriate. Her view was that it was not and she recommended a reduction to once weekly for the following reasons:

“Daily contact between infant and parents is something clinically advisable when there is a very clear reunification plan and clear evidence around the capacity of the parents to care and lay down foundations for secure attachment. I was concerned because there certainly hadn't been a thorough assessment of the capacity of the parents to do that with these infants. What inadvertently happens with these very frequent contact schedules is that infants are denied the opportunity to form security with anyone and particularly with the foster parents. Secondly I took into consideration the history from my assessment and witness 25's assessment of [KB & TG] and saw a very clear pattern which needed to be assessed thoroughly in relation to these infants before they were exposed to such a frequent schedule. It doesn't have anything to do with the supervision of the access. It's got to do with the disruption of the infants' schedule and the absence of the infants from their primary carer, in this case the foster parents. This is the sort of regime which when ongoing for several weeks or months can cause disorganized attachment in infants...One of the core truths about attachment security is in the critical period from 0-18 months it requires the regular, consistent, predictable, reliable and most importantly the responsive presence of the primary caregiver...There is no research I am satisfied with methodologically that shows us increased access from a visiting parent adds to attachment security. Research shows a nominal difference between infants who have access once per week and those who have access several times per week.”<sup>443</sup>

Witness 21 went on to identify three levels of contact for a non-custodial parent-

1. **Attachment-based contact**: Where reunification is being pursued - up to 4 days per week leading to overnight.
2. **Relationship-based contact**: Where reunification is not on the cards but the parents have been assessed as able to contribute to the emotional development of the child – more like monthly.
3. **Identity-based contact**: Where reunification is not being pursued and the parents have a history of traumatized care - something of the order of 4 times per year or less.

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<sup>443</sup> Evidence in chief of witness 21 at pp.134-135 of my notes.

Witness 21's expert opinion in September 2007 was that "once weekly contact with parents involving little transportation of the infants for a 2-3 hour period is in line with best practice case management" and one supervised access visit per week was "recommended to hold the case over" until an assessment had been completed of the parents' capacity to care and lay down foundations for secure attachment.<sup>444</sup>

Witness 21 was asked about the appropriate level of access between the parents and the twins now if reunification was not considered appropriate by the Court. She gave a ball-park figure but properly declined to give a definitive answer:

"As I have not assessed father at all and I have some knowledge of mother, I'd be looking if contact were to be placed at monthly or fortnightly you would need very solid evidence of parents' capacity to support the children in their placements and to contribute to their emotional development by protecting them from any further trauma and generally being willing to participate in their lives in an effective and supportive way. It depends a great deal on the extent to which each parent has integrated their own traumas and can provide a safe presence to the children. I can't say what the answer is. If the Court was to have serious doubts as to capacity of either parent to do that, one would be looking at quarterly or less. In a small minority of cases we have recommended no contact at all when a parent cannot contain toxic behaviour or where – very rarely – a child is insidiously re-traumatised simply by the presence of the parent. Those are the sorts of benchmarks I would be looking at."<sup>445</sup>

While I do not reject witness 21's opinion out of hand, for the reasons discussed above<sup>446</sup> I can give little weight to an expert opinion reached in what is close to a factual vacuum and which is partly based on an assessment by her former colleague witness 25 which I do not accept.<sup>447</sup>

### 26.3 OPINION OF WITNESS 29 RE THE TWINS & PARENTS

Witness 29 did not see any particular reason to change the *status quo* for the twins. However, like witness 21's, her expert opinion has the disadvantage of being given in a factual vacuum as she had not seen the children whether in the company of their parents or otherwise-

Ms Aitken- "Given [the father's] access has been three times a week for 1 hour and access has been going extremely well for some months now with no concerns by DOHS, would that help you to say how access will go in the future?"

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<sup>444</sup> *Op.cit.*, p.135.

<sup>445</sup> In evidence in chief at p.136 of my notes.

<sup>446</sup> In section 25.

<sup>447</sup> See section 18.1 above.

Witness 29- I wouldn't see a problem with it continuing that way so long as it was supervised.

Ms Aitken- If access is smooth is that going to have any negative impact on the children?

Witness 29- I wouldn't believe so. Any supervised contact as long as there are no anger issues, I don't see how that would affect or harm the children."<sup>448</sup>

## 26.4 OPINIONS OF WITNESS 24 & WITNESS 30

Witness 30 & witness 24 each support the notion of access described in DOHS' Draft Best Interests Case Plan in the following relatively unspecific terms:

“To ensure a sense of identity and connectedness to their biological family of origin for KB, TG, WB and JB to have safe, meaningful and predictable contact with the parents and extended family in line with permanency planning.”<sup>449</sup>

What became clear from the cross-examination of both witness 24 & witness 30 was that they were saying that access needed to be reduced and in forming that opinion they were relying on two things-

1. the opinions of professionals, including witness 21, witness 23 & witness 26; and
2. the requirements imposed on DOHS by external permanent care agencies.

That much appears from the following evidence of witness 24<sup>450</sup>:

Mr Gelfand- “Do you dispute the view that KB had a very strong connection to his mother?

Witness 24- No. I'm not in a position to dispute that, no.

Mr Gelfand- Are you aware that he has often spoken to his carer about his mother and to the other workers from Ozchild?

Witness 24- Yes.

Mr Gelfand- And aware in relation to his behaviour associated with the cessation of access?

Witness 24- Yes, I am.

Mr Gelfand- Are you aware of KB's instructions in this case?

Witness 24- Not entirely.

Mr Gelfand- He says he wishes to return to live with his mother and father. In light of the evidence in relation to the mother and KB's improved psychological health on what basis do you recommend that access between KB and his mother should be reduced?

Witness 24- A permanent care caseplan has been in place since April 2007 and in relation to the reduction of access in relation to his ongoing stability and his knowledge of where he is going to be in the future access needs to be reduced in light of permanent care planning. My understanding is that the agency looking at permanent care planning can't go forward any further while access is at the level it is currently. Knowing there is no plan to reunify KB needs to have an understanding of where he is long-term and the current access regime wouldn't support him looking to move forward.

Mr Gelfand- On what basis do you say he can't move forward with current or increased levels of access?

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<sup>448</sup> At p.257 of my notes. See also other *viva voce* evidence by her at p.261. In retrospect it was probably not very fair of counsel for the father to ask for witness 29's opinion on this issue, but no objection was taken either by me or by the other counsel.

<sup>449</sup> See amended DOHS' Addendum report of witness 24 dated 01/04/2008 at p.26.

<sup>450</sup> Witness 30's rationale was to like effect.

**Witness 24-** We have had a number of discussions with other professionals re children's understanding of permanent care planning and any child having access at that level gives a child a mixed message where he is going to be in the long-term. Ongoing access at the level it is currently doesn't give the child a chance to understand he is not going to live with his mother but is going to reside at a place which is not with his mother.

**Mr Gelfand-** The truth is that access hasn't presented any problem with KB developing attachment with his carer?

**Witness 24-** Yes. I agree with that.

**Mr Gelfand-** You are not aware that KB hasn't wanted to go to access or at the end not to go back to the carers?

**Witness 24-** I'm not aware of that.

**Mr Gelfand-** What it boils down to is the practicalities of the requirements of the external agencies?

**Witness 24-** I accept that is a huge issue in relation to permanent planning. I don't really know if KB has an understanding of whether he will return to his mum or whether he won't.

**Mr Gelfand-** You cannot say whether or not the current levels of access once per week with his mother or the level it was until February are in any way detrimental to KB can you?

**Witness 24-** Well, I'm not so much an expert in attachment and what the impact would be so that would be a more appropriate question for an expert.

**Mr Gelfand-** Part of your decision is based on advice you have received that those levels of access are not in his best interests?

**Witness 24-** Yes.

**Mr Gelfand-** Advice received from witness 21?

**Witness 24-** Yes I have and a number of different agencies or people who have had involvement with the case [(name removed), witness 26 & witness 23] that...the quantity of access won't necessarily be in his best interests in that it won't change the attachment with his mother."<sup>451</sup>

It seems from witness 24's evidence that the tail of the external agencies is wagging the Department's dog when it comes to permanency planning. That this leads to a Catch-22 situation in many cases appears from some answers witness 30 gave in an exchange with me, triggered by her attempt to justify witness 26's primary opinion:

**Ms Athanasopoulos-** "For a child like KB who likes his mother two weeks is a long time to wait.

**Witness 30-** Reduction over a period in light of what KB could cope with and how he is travelling in relation to that reduction to fortnightly. In one sense we need KB to make some sense of his world because we need to give him something – where possible through a therapeutic process – he needs to be reassured at some level as to his future placement.

**Mr Power-** But you can't do that because you don't know with whom he will be living in the future. It's a fundamental flaw in how the whole permanent care process is set up. It never has been child-centred.

**Witness 30-** I had a discussion with the agencies and they would not be prepared to take a child as a candidate for permanent care if the child is on multiple week accesses.

**Mr Power-** I have taken an oath of office. I have to apply the law [specifically s.10 of the CYFA] even if the agencies do not. If DOHS as prime contracting party doesn't require its agents to apply the law, that's its lookout. It can't expect me to disregard the law because of a so-called requirement of its agents.

**Witness 30-** I understand what you are saying."<sup>452</sup>

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<sup>451</sup> At pp.180-181 of my notes.

<sup>452</sup> At pp.286-287 of my notes.

**I had a similar exchange with witness 24:**

**Mr Gelfand-** “In what sense do you say reducing access can assist KB to move forward?

**Witness 24-** It still allows a relationship with his mother but allows the permanent carer and KB to build on their relationship with each other.

**Mr Power-** But there is no permanent carer.

**Witness 24-** Carers 3 & 4 are saying they are interested in being permanent carers.

**Mr Power-** But they haven’t been approved as permanent carers yet.

**Witness 24-** Yes.

**Mr Power-** Isn’t that putting the cart before the horse for me to reduce access while [the carers] haven’t been approved [as permanent carers]?

**Witness 24-** Yes your Honour. The process of assessment hasn’t started yet.

**Mr Gelfand-** Are you aware of any evidence of the current level of access preventing KB or TG from building a relationship with the carers?

**Witness 24-** No. I’m not.”<sup>453</sup>

I am concerned by witness 30’s and witness 24’s evidence about the way in which permanent care planning is apparently organized in this State. I consider that a blanket requirement to reduce access in order to commence permanent care planning can often be out of kilter with a particular child’s developmental needs and does not properly take into account the legal requirement to apply the matters in s.10 of the *CYFA* to each individual child’s circumstances. KB’s case is a particularly striking example. It is clear that witness 26 also disapproves of the current practice being applied across the board as a rule of thumb:

- “I would share your disquiet about the process for some of the families I have met with. I’m not an expert on the process of permanent care planning within DOHS and how that works...I have seen cases where contact with a maltreating parent has been traumatizing each time contact occurs and little prospect of that changing. In those circumstances that view from DOHS is probably appropriate but it is one which should be decided on a case by case basis rather than on a blanket view.”<sup>454</sup>
- “I know the practice for children in permanent out of home care is for very infrequent contact but I think that’s a matter of practice rather than proven benefit for an individual in an individual case.”<sup>455</sup>

It follows that I will accept witness 24’s & witness 30’s opinions on the appropriate duration and frequency of access for these boys only to the extent that they are consistent with the opinions of other experts which I accept. Even if the permanent care caseplan is confirmed, it makes no sense to me at all to reduce any of the boys’ accesses with their mother to allow them to “build on their relationship with their permanent carer” when that permanent carer has not yet been identified.

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<sup>453</sup> At p.182 of my notes.

<sup>454</sup> In cross-examination by counsel for the mother at p.221 of my notes.

<sup>455</sup> In evidence in chief at p.213 of my notes.

## 26.5 OPINION OF WITNESS 23 RE ALL 4 BOYS

Counsel for the Department opened the case on the basis that for all 4 children access should be 3 hours once per fortnight to be supervised.<sup>456</sup> There was no pre-condition other than supervision. In her most recent report witness 23 recommended-

“that the children continue to have contact with their parents for the purpose of identity development and connection. However, it is important that this not occur at a level that will compromise the stability, security and safety provided in the current placements.”<sup>457</sup>

But in her *viva voce* evidence witness 23 did three about-turns, firstly recommending that access between the father and TG merely be “considered”, secondly recommending no access at all between the father and KB and thirdly half resiling from that position<sup>458</sup>:

Ms Aitken- “You recommended that the children continue to have contact with parents. Which children and in what context?

Witness 23- The recommendation is intended to refer to all 4 children.

Ms Aitken- Are you recommending that the father have contact with all 4 children?

Witness 23- I’m recommending that he have contact with the 3 children who are biologically his. It is intended to refer to the mother having contact with the 4 children who are biologically hers and the father having contact with the 3 children who are his children.

Ms Aitken- Why didn’t you stipulate that in your recommendations?

Witness 23- It’s not necessarily unclear. I’m recommending that all 4 children have contact with their mother.”

I interpose to say that I found witness 23’s evidence extracted above to be internally inconsistent. Of course it’s unclear. The recommendation in her report has fundamentally changed. I asked her a few questions to try to clarify her position:

Mr Power- “Are you recommending that KB have access with his biological father?

Witness 23- As far as I’m aware we don’t know who KB’s biological father is.

Mr Power- Why are you making this recommendation at all?

Witness 23- DOHS had asked us for recommendations in relation to access. We haven’t done an assessment of the quality of access between the children and the parents. I’m not in a position to make recommendations in relation to the duration or frequency of access. It is a general recommendation based on a general principle that it is desirable for children to have contact with their parents for the purposes of identity development and connection. We are aware that TG hasn’t had contact with the father for quite a period of time, not since he has been in care, and in discussion between myself and (name removed) we did have a view it would be appropriate for him to have some contact with his father.”

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<sup>456</sup> See section 4.1 and footnote 22 above.

<sup>457</sup> Report of witness 23 dated 14/05/2008 at p.3.

<sup>458</sup> The following 4 extracts of evidence are taken from pp.246-247 of my notes.

I interpose to say that I agree with this last answer of witness 23 and the rationale behind it. It is appropriate for TG to have some contact with his father.

Cross-examination continued:

Mr Power- “Why have you drawn a distinction between KB not having access with the father and TG having access with him?”

Witness 23- Based purely on the fact that TG’s biological father is the father and KB’s biological father is as far as I am aware unknown.

Mr Power- Your recommendation is rubbish if it is based solely on that distinction.

Witness 23- As far as I’m aware KB believes that the father is his father. It is known within the care team and I’d have some quite significant concerns about KB being put in a position that something that’s not the truth is the truth.

Mr Power- You might as well say the same about the Santa Claus myth.

Witness 23- [ANGRILY] It’s a fact fundamental to their identity about who they are in the world and that’s quite different to the concept of Santa Claus.

Ms Aitken- The father has instructed that KB does identify him as his father.

Witness 23- [NODS AGREEMENT]

Ms Aitken- He has been with the father, not currently, but from the time he was born. He was not ever with any other person who could have been called his father.

Witness 23- That’s not my understanding in relation to the history that I know. I may be incorrect.

Ms Aitken- Your recommendation if implemented and TG were to have access with the father and KB were not, don’t you think that would be traumatic for KB if TG were to have access with the person he considers to be his father?

Witness 23- I’m not sure whether he wants to see his father.

Mr Power- Assume he does.

Witness 23- On that assumption I think it would cause KB some confusion and distress and there would need to be a lot of discussion and planning about implications in change of the access regime, implications for all of the children including TG and KB.

Mr Power- Are you recommending that TG have access with his father?

Ms Witness 23- I’m recommending that be considered but there would need to be planning around that.

Mr Power- Where does it state that in your reports?

Witness 23- It doesn’t state that.

Ms Aitken- Given that KB has said he wants to see his father and he identifies the father as his father, if he were not ever to make contact with his biological father would you agree it would be detrimental to him in the long term to be deprived of a father figure?

Witness 23- I’m not sure I can answer that. I’m not necessarily sure it would be. It depends on what KB identified as needing. If he requested contact with the father at some time in his life that should be considered.

Ms Aitken- When he is older?

Witness 23- At any point when he spontaneously requests contact with the father that should be considered, including now.”

I interpose to say that by now witness 23 seems to have turned nearly 180 degrees from the position I had shortly before rather rudely described as “rubbish”. Cross-examination continued and she turned partly back again:

Ms Aitken- “There is evidence he has spontaneously requested access.

Witness 23- It may well be appropriate for him to have contact with the father under those circumstances but to put in place an access schedule based on KB continuing to believe the father was his father would be problematic for KB in the long term.

Ms Aitken- Are you suggesting that should be addressed in some way?

Witness 23- At some point in his life that will need to be addressed. I’m not saying it needs to be addressed now.

Ms Aitken- Are you saying he could maybe have access without it being addressed now?

Witness 23- [VERY LONG PAUSE] I'm not sure. I think I need to be in a position of knowing what KB said and what his wishes are before I could make a recommendation about it. I haven't heard from KB what his wishes are or heard from his carers. I'd have to speak to KB's carers and the person he has expressed that to to understand more what is driving that for KB."

That last answer reminds me of St Thomas. I am bound to say that reading this evidence again made me giddy. I largely accept witness 23's original opinion but not the "spin" she later put on it in the witness box.

Witness 23 had assessed KB & TG in March 2008. Unfortunately she has not been able to assess the parents or observe any of the accesses between any of the boys and the mother and/or the father. This was the parents' fault, not hers. Wrongly in my view, they had decided not to participate in any further sessions with Take Two after the initial session on 29/02/2008.<sup>459</sup>

Witness 23 was very well cross-examined by counsel for the mother about the importance of ensuring that there was ongoing contact between each of the boys and their mother and between the siblings. So far as maternal access is concerned, witness 23 spoke of access providing a sense of connectedness for KB and agreed that given the possibility of placement change, any reduction in access might contribute to KB's feeling of instability. She also agreed that the significant amount of regular access which KB had had with his mother does not appear to have prevented him from developing safe and secure relationships with his carers. I strongly agree with her evidence in the following passage:

Mr Gelfand- "In relation to KB & TG, their relationship with their mother is an important part of their lives?

Witness 23- Absolutely...

Mr Gelfand- "KB has not been with his mother for 2 years and has had no contact with his father [the father] during that time?

Witness 23- That's right.

Mr Gelfand- From your observations of KB during those two sessions it seems KB has made significant progress over 2 years?

Witness 23- That's how it would seem.

Mr Gelfand- Significant amounts of regular access have been a feature of those past 2 years?

Witness 23- That's correct.

Mr Gelfand- And that access seems to have not prevented him from developing safe and secure relationships?

Witness 23- That's true. He has developed a strong relationship with his carers and it would seem that access hasn't prevented that significantly.

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<sup>459</sup> See report of witness 23 dated 29/03/2008 at p.2.

**Mr Gelfand-** Given that the results on the diagnostic tests for PTSD seem to have improved since the initial diagnosis was made, the levels of access don't seem to have compounded his stress?

**Witness 23-** It is really difficult to be clear because we don't have a picture of KB if there was a different level of access so it is difficult to make a comparison around if he had less or a different access schedule.

**Mr Gelfand-** You have observed a period of improvement in KB's presentation which coincides with whatever access was. We couldn't say that the level of access had led to a deterioration in his presentation.

**Witness 23-** No we couldn't say that. We couldn't say KB has experienced trauma during that period which has impacted on his recovery from PTSD.

**Mr Gelfand-** Overwhelmingly the majority of reports of access with his mother has been positive. He willingly attended and seemingly enjoyed the access. That would be an important part of the recovery process for him.

**Witness 23-** Absolutely. Any nurturing relationships that KB has been engaged in would have been very useful for his recovery. Given what he had experienced during his time with his mother and stepfather, it is very important for him to see his mother was safe so I imagine that would be very reassuring for KB.

**Mr Gelfand-** There is no reason to suggest that future levels of access might disrupt his bond with his carer or the development of attachment to a new carer?

**Witness 23-** His attachment with his current carer is really quite strong and showing signs of emerging security so I don't imagine contact is going to impair that significantly.

**Mr Gelfand-** Should KB have to move placement would that be traumatic for him?

**Witness 23-** I think that would be very distressing for KB. I think he has developed a strong and important relationship with his two carers, especially the primary carer carer 3, and that would appear to be the context for some really significant healing and recovery for KB.

**Mr Gelfand-** Assuming that KB's relationship with his mother is a positive and stable relationship, should KB have to move placement to a different permanent carer, wouldn't it be the case his access with his mother and his relationship with his mother could provide ongoing stability for KB during that traumatic period?

**Witness 23-** I can't comment because I don't have enough information on the quality of the relationship between KB and his mother.

**Mr Gelfand-** Assume a quality relationship.

**Witness 23-** Maintaining the relationship with his mother under the circumstances of placement change would be important given the need for continuity in his life. Under optimal circumstances it would be important for him to maintain connections with as many important people as possible.

**Mr Gelfand-** It is not really identity relationship with his parents, it is providing a stability for the child.

**Witness 23-** Yes, a sense of connectedness.

**Mr Gelfand-** Meeting with the mother quarterly probably wouldn't be enough to enforce that relationship?

**Witness 23-** I think that given the level of contact currently that moving towards quarterly would be really difficult for KB to manage.

**Mr Gelfand-** Given that scenario and placement change, any reduction in access might contribute to his feeling of instability?"

**Witness 23-** Possibly."<sup>460</sup>

Nothing in the above extract seems to me to support the concept that access between KB and his mother should be significantly reduced in the absence of (1) a confirmed decision to proceed with a permanent care case plan; and (2) an identified permanent carer.

## 26.6 OPINION OF WITNESS 26 RE THE TWINS & PARENTS

In September 2007 witness 26 was asked by DOHS to provide an expert opinion on the appropriateness of the care of the twins and in particular their access with parents who had a strong desire to assume their roles as parents but who were considered at that stage unable to provide the level of emotional consistency and absence of disruption and trauma necessary for optimal development.<sup>461</sup> After an interesting preamble on early childhood development, his reported opinion about the then daily access regime was that it was potentially disruptive of the twins' development:

“The fields of early childhood development and infant mental health have provided an increasing amount of powerful evidence that the very early experiences of infants and young children can have profound effects upon their emotional, social and cognitive development. The very young infant from the moment of birth is alert and attuned to his environment. Necessarily, those people caring for the infant constitute his world. The very young infant is able to hear, see, feel and perceive with all senses the quality of care provided them by their immediate carers. The nature of this care provides the basis for the development of a stable sense of self and of attachment relationships. Babies are able to remember in their nonverbal memory (procedural memory) the things that happen to them, and the emotional context. The attuned and emotionally available caregiver helps the baby manage the ordinary ups and downs of life. Extreme disruption in the availability of a consistent and predictable caregiver may constitute a significant trauma in itself.<sup>462</sup> ...

Babies in the first months of life have as their primary task the development of control of their own body, and self regulatory systems. Again, this task is facilitated by the presence of a consistent, emotionally available caregiver, who can read the baby's psychological and emotional signals regarding hunger, tiredness, needs to play and engage and needs to rest and settle. It is likely that being removed from their primary foster carer every day for a period of over four hours, by being taken by a worker and transported to and from their primary environment, constitutes a significant disruption or trauma in the process of establishing their own sense of self and self regulation. It may be that this also makes them less available to develop a relationship of attachment with their parents. It may be that the baby's parents will be able to engage and interact with them in a more productive and fruitful way, when they are consistently cared for with the minimum of disruption to their care by their foster carer. The babies when physiologically and emotionally contained and settled may be more available for sensitive and playful interaction with their parents, even if they have not been the primary moment to moment carers.

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<sup>460</sup> At pp.163-165 of my notes. The emphasis is mine.

<sup>461</sup> I glean the context of the opinion sought from pp.1+2 of witness 26's Infant Mental Health Opinion dated 16/09/2007.

<sup>462</sup> See Schuder M & Lyons-Ruth K, "Hidden Trauma in Infancy, Attachment, Fearful Arousal and Early Dysfunction of the Stress Response System" in "Young Children and Trauma", ed. Osofsky J, NY, Guildford Press.

In a situation such as that described above, I would recommend that the frequency of and the amount of time that the babies have been away from the primary foster carer be reviewed such that their day-to-day experience with their primary carer becomes more predictable and contained. I believe that adequately meeting the emotional and developmental needs of infants in the first months of life is significantly important in the development of their current and later mental state.”<sup>463</sup>

### 26.6.1 FREQUENCY & DURATION OF ACCESS

On 17/10/2007 an interim accommodation order contest settled - after witness 26 gave evidence - on the basis that the mother was to have access on 5 days weekly on Monday to Friday for 3½ hours on each occasion and the father was to have access on Monday, Wednesday & Friday for 1 hour on each occasion. It is fair to say that from both the content and the tone of his answers witness 26 appeared to be a bit discomfited about his recommendation of 5 access visits per week in that hearing:

Mr Gelfand- “You recommended 5 days per week would be appropriate based on first principles?

Witness 26- It was verbal evidence at the time.

Mr Gelfand- Based on evidence and development?

Witness 26- I was reluctant to answer the Court’s question because a hypothetical reply was difficult to pin down but that’s the evidence I gave.

Mr Gelfand- You were giving evidence in a factual vacuum?

Witness 26- Yes.

Mr Gelfand- Five days per week if the parents & carers are attuned to the baby’s needs and communication would not be harmful.

Witness 26- And travelling not an issue and not an exposure to a whole heap of strangers. That was assuming an ideal context.”<sup>464</sup>

Witness 26’s reply highlights the great limitations of expert opinions given in a factual vacuum discussed above in section 25. However I do not believe that witness 26 should beat himself up about it. There is no suggestion that access at this frequency harmed the twins and the better inference is that it has helped in their development.

That witness 26’s recommended regime is so different from the weekly access which witness 21 had recommended demonstrates what an inexact science the whole area of access is. I still stand by what I put to witness 21:

Mr Power- “Access frequency is a very inexact science.

Witness 21- There is much greater precision in the last 5-7 years than we had previously.

Mr Power- In evidence in chief on 17/10/2007 witness 26 expressed a different view from you.

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<sup>463</sup> Infant Mental Health Opinion of witness 26 dated 16/09/2007 at pp.1-2.

<sup>464</sup> At p.220 of my notes.

Witness 21- Witness 26 would have advocated more.

Mr Power- You can drive a truck through the two positions.

Witness 21- What is important is to look at the regularity and predictability of the infant's routine. I don't support the recommendation of 5 days per week in the absence of assessment that this is of developmental value to the infants. These assessments should have been put in place very quickly."<sup>465</sup>

By contrast, witness 26 freely conceded the lack of research in this area. It is no criticism of witness 26 to say that he prefaced his answers to the most critical questions with a comment to the effect that it was a difficult question to answer.

Now that the twins are 10 months old witness 26 was advocating a much less frequent access regime if the plan was for non-reunification. However, he also believed that it would be of benefit to each of the twins and their parents if access was restructured "to provide less frequent but longer periods of contact for WB & JB in an environment which is as much like a family setting as is possible". "A longer period of visiting", he said, "would allow for the experience to be more positive and less disruptive for each of WB and JB and their parents."<sup>466</sup> I agree with this aspect of his recommendation.

Witness 26 was asked about the duration of each of these longer access visits to provide a higher quality access experience:

"It is a difficult question to answer in that there is not a lot of research in this area but my premise in making that point is for the parents to be actively engaged in the care of their infants and not just briefly visiting them for a period of 1 hour. The babies and parents would get to know each other better if it was a longer period: feeding, settling, responding to the infants' distress, things like changing nappies and feeding. My estimate is that 3 hours would be a reasonable period in the course of an infant's day where some of those things could be attended to. It is likely to be a better experience than a briefer period of about 1 hour. In the Infant Mental Health literature we talk of the importance of 'good enough parenting' which means in episodes of ordinary disruption to the infant's state - e.g. crying, being unsettled, being hungry, toddler crawling around who falls over and hurts himself - the parent responds and settles the toddler or WB crawls over JB and scratches him and JB is upset and the parents step in to provide some sense of repair and containment. The repair of those periods of distress is as important in developing a relationship as the time when things are going well."<sup>467</sup>

I had initially thought from the above answer that witness 26 was recommending one 3 hour access visit per week but it soon became clear that he was recommending

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<sup>465</sup> At pp.135-136 of my notes.

<sup>466</sup> See his report dated 30/03/2008 at p.8.

<sup>467</sup> Evidence in chief of witness 26 at p.210 of my notes. The emphasis is mine.

a reduction to one 3 hour access visit per fortnight, albeit a gradual reduction over a period of perhaps 2 to 3 months<sup>468</sup> based on an assessment of how the twins were adjusting to the change, not a dramatic precipitous change:

Mr Gipp- “In view of your assessment and a plan for non-reunification what would you consider an appropriate level of access between the parents and the twins?”

Witness 26- That’s a very difficult question and there are a number of factors which come to mind:

(1) At what point in time is one considering contact? At the moment the twins are seeing their father 3 times per week and when I met the family they hadn’t seen mother for some 5 weeks following a breach of some conditions re contact the mother had apparently done. I wouldn’t think it helpful to make sudden dramatic precipitous changes in the contact the parents have with the children especially since with their father especially there has been pretty regular contact since their birth.

(2) If they are not going to reside in the care of their parents over the next 6 months moving to 3 hours per fortnight would provide a sense of continuity to the boys and hopefully to the parents as well. In that I would be assuming the parents would be able to visit together. I am aware that may not be feasible given the conflict between the parents even at DOHS offices and with the history of violence between the parents, especially from father to mother, it would be detrimental for the children to be exposed to that sort of violent conflict said to have occurred before. I made that opinion on the assumption that they would be able to have access together. If they weren’t then a different arrangement might be appropriate.

Mr Power- What if they were not having access together?

Witness 26- Depending how the relationship between the parents was going, if each parent had 2 hours in a time that was adjacent, say one from 10am-12pm and another from 12pm-2pm which would minimize travel and disruption for the infants and if it were possible, as I believe it should be, to have the same supervisory person over that time, it would be a reasonable contact period for each of the parties. The critical thing is to build in some flexibility and responsiveness so that it is an optimal experience for each of the children and their parents. For example, if the children were finishing a sleep and it meant having to wait for ½ hour until they woke up and were in a more comfortable state to transport, ideally access might be extended ½ hour at the other end. If a child was sick on one day, ideally the flexibility should be there so that they could meet with their parents the following day or 2 days later. Similarly if the parents were ill and the session had to be postponed for that reason, it should be able to be resumed the following day or the day thereafter.”<sup>469</sup>

But, to my surprise, a little later on witness 26 recommended a short term increase in the access schedule. Asked whether the access between the twins and their parents should be joint and for how many hours in the initial stages, witness 26 replied:

“You are pushing me to specifics. It’s a hard question. We have a group putting forward a research proposal to see what works best for children of particular developmental ages because the scientific literature is fairly silent. What is best for the children is not well supported by facts. I’d be going from first principles in working with very young children and families. If it were possible to have longer periods of 2-3 hours with both parents twice a week in

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<sup>468</sup> Asked in evidence in chief (at p.213 of my notes) when the fortnightly access should come into effect, witness 26 replied: “Difficult to answer because in an ideal world one would track as time went on but I would imagine something to work towards over a 2-3 month period rather than more quickly.”

<sup>469</sup> At pp.212-213 of my notes.

the immediate future and that was logistically possible for the parents and the carers that would be better than broken up into visits of 1 hour several times a week. I think so given my clinical experience. That would need to be monitored and hopefully adjusted by agreement but I am aware that that doesn't always happen easily."<sup>470</sup>

I do not understand why witness 26 recommended a sharp, short-term increase to 2-3 hours with both parents twice a week to be followed by a gradual reduction over 2-3 months to 3 hours per fortnight. This was pursued in cross-examination by counsel for the mother, albeit with a different agenda. Interestingly he commenced by verifying that he had actually heard witness 26 correctly before lunch, something that I had wondered as well:

Mr Gelfand- "You were asked by Mr Gipp to specify what the access arrangement might look like in the interim period if access was to be reduced to once per fortnight and you said perhaps rather than 3 visits of 1 hour for the father and 1 visit of 1 hour for the mother, perhaps twice a week for 2-3 hours might be a better arrangement?"

Witness 26- That's what I said, yes."<sup>471</sup>

In the course of what followed witness 26 was led into expanding 3 hours per fortnight into 3-4 hours per fortnight which seems to me to show how inexact all of this is and how there are no magic answers. Witness 26 also offered what I regard as a well-founded explanation of why ongoing access twice per week has the potential to be disruptive if reunification is not on the cards:

Mr Gelfand- "In the event that sort of access arrangement was put in place from what you said it is important constantly to monitor what is going on for the parents and the carers?"

Witness 26- Yes.

Mr Gelfand- If that proved to be a positive outcome for all parties involved there is no reason why that couldn't become the arrangement for the foreseeable future?"

Witness 26- I don't have incontrovertible evidence about optimal arrangements in any particular situation but looking at it in the longer term I'd have thought twice per week has the potential to be disruptive for the 18 months, 2-3 year olds routine more so than once per fortnight and also has the potential to lead to confusion about where the primary caregiving response would come from, which is not to say that the child won't have a clear set of attachment relationships with the carers and the parents as well.

Mr Gelfand- Are you saying that from first principles 2 hours twice a week has the potential to be disruptive?"

Witness 26- Each child is different but I imagine from the perspective of the 18 months to 2 year old they would ask themselves '*Who are my parents? Who are the primary persons responsible for me? Why am I not with them? Why am I with fostercarers?*' As a child gets more cognitively developed, the more likely the child is to ask.

Mr Gelfand- There is no reason why given ideal circumstances and appropriate interactions between parents and children that level of time away from the primary carer can't be sustained?"

Witness 26- That's conceivable if one is arguing from the perspective of an ideal, uncomplicated process. A large part of my recommendation is based on information I

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<sup>470</sup> In evidence in chief at pp.214-215 of my notes.

<sup>471</sup> At p.222 of my notes.

have about the history of JB & WB's parents. It is less likely to be the case than the hypothetical situation.

**Mr Gelfand-** If in 12 months the relationships were clear, 3, 4 or 5 hours might be appropriate?

**Witness 26-** It depends on if you are referring to the twins here or to children in general. If in relation to the twins I'd have been intending fortnightly 3-4 hours. In other children generally in relation to absence from parents, 3-4 hours per week. It would be more than that if children in an ordinary family were attending child care.

**Mr Gelfand-** Your recommendation in this case is informed to some degree at least by the history and the possibility that things won't go to plan?

**Witness 26-** I think one of the likely impacts for example of an increased frequency of access, where it is reduced and then increased again, is to build up an expectation for both parents and children this is going to lead to parents resuming full care and custody of children. If that were the decision, that's how one would approach frequency of contact. Conversely if there is to be no reunification it is unfair to each of the parties – parents and children – to maintain access at that sort of level.

**Mr Gelfand-** Do you agree that twice per week access for a number of hours each time isn't consistent with resumption of full-time care of the twins?

**Witness 26-** True. Not full-time care of the twins, that's true but it depends. I'm not sure if you were saying ongoing.

**Mr Gelfand-** If that were the situation for the next 12 months, that's unlikely to create within the twins an expectation that their mother and father are primary carers compared with the carers with whom they are spending the rest of the time?

**Witness 26-** It depends on the impact on the adults around them or what their interpretation of a schedule like that might be. If it meant for carers and other support people they were in a constant dilemma about who is in charge – even if the children are not directly involved – it has the potential to diminish their confidence in the foster carer. If the foster carer feels he doesn't know where he is going, that will be transmitted to the infants in the way they are cared for by the carer.”<sup>472</sup>

Following up on witness 26's evidence about “a research proposal to see what works best for children”, I commented that this was still “a very inexact science”. Witness 26 agreed, singling out the important factor of the impact of access on the carer:

“There is a whole range of factors. One I haven't mentioned so far is impact on foster carers in general and in this case in particular as well, their feeling of continuity and stability as well. For an infant to have a foster carer who feels no predictability from one day to the next is unfortunate for the child as well. That's another component to build into the process of deciding what is an optimal arrangement for a particular child. If the child is operating from a sense of secure emotional base and out of the care of their own parents, I think that gives them a stronger position to develop a fruitful relationship with their own parents than if they are in a situation where they are feeling insecure and anxious. If it is possible to provide some sense of consistency and predictability about a child's longer term care arrangements then that's in the interests of the child as well.”<sup>473</sup>

I said to witness 26 that on my then view of the evidence – and it still remains my view – I was probably going to have to impose a fixed regime in relation to the

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<sup>472</sup> At pp.222-224 of my notes.

<sup>473</sup> In answer to a comment by me at p.220 of my notes.

father's access rather than relying on the parties to agree on a more flexible regime.

**Witness 26 understood:**

**"I think I would agree with the Court on my reading of reports...The father was very cooperative and engaged with me but I am aware there are times he gets very angry and threatening which is a reality unlikely to change in the immediate future and needs to be factored into the logistics of family contacts with the boys. In my time with the father & the mother he was cooperative and engaging and very amenable to the discussions we had about the boys and how they were going and their experiences."**<sup>474</sup>

### **26.6.2 LOCATION OF ACCESS**

Elaborating on his recommendation that access be held "in an environment that is as much like a family setting as is possible", witness 26 conceded that there were not so many in Victoria. One which had impressed him was Bethany Family Services in Geelong which "has a large living room, food preparation area and a more commodious play area for toddlers to move round. A situation like that would be much more appropriate for a family having access. So much more room for the events of family life to occur and for parents to take an active role in those."<sup>475</sup>

**He continued:**

**"For persons feeling persecuted by the system I don't know of a simpler solution than the one-way screen but if there was evidence that threat to staff or others was significantly diminished I could imagine as with other families supervised access might occur at places other than DOHS' offices. Ideal in that circumstance might be with a member of the extended family with the parents being able to visit in that family home and spend time with them. Whether that's a feasible option in this case instance I don't know. It seems unlikely in the shorter term."**<sup>476</sup>

On the evidence I have heard it seems highly likely that for the foreseeable future the access between the father and the twins will have to be held in the fairly unsatisfactory environment of a supervised access room at a DOHS' office. However, I do not see any reason why a more comfortable and positive environment could not be used for any access with the twins which the mother attended alone.

### **26.6.3 WHETHER ACCESS SHOULD BE A "THERAPEUTIC PROCESS"**

**In his second report witness 26 recommended that:**

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<sup>474</sup> In answer to a comment by me at p.215 of my notes.

<sup>475</sup> Evidence in chief of witness 26 at p.211 of my notes.

<sup>476</sup> *Ibid.*

**“The access times between WB and JB and their parents should be made as therapeutic as possible, with the possibility that the Take Two program may be able to assess and facilitate the development of an appropriate quality of relationship between WB and JB and their parents.”<sup>477</sup>**

**He expanded on this in *viva voce* evidence:**

**“Interested in how the children were adjusting to the change in arrangements. From my observations of the family so far they would be able to manage that reasonably well. Unfortunately the mother was not able to see the boys for 6 weeks and was able to resume contact without trouble. Tracking their behaviour, how they are sleeping, feeding, how curious, how access fits in with WB’s medical appointments, how the parents are managing that themselves. In my recommendation I believe contact should be a positive and therapeutic process, someone working therapeutically with the parents and boys so the rate of change would depend on how the therapeutic process was going. Specifically I understand that Take Two are able to be involved with the family and from my single meeting with the mother & the father they were looking forward to some specific support for them in the process of working with the boys. The role of Take Two workers in influencing the rate of change of contact would be critical. In the broad scheme of things I would think it would be over some months.”<sup>478</sup>**

**I agree with witness 26 that access should be as positive as possible. The more comfortable the location, the more positive the access is likely to be. But I do not agree with his recommendation that Take Two or any similar professional organization needs to be involved in a so-called “therapeutic process”. In the first place, I do not believe that access with the twins should be reduced to once per fortnight over the period of these orders. In the second place, the parents have had well over 100 supervised access visits so far with the twins and the interaction has generally been very positive. In the third place, Take Two agreed to become involved but set a list of five pre-conditions, the fourth of which – as I understand it – was that Take Two would be performing an assessment role as opposed to merely a monitoring role.<sup>479</sup> Why further assessment would be needed after over 100 largely problem-free access visits is a mystery to me. Asked whether TG’s access with his mother should be “therapeutic”, witness 22 said: “No. They just need to be together.”<sup>480</sup> I believe that the same is true of the twins and their parents.**

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<sup>477</sup> See his report dated 30/03/2008 at p.8.

<sup>478</sup> In evidence in chief at pp.213-214 of my notes. The emphasis is mine.

<sup>479</sup> The five pre-conditions were detailed by counsel for DOHS in a series of questions to witness 23: see pp.244-245 of my notes.

<sup>480</sup> In cross-examination by counsel for the father at p.238 of my notes.

## 26.7 OPINION OF WITNESS 22 RE OLDER BOYS AND PARENTS

In her recommendations in August 2007 the Clinician witness 22 proposed that KB & TG continue to reside with their current carers and have supervised access with the mother & the father for two hours twice weekly.<sup>481</sup>

In *viva voce* evidence witness 22 expressed a typically strong view about the fact that the father had had no access with KB & TG since the Court so ordered in 2005, saying: “I find that extraordinary and totally contrary to attachment theory.”<sup>482</sup> Witness 22 saw no risk that maintaining a connection with their mother at the level she recommended might undermine the ability of either KB or TG to form an attachment with their carers:

Mr Gelfand- “Is there a risk that in maintaining a connection with his mother it might undermine his ability to form an attachment with subsequent carers?”

Witness 22- No. I don’t know where that notion comes from. It’s really extraordinary. The more secure his attachment with his mother the easier it is to broaden his fields of attachment, not the opposite.<sup>483</sup>

Mr Gelfand- Children would develop attachment with more than one primary carer?

Witness 22- Yes, of course. In the first 12 months if they can see their mother every day. If they haven’t seen mothers they have trouble for the rest of their lives really.

Mr Gelfand- Even where children are unlikely to be returned to the full time care of the parent?

Witness 22- Yes. Where that happens they usually go into care quite easily. Attachment with the mother is the basis of other attachments, that’s exactly what I’m saying.

...

Mr Gelfand- Is there any risk in relation to the development of attachment between TG and the person who has the daily full time care of TG if there is access at your recommended level?

Witness 22- The relationship with his mother first needs to be repaired. He has experienced too much in relation to separation trauma. When that is repaired, he has a much better chance of forming an attachment with his carer.

Mr Gelfand- How do you repair?

Witness 22- ...He has developmental delay so he needs a heap of intervention there. He needs to see his mother on a regular basis. There are some infant-parent therapists who can work with the parent and child together if there is damage to attachment but I don’t think they need that, I just think they need to be together.

Mr Gelfand- Witness 26 recommended access between the children and the parents be as therapeutic as possible. For the twins he recommended Take Two be involved with accesses.

Witness 22- With TG and his mother, no. They just need to be together.

Mr Gelfand- Following on evidence of witness 26 and others that the mother’s interaction with the children was a little flat, can you make any comments about your observations of her interactions?

Witness 22- My impression was all 4 members were very happy to see each other and to be together really...

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<sup>481</sup> Children’s Court Clinic report of witness 22 at p.13. See also her *viva voce* evidence at p.134.

<sup>482</sup> In cross-examination by counsel for DOHS at p.150 of my notes.

<sup>483</sup> Witness 22 then detailed the normal processes of development of attachment between a child and other persons in his/her life.

**Mr Gelfand-** Witness 26 gave evidence the reunion process provides the primary data for assessing attachment between children and their attachment figure.

**Witness 22-** I don't like to generalize. If there has been a long period of not seeing someone, like when you see a friend after a long time, there can be a period of almost immobility. In this case he was very happy, delighted, to see his mother.

**Mr Gelfand-** An attachment is there?

**Witness 22-** I would say this is where his primary attachment is. In spite of all he has been through somehow he has managed to hold on to this image of his mother."<sup>484</sup>

Witness 22 made very positive observations of the mother's capacity to be attuned to the children: "She was very attuned. Her sons were delighted to see her and she likewise."<sup>485</sup> She saw "nothing of concern during her interview with KB which would suggest he should not have access with [the father although she] felt KB had things to work through, he had issues, and that was behind [her] recommendation for him to have psychotherapy."<sup>486</sup>

In relation to TG, witness 22 said:

- "TG needed two things – to see lots of his mother and with shifts in the family now would be the right time to introduce his father to the accesses"<sup>487</sup>
- "TG was 2½ which is a really difficult stage even in the most well-endowed family because it is a very delicate stage of development when a child is forming his own identity and moving away from symbiosis with the mothers. It is called the 'Terrible Twos' because there is a conflict about being independent and being dependent. There are swings in their affect and they can assert independence regularly: 'Me do it.' This little boy not only lost his mother but lost the previous familiar environment he had had. He was put in a separate placement before he was with carer 4. He didn't have optimal cognitive resources. He wasn't that bright which could have been compounded by the emotional factors in play. What he needed to shore up his resources was (1) to see lots of his mother and (2) because his father is a key attachment figure he needed to see his father. It is almost universal the fantasy of having the parents together and they being ensconced within a nuclear family."<sup>488</sup>
- "TG wanted his mum. That was the direction of his desire. In the way fathers do [the father] engaged more with the older one but had toys appropriate to both their age levels and TG was happy to play with his father but he had his eye on his mother."<sup>489</sup>

Witness 22 had recommended the same access regime for KB & TG. She was asked whether there were different considerations arising from KB's commitments at school and whether there was a possibility that the level of access for KB could become too disruptive or confusing for him. Adopting witness 26's recommendation, she said:

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<sup>484</sup> At pp.237-238 of my notes.

<sup>485</sup> In cross-examination by counsel for the mother at p.238 of my notes.

<sup>486</sup> In cross-examination by counsel for the father at p.236 of my notes.

<sup>487</sup> In cross-examination by counsel for DOHS at p.149 of my notes.

<sup>488</sup> In cross-examination by counsel for DOHS at pp.149-150 of my notes.

**“I think we take the cues from KB really. Yes, their attachment needs are different once they go to school. In relation to whoever said quality access, less frequency, longer time, that could apply to KB especially if he wants his dad to come and watch him play footy or something like that.”<sup>490</sup>**

**It is clear from her report that witness 22 contemplated a return of the twins to their parents’ care but had not ruled out a subsequent return of KB & TG. Her recommendations as to access frequency & duration were drafted leaving open the possibility that the Court might ultimately return the boys to parental care.**

## **27. PARENTAL ACCESS CONDITIONS & ISSUES**

**At one stage in cross-examination it was put to witness 26 that specific figures for the optimal frequency and duration of access between the twins and the parents are very difficult to arrive at. He agreed:**

**“I would be loath to be dogmatic about what would be the optimal set of arrangements and that was my anxiety in Court in October 2007 too. To be dogmatic about it would be a problem.”<sup>491</sup>**

**I also do not claim any infallibility on the difficult issue of optimal access conditions but I do have the advantage of a vastly greater amount of evidence to weigh than witness 26 was able to acquire from his two assessments in March 2008 and witness 22 was able to acquire from her assessment in August 2007.**

**I agree with witness 26 that it would be in the best interests of both the twins and their parents for there to be less frequent but longer periods of contact between them. It seems from an answer given by witness 22 that she did not disagree with witness 26’s hypothesis so far as KB at least was concerned<sup>492</sup>, although she clearly did not agree with it in relation to very young babies.<sup>493</sup>**

**I will not include a condition that Take Two or similar organization should be involved in order to qualify the access for the label ‘therapeutic’.<sup>494</sup>**

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<sup>489</sup> In cross-examination by counsel for the mother at p.238 of my notes.

<sup>490</sup> *Op.cit.*, p.239.

<sup>491</sup> In cross-examination by counsel for the mother at p.220 of my notes.

<sup>492</sup> See section 26.7 above.

<sup>493</sup> In cross-examination by counsel for DOHS at p.234 she said: “I don’t like to generalize but as a general principle the smaller the baby the more they need to see their mother. There are so many variables to consider. For babies preferably every day.”

<sup>494</sup> The reasons for this are set out in section 26.3.3 above.

Although I will leave the location to be as agreed between DOHS and the respective parent, it seems highly likely that for the foreseeable future any access in which the father is involved will have to be held in an environment like that at location 3 DOHS office. However when the access with KB & TG involves the mother alone, I believe it should revert to a place outside the office. Conceding that access visits at location 3 DOHS' office are "not ideal"- something of an understatement – counsel for DOHS asked witness 30 whether any other options are available in a better setting. I strongly agree with her reply:

“Yes. Since 2006 DOHS with Menzies Inc provided some funding for Sages Cottage and basically contracted out a program for supervising access between children and parents. It has subsequently been replicated by Gordon Homes. When I came back from leave one thing I was looking at was what can we do to adjust access for the family. One thing I raised with the case supervising manager for the region was to see if Menzies Inc was willing to look at a referral for the mother and the two older children and facilitate access there. It was suggested that access should be moved there if the mother was willing. I don't believe [security] issues exist for the mother as they do for the father. Subsequently I had a discussion with Sages Cottage so I can have a conversation with the mother & the father in relation to that occurring. In relation to JB & WB we won't be looking at a different environment because there are still concerns we need to be mindful of but hopefully we can look at this down the track.”<sup>495</sup>

The evidence does not disclose that any of the boys – and in particular KB & TG - are at any risk of physical or emotional harm if having unsupervised access with their mother save for the possibility of harm should the father show up during the access. For that reason only I will require the mother's access to be “supervised” or “monitored” by DOHS or its nominee unless DOHS considers that supervision or monitoring is not necessary. “Monitoring” involves a lower level of intervention than “supervision”. The conditions regulating the father's access will be the standard supervision conditions.

I will include a condition allowing DOHS to decide whether any particular access should be attended by the parents separately or together. It would be impossible for me to decide this in advance since I do not know for certain whether the parents will separate in the near future and remain living separately and apart. If they do separate it is clear that accesses should not be joint. If they remain living as a

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<sup>495</sup> Evidence in chief of witness 30 at p.266 of my notes.

couple, the decision whether an access is to involve one or both parents should depend on the convenience of the children and on the progress of accesses generally.

### **27.1 ACCESS BETWEEN THE TWINS AND PARENTS**

I do not agree with witness 26 that the twins' parental access should be reduced to 3-4 hours per fortnight during the currency of these orders. It is possible that I would have agreed with him if I had unconditionally confirmed the Department's permanent care plan and if permanent carers had been approved for the children. But that is not presently the case. Nor do I understand – let alone agree with – witness 26's recommendation of a sharp, short-term increase to 2-3 hours with both parents twice a week pending its reduction over 2-3 months.

Particularly in cases where children have been or are very likely to be case planned for permanent care, I accept the importance of ensuring that access is not so frequent as to:

- cause disruption to or even endanger the out of home placement; or
- lead to confusion in the child about where the primary caregiving response would come from.

But I also think it is important that access not be so infrequent as to dishearten parents who are clearly important attachment figures in their children's lives. Given these parents' demonstrated past commitment to regular attendance at access with the twins and given that for the moment the mother & the father are the only assured long-term attachment figures in the twins' lives, access should not be set at a figure which has the potential to dishearten the parents and risk each of them falling out of the children's lives as has happened to child C & child D and has at least partly happened to child A & child B. Balancing all the considerations as best I can, I will set access between parents and twins at once per week for 3 hours. In my view that is the optimal figure for these particular twins at this stage of their lives on the assumption that the case plan is for permanent care with carers who may not necessarily prove to be their current carers.

## **27.2 ACCESS BETWEEN KB & TG AND THE MOTHER**

There are additional complicating factors with KB & TG. KB attends school full-time. As at 06/05/2008 TG was in day care one day per week but the plan is to increase that to 2½ days per week.<sup>496</sup> Access should not be scheduled in such a way as to disrupt KB's schooling. It would be better – but not essential – that it did not disrupt TG's day care arrangements either. In August 2007 when witness 22 recommended supervised access with the mother & the father for two hours twice weekly, she was working on the possibility that the Court might ultimately return the boys to their care. In my view, that is no longer a realistic possibility so far as the father is concerned.

Again balancing the competing factors, I will set access between KB, TG and their mother at one visit per week for a minimum of 2 hours. It should be noted that “minimum” does not mean “maximum” for I expect there will be times at which it will be in KB & TG's best interests to have a longer period of access with their mother, for example to go to the pictures with her or to visit extended family in location 1.

## **27.3 ACCESS BETWEEN KB & TG AND THE FATHER**

Apart from witness 22's assessment on 13/08/2007 KB & TG have not had any contact with the father since February 2006. That is the greater part of TG's life. The boys will need to be re-introduced to the father. I prefer witness 22's unconditional view that the boys “needed to see” the father<sup>497</sup> to witness 23's tentative view that access “be considered but there would need to be planning around that”. I therefore do not consider it is in the boys' best interests to include the condition sought by DOHS that the father's access “resume as recommended by Take Two and Australian Childhood Foundation and DOHS” or to make a pre-condition to the access that there be “therapeutic recommendations for TG & KB” (whatever that might mean) or that the father has engaged and is receiving treatment from a psychologist or psychiatrist.<sup>498</sup>

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<sup>496</sup> Evidence of witness 2 at p.19 of my notes.

<sup>497</sup> See section 26.7 above.

<sup>498</sup> This is draft condition 12 set out in section 4.1 above.

However, because the boys have to be re-introduced into the father's life and vice versa, I do not believe it is appropriate to commence his access with them on a weekly basis. It should be somewhat less and the impact of reinstated access on the boys should be carefully assessed. Again balancing the competing factors as best I can, I will set access between KB & TG and the father at a minimum of one visit per fortnight for a minimum of 1 hour to commence forthwith. Again "minimum" does not mean "maximum" and if it is assessed that there are no protective issues arising from this access, it should be gradually increased in frequency & duration.

#### **27.4 ADDITIONAL ACCESS FOR THE MOTHER IF CONDITIONS MET**

As I have said above<sup>499</sup>, I am of the strong view that one last tightly time-limited attempt at reunification with their mother is in the best interests of all of the boys given their strong identification with her as their mother. The two pre-conditions for this to occur are that the mother & the father-

- (1) cease living as a couple on a genuine domestic basis no later than 04/08/2008; and
- (2) remain living separately and apart.

I will set additional access conditions for the mother on the custody to Secretary orders-

- to come into operation if these pre-conditions are met on 04/10/2008; and
- to remain in operation only if the mother & the father remain separated.<sup>500</sup>

These are that the mother may have at least one additional access visit per week with the boys for a minimum of 3 hours per visit. This is 3 hours for KB & TG as well as the twins because the process of reunification must take precedence over school/child care. If these pre-conditions are met by the mother and/or the father, I would expect that DOHS would change the case plan and as reunification proceeds this additional access would gradually increase above these base levels.

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<sup>499</sup> See the final paragraph of section 22 above.

<sup>500</sup> For the avoidance of doubt, this is a "once only offer". If the pre-conditions are met but the parents reunite at some time after 04/10/2008 the condition can never have renewed effect even if the parents subsequently separate again.

## 28. SIBLING ACCESS

I strongly agree with witness 23's recent recommendation that all 4 boys "be provided with opportunities for quality, supported contact with each other."<sup>501</sup>

I also agree with her *viva voce* evidence:

Witness 23- "Meaningful contact opportunities for siblings is very important.

Mr Gelfand- Given TG's presentation and his level of distress he would need quite a significant amount of support in contact periods?

Witness 23- Optimum conditions for contact between siblings is for both sets of carers to be present during contact periods because children require people who can be sensitively attuned to their needs.

Mr Gelfand- How often?

Witness 23- That has been the subject of quite a lot of discussion. I think the ideal is as often as it can be as long as it happens in a way manageable for both of the placements. For foster carers to provide the level of support, they need not to be pushed beyond what they can critically offer. It is important that carers are not required to provide access at a level beyond which they can manage because then they won't be able to support the children appropriately.

Mr Power- Without being critical of the carers, my gut reaction is that if it is left to the carers, sibling access won't happen much if at all.<sup>502</sup>

Witness 23- I think it will happen but probably not as frequently as everyone involved would like to see. The carers have committed to facilitating contact once a month and there have been some subsequent discussions about arranging a respite foster care placement that could facilitate some contact, at least between TG & KB."<sup>503</sup>

I agree with witness 2, witness 3 & witness 24 that sibling access once per month is unsatisfactory.<sup>504</sup> In my view that is clearly insufficient to ensure an optimal development of the sibling relationships given that TG is living in a different placement from the other boys. Section 10(3)(k) requires me to make provision for sibling access which is in the best interests of all of the boys.

Apparently reacting to the inconclusive evidence of the Ozchild social workers, witness 30 set about arranging a definite and more appropriate schedule for sibling access than Ozchild had been able to negotiate. Referring to notes, she said:

"The manager of Ozchild has provided me with a record of what has occurred and what the future intention is. Sibling access occurred on 04/04/2008 facilitated by Ozchild at (location removed) "location 7" between TG & KB. On 20/04/08 & 16/05/2008 there was access for 1½ hours in a park at location 7. At the latter there was an exchange of presents for KB's birthday.

<sup>501</sup> Report of witness 23 dated 14/05/2008 at p.3.

<sup>502</sup> In part this view was based on the large number of care team meetings in which the issue of sibling access was discussed without any result being achieved as described in the evidence of witness 2 & witness 3. But it is also based on the enormous care load which carer 3 & carer 4 have taken on and it would be churlish to criticize them for that.

<sup>503</sup> At p.165 of my notes.

<sup>504</sup> See their evidence in my notes at pp.26, 33 & 193 respectively.

The next scheduled access is 31/05/2008 and it is intended to have a sleepover at (name removed) (respite carer's) house. The next on 14/06/2008 is for 2 hours at a park in location 7. On 20/06/2008 there is to be another sleepover at (name removed)'s house. On 12/07/2008 & 09/08/2008 there is to be sibling access in a park somewhere for 3 hours including a meal. On 25/07/2008 & 22/08/2008 there is another scheduled sleepover at respite carer (name removed)'s house."<sup>505</sup>

I am very pleased that witness 30 took the bull by the horns and arranged a comprehensive sibling access schedule which I do consider to be in the best interests of the boys. I shall include a condition on all of the orders that-

“Sibling access is to occur between KB, TG, WB & JB a minimum of twice per month and is to be facilitated and supervised by DOHS or its nominee.”

## 29. OTHER CONDITIONS ON THE ORDERS

I have included a number of other conditions on the orders in addition to the contact/access conditions discussed above. In doing so I have taken what I consider to be the relevant conditions on the current orders<sup>506</sup> and have varied several of them to accord better with the evidence. However, I have not adopted a number of the indifferently drafted conditions tendered by DOHS at the very end of this hearing, either because I consider they are not necessary or because it would be contrary to the rules of natural justice to do so.<sup>507</sup>

I make the following comments in relation to the other conditions or non-conditions:

- **Conditions 5 & 6:** I do not see the need for the mother to attend psychotherapy. Counselling will suffice. By contrast there is a great need for the father to attend psychotherapy. Witness 30 has correctly stated that this would be “beneficial for the father regardless of any outcome” of this case.<sup>508</sup> I agree with witness 30 that relationship counselling for the purposes of reunification is not in the best interests of the boys and hence is specifically excluded from these conditions. Witness 30 was not prepared to commit DOHS to financial assistance but the reality is that neither the mother nor the father can afford it.<sup>509</sup> Hence I have

<sup>505</sup> Evidence in chief of witness 30 at p.268 of my notes.

<sup>506</sup> Custody to Secretary orders in the cases of KB & TG, interim accommodation orders in the cases of WB & JB.

<sup>507</sup> For further discussion of this and for DOHS' draft conditions see section 4.1 above.

<sup>508</sup> In cross-examination by counsel for the father at p.282 of my notes.

<sup>509</sup> Witness 29 doubted that therapy of the sort required by the father would be able to be found in the public sector: see e.g. p.283 of my notes.

added a requirement that DOHS pay for any counselling/therapy which it has agreed that the respective parent should attend.

- **Conditions 7 & 8:** As a matter of prudence I have included conditions requiring the parents to allow the boys to attend a paediatrician/doctor/MCHN and to attend counselling and/or therapy and receive services from therapeutic service providers although there is no suggestion the parents would refuse to do so.
- **Condition 11** is justified by the mother's threats to attend the twins' placement.
- **Condition 12** is justified by the litany of misbehaviour set out in section 14.
- The history does not indicate any need for parents to confirm access by 9am.
- There is no need to include conditions expressly relating to Specialist Children's Services as I have included a more generic requirement in condition 8.
- There is no need to include conditions relating to attendance of any of the children at childcare or school. There is no suggestion that the parents would refuse to allow that.

## 30. ORDERS

For the reasons detailed above, I make the following orders:

- A. The DOHS' applications **AD1** dated 11/04/2007 to extend the custody to Secretary orders for KB & TG are granted. The custody to Secretary orders first made on 18/09/2006 are extended for 12 months until 04/06/2009 pursuant to s.296(2)(b) of the *CYFA*.
- B. The mother's applications **AM1** dated 05/02/2008 to vary the custody to Secretary orders for KB & TG are granted. The conditions previously on each order are replaced with the following 19 conditions:
1. The mother must accept visits from and cooperate with DOHS or its nominee.
  2. The father must accept visits from and cooperate with DOHS or its nominee.
  3. The mother must accept support services as agreed with DOHS.
  4. The father must accept support services as agreed with DOHS.
  5. The mother must go to counselling [including counselling in relation to family violence but not including relationship counselling] as agreed with DOHS and must allow reports about attendance and progress to be given to DOHS. DOHS is to pay for any such counselling which it has agreed for the mother to attend.
  6. The father must go to counselling and/or therapy [but not including relationship counselling] as agreed with DOHS and must allow reports about attendance and progress to be given to DOHS. DOHS is to pay for any such counselling and/or therapy which it has agreed for the father to attend.

7. The mother & the father must each allow the child to be taken to a paediatrician and/or medical practitioner for assessment or treatment if so required by DOHS, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.
  8. The mother & the father must each allow the child to attend counselling and/or therapy and receive treatment and/or services from therapeutic service providers if so required by DOHS and must allow reports to be given to DOHS.
  9. The mother & the father must each tell DOHS at least 24 hours before changing address.
  10. The mother & the father must not hit or hurt the child and must not expose the child to physical or verbal violence.
  11. The mother & the father must each not attend the child's placement.
  12. The mother & the father must each not threaten or assault DOHS' staff or staff of any DOHS' nominee.
  13. The father must not live with or have contact with the child other than pursuant to condition 16.
  14. The mother may have access with the child once per week for a minimum of 2 hours at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise or monitor access unless DOHS assesses that supervision or monitoring is not necessary. 'Monitoring' involves a lower level of intervention than 'supervision'.
  15. [THIS CONDITION IS TO COME INTO OPERATION ON 04/10/2008 PROVIDED THAT THE MOTHER & THE FATHER HAVE CEASED LIVING AS A COUPLE ON A GENUINE DOMESTIC BASIS NO LATER THAN 04/08/2008 AND HAVE REMAINED LIVING SEPARATELY AND APART. IT IS TO REMAIN IN OPERATION ONLY IF THE MOTHER & THE FATHER REMAIN SEPARATED.] In addition to the access referred to in condition 14, the mother may have at least one additional access visit per week with the child for a minimum of 3 hours at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise or monitor access unless DOHS assesses that supervision or monitoring is not necessary.
  16. The father may have access with the child a minimum of once per fortnight for a minimum of 1 hour at times and places as agreed between DOHS and the father. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.
  17. If either the father or the mother engage in any verbal or physical violence or any threatening behaviour while attending access DOHS or its nominee may cancel that access visit immediately.
  18. DOHS or its nominee has the right to determine whether any particular parental access visit may be attended by the mother and the father separately or together.
  19. Sibling access is to occur between KB, TG, WB & JB a minimum of twice per month and is to be facilitated and supervised by DOHS or its nominee.
- C. The DOHS' applications **AD2** dated 05/11/2007 to revoke the custody to Secretary orders and **AD3** dated 28/06/2007 to vary the custody to Secretary orders for KB & TG are struck out.
- D. The protection applications for WB & JB **AD4** are found proved on the likelihood limbs of the grounds set out in ss.162(1)(c) & 162(1)(e) of the *CYFA*. They are not found proved on the grounds in s.162(1)(f).

**E. WB & JB are each placed on a custody to Secretary order for 12 months until 04/06/2009 pursuant to s.287 of the CYFA. Each custody to Secretary order contains the following 19 conditions:**

- 1. The mother must accept visits from and cooperate with DOHS or its nominee.**
- 2. The father must accept visits from and cooperate with DOHS or its nominee.**
- 3. The mother must accept support services as agreed with DOHS.**
- 4. The father must accept support services as agreed with DOHS.**
- 5. The mother must go to counselling [including counselling in relation to family violence but not including relationship counselling] as agreed with DOHS and must allow reports about attendance and progress to be given to DOHS. DOHS is to pay for any such counselling which it has agreed for the mother to attend.**
- 6. The father must go to counselling and/or therapy [but not including relationship counselling] as agreed with DOHS and must allow reports about attendance and progress to be given to DOHS. DOHS is to pay for any such counselling and/or therapy which it has agreed for the father to attend.**
- 7. The mother & the father must each allow the child to be taken to a paediatrician and/or medical practitioner and/or Maternal & Child Health Nurse for assessment or treatment if so required by DOHS, must allow any recommended treatment to be carried out and must allow reports to be given to DOHS.**
- 8. The mother & the father must each allow the child to receive treatment and/or services from therapeutic service providers if so required by DOHS and must allow reports to be given to DOHS.**
- 9. The mother & the father must each tell DOHS at least 24 hours before changing address.**
- 10. The mother & the father must not hit or hurt the child and must not expose the child to physical or verbal violence.**
- 11. The mother & the father must each not attend the child's placement.**
- 12. The mother & the father must each not threaten or assault DOHS' staff or staff of any DOHS' nominee.**
- 13. The father must not live with or have contact with the child other than pursuant to condition 16.**
- 14. The mother may have access with the child once per week for a minimum of 3 hours at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise or monitor access unless DOHS assesses that supervision or monitoring is not necessary. 'Monitoring' involves a lower level of intervention than 'supervision'.**
- 15. [THIS CONDITION IS TO COME INTO OPERATION ON 04/10/2008 PROVIDED THAT THE MOTHER & THE FATHER HAVE CEASED LIVING AS A COUPLE ON A GENUINE DOMESTIC BASIS NO LATER THAN 04/08/2008 AND HAVE REMAINED LIVING SEPARATELY AND APART. IT IS TO REMAIN IN OPERATION ONLY IF THE MOTHER & THE FATHER REMAIN SEPARATED.] In addition to the access referred to in condition 14, the mother may have at least one additional access visit per week with the child for a minimum of 3 hours at times and places as agreed between DOHS and the mother. DOHS or its nominee will supervise or monitor access unless DOHS assesses that supervision or monitoring is not necessary.**
- 16. The father may have access with the child once per week for a minimum of 3 hours at times and places as agreed between DOHS and the father. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.**
- 17. If either the father or the mother engage in any verbal or physical violence or any threatening behaviour while attending access DOHS or its nominee may cancel that access visit immediately.**
- 18. DOHS or its nominee has the right to determine whether any particular parental access visit may be attended by the mother and the father separately or together.**

19. Sibling access is to occur between KB, TG, WB & JB a minimum of twice per month and is to be facilitated and supervised by DOHS or its nominee.

F. Breaches of the interim accommodation orders for WB & JB dated 04/02/2008 AD5 are found proved. No further orders are made.

