

CHILDREN'S COURT OF VICTORIA

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

Child: RK [04/02/1997]

<u>JUDICIAL OFFICER:</u>	PETER T. POWER
<u>WHERE HELD:</u>	MELBOURNE
<u>DATES OF HEARING:</u>	13-15, 18 May 2009
<u>DATE OF DECISION:</u>	18 May 2009
<u>CASE MAY BE CITED AS:</u>	DOHS v Ms K & Mr L
<u>MED. NTRL. CITATION:</u>	[2009] VChC 3

REASONS FOR DECISION¹

Child protection – Protection application – Interim accommodation order contest – Mother’s heroin use leading to apprehension of child – Child aged 12¼ years with a very positive emotional bond with mother – Child in mother’s care all her life until apprehended and placed in out of home care 3 months ago – Recent resumption of contact between child and father - Whether in best interests of child to be returned immediately to mother or placed with father until eventual reunification with the mother or remain in current foster care placement until eventual reunification with the mother – Whether father’s and mother’s access with the child should be unsupervised, unmonitored and overnight - *Children, Youth and Families Act 2005*, ss.8, 10, 270 – *F v C* [Supreme Court of Victoria, unreported, 28/01/1994]

PARTY	COUNSEL	SOLICITOR
Department of Human Services [Child Protection]²	Mr R Rigby	Court Advocacy Unit – Ms M Armstrong
Mother (name removed)	Mr S Taghdir	Ms Deanne Jackel
RK	Ms L Steiner	Ms Nicole Amad
Father (name removed)	In person - Unrepresented	

¹ This is a slightly amended transcript of my *ex tempore* judgment delivered on 18 May 2009. A couple of inconsequential errors have been corrected, the text has been slightly changed in several places to make it more readable, some of the text has been re-positioned and a couple of sections have been expanded. But the essence of the judgment remains unchanged: see *Fletcher Construction Australia Ltd v Line Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28; [2001] VSCA 167. **Any party or legal representative who wishes an electronic copy of this judgment should provide an email address to the Principal Registrar at Melbourne Children’s Court and the requested file will be provided without charge.**

² Hereinafter ‘DOHS’ or ‘the Department’.

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1. RK'S FAMILY

This is an interim accommodation order contest in relation to RK who is 12 years old. RK was born on 4 February 1997, a propitious date as it happens to be my birthday as well. RK's mother, (name removed) "the mother", is 37 years old and her father, (name removed) "the father", is 39 years old. It is common ground that "there is clearly a positive emotional bond between RK and her mother", as was conceded by Ms (name removed) "Ms YH" in the course of her evidence.

2. RK'S COMPLAINTS OF FEBRUARY 2009

The Department of Human Services apprehended RK on 20 February 2009 as a result of notifications which it received that day. From the evidence that I have heard from Mr (name removed) "Mr CT", the principal of RK's school – (location removed) Primary School - it does not seem to be a secret that the reason for the Department's intervention was because of concerns which RK herself had expressed to a teacher at her school. On 9 February 2009 a member of the teaching staff at (location removed) Primary School spoke to Mr CT about some concerns that she had as a result of RK having spoken to her. That teacher had become concerned because she had noticed a change in RK's behaviour. RK had become unusually disruptive and a little bit rude and the teacher had spoken to her. RK mentioned things at home, including her lifestyle and the home situation. She said that she would rather stay away from home, she does not go home until about 11 o'clock some nights, she has never seen her mother inject but she believes that her mother and her mother's then partner are taking foreign substances.

On 18 February 2009 RK had a similar conversation with her class teacher. Her teacher had asked RK what was wrong as she was looking gloomy and down. She said that she was miserable because her mother was a junkie spending all the food money on drugs. Mr CT said that this was regarded by the teacher as being "quite out of the blue" because RK had never previously disclosed this in class in this manner. RK's global complaint that the mother was spending all the food money on drugs was responded to by the mother in her evidence in which she said, "There was food there but frozen food and stuff and she didn't like eating that. RK was given money for lunch orders but I found out later a lot of time she would leave her lunch money behind. And other times I found out she was spending the money to buy V drinks on the way to school." The mother did agree that there is now more money available to buy food since she is not using drugs. Although I am not be satisfied that RK was being appropriately fed, equally I am not satisfied that RK intended to be interpreted

literally when she said her mother was spending all the food money on drugs.³

3. PROTECTION APPLICATION

Having apprehended RK on 20 February 2009, the Department took out a protection application on the grounds set out in s.162(1)(c) and 162(1)(e) of the *Children, Youth and Families Act 2005*⁴, alleging that:

- RK had suffered or was likely to suffer significant harm as a result of physical injury from which her parents had not protected her or were unlikely to protect her;
- RK had suffered or was likely to suffer significant emotional or psychological harm from which her parents had not protected her or were unlikely to protect her.

The protection application did not include a ground under s.162(1)(f), the so-called ‘neglect’ ground.

4. INTERIM ACCOMMODATION ORDERS

On 20 February 2009, a bail justice placed RK on an interim accommodation order in out-of-home care. The case came to court on 23 February. The Court made an interim accommodation order placing RK in out-of-home care provided by Anchor Foster Care and placed on that order a total of ten conditions as follows:

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 submit to random supervised drug and alcohol testing 2 times per week or otherwise as directed by DOHS and must allow the results to be given to DOHS.
6. Mother must participate in assessment and/or treatment for alcohol and drug dependence as directed by DOHS and must allow reports to be given to DOHS.
7. Mother must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
8. Father has the right to come to Court and ask the Court to change the order.
9. Mother may have access with the child for a minimum of three times [presumably per week] for a minimum of 1 hour at times and places as agreed between the parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.
10. Father may have access with the child at times and places as agreed between the parties. DOHS or its nominee will supervise access unless DOHS assesses that supervision is not necessary.

The case was adjourned to 16 March 2009. On that day the case was further adjourned to a dispute resolution conference on 4 May and the access conditions were changed. The

³ This is referred to hereinafter as ‘the food issue’.

⁴ Hereinafter ‘the *CYFA*’.

mother's access was reduced from three times a week to twice a week, the father's access was changed to include the words "for a minimum of once a week for a minimum of one hour."

It is not really clear to me why the mother's access was reduced. It does not seem to have been a reflection of anything untoward that occurred in mother's access over the previous three weeks.

5. FOSTER CARE PLACEMENTS

Since her apprehension on 20 February 2009 RK has been in four foster care placements. The first three were organized by Anchor Foster Care, the fourth by (location removed) Adolescent Emergency Care.

The first placement was with a foster carer at (location removed) from 20 February to 5 March. That placement terminated because the carer wished to travel interstate. From 6 March to 9 March RK was placed with a carer at (location removed). That placement broke down as a result of RK removing herself from that placement on 9 March and complaining that she had been teased by that carer. It is probably a measure of RK's maturity - about which there is so much evidence - that on the following day she took herself to the Department's office. It is very unusual for a 12 year old girl - who had at that stage only just turned 12 - to display that level of maturity. I know nothing more about RK's allegations of abuse in care. There was nothing about it in Ms (name removed) "Ms SJ's" application and disposition report. Of course there should have been but there was not.

On 10 & 11 March, RK was placed with a foster carer at (location removed) on a very short term basis. On 11 March she was placed with a carer in (location removed) with whom she has remained. Although she expressed a strong wish to return to her mother's care immediately, she is - subject to that qualification - happy with her current carer.

6. POSITION OF THE PARTIES IN THIS CASE

DOHS: The Department is seeking an extension of an interim accommodation order leaving RK in out-of-home care for a period during which the Department would like the mother to do screens and have the accommodation order issue sorted out. During that period the Department would look at a schedule for returning RK to her mother's care when those things have been satisfactorily completed.

Child: RK wants to go home to live with her mother. She understands it is a different home

from the home she was removed from. She has been very unhappy out of her mother's care. She is not complaining about that care it is just that she misses her mother.

Mother: The mother wishes RK to be returned to her care immediately.

Father: At the outset the father said that he would also like RK to go home to her mother. He noted that RK is fairly strong willed and she knows what she wants and she knows her mother and that is where she would like to live. From his own perspective at that stage he was simply seeking unsupervised access. About halfway through the third day of the case Ms Steiner advised me that the father's position was that he would like RK to be placed in his full time care in the event that I decided that she should not be placed in her mother's full time care. Although that was fairly late in the course of the case, I accept that the father is unrepresented and I draw no adverse inference from him making this late request.

7. OUTCOME OF CASE

For the reasons which follow I intend to adjourn this case to 5 June 2009 for a rollover at 10 a.m.. I intend to make the next significant date 2 July for a Directions Hearing at 9.30 a.m. in which I will be part heard. I will schedule a three day contest to start on 13 July 2009 should that be needed. I intend to place RK on an interim accommodation order still in out-of-home care but with much more generous access conditions with her father and her mother than the access conditions that are on the current order.

8. WITNESSES

I heard evidence from the following 7 witnesses:

W1	Ms SJ	DOHS' protective worker who was allocated to this case from 20/02/2009 until late March 2009.
W2	Ms YH	DOHS' protective worker who was allocated to this case from 02/04/09.
W3	Mr CT	Principal of (location removed) Primary School.
W4	Dr MG	Mother's treating General Practitioner.
W5	Mr NM	Analytical chemist & Toxicology Supervisor employed by Dorevitch Pathology.
W6	The mother	RK's mother.
W7	The father	RK's father.

The five professional witnesses and the father presented as honest and credible on all matters. In particular I was impressed with Ms YH who was willing to make appropriate concessions. That is always a good thing in a professional witness. Although I do not accept her recommendation on the frequency and build up of access, this is not a criticism of her

professionalism. It is simply a question of me having balanced the matters in s.10 of the *CYFA* differently from the way in which she and her team leader have balanced them.

Apart from the specifics of her heroin use, the mother appeared a good, quite thoughtful and insightful witness. However, it would be dangerous for me to rely on the evidence of her heroin use.

9. DOCUMENTS

The Department tendered the following five documents:

1. DOHS' Application & Disposition report of Ms SJ dated 13 March 2009.
2. DOHS' Addendum report of Ms YH dated 28 April 2009.
3. DOHS' Addendum report of Ms YH dated 11 May 2009.
4. Dorevitch Pathology Drug Screen report dated 15 April 2009.
5. Dorevitch Pathology Drug Screen report dated 06 May 2009.

The father tendered a reference from Mr (name removed) "Mr DM", the manager of the (location removed) Learning Centre.

10. RK'S CHARACTERISTICS & SCHOOLING

RK's presentation at school was described by Mr CT as good. She was occasionally out of school uniform but nothing out of the ordinary. He had not noticed any changes in her current presentation. Academically she is a bright student, an "above average student" was the way he put it. (Location removed) Primary School has no academic concerns about her. Mr CT has not had any conversations with RK lately about her current situation and the only sort of conversations that RK has had with teaching staff were the ones that led to the notification. Generally speaking Mr CT said she keeps this sort of stuff to herself, she is a fairly independent sort of girl and does not offer a lot of information about those sorts of things. He was asked socially how does she get on at school and he said, "Fine, my observations are that especially in the playground she is always with a group, that's a good sign, I never see her alone in the yard and have had no concerns from other teachers there are any issues there." He was asked about her independence and in particular was he aware of how she gets to school. He said by public transport. "We have a joke, she knows the Connex timetable better than Connex, she takes a couple of buses, she's always on time." Asked about her demeanour he said, "A very pleasant girl, she's got a nice personality, she has a very good heart. Across the staff she is a very popular girl, an easy girl to teach."

(Location removed) Primary was, I think, at least the fifth school that RK has attended. She had been at (location removed), then at (location removed) than at (location removed). She was then sent to (location removed). She was moved from there when her mother moved

house but her mother subsequently moved her back to (location removed) because RK had liked that school very much. So she has spent the majority of her primary school years at (location removed) Primary School.

Section 10(3)(o) of the *CYFA* requires me to give consideration to the desirability of allowing RK's education to continue without interruption or disturbance. Given the recent instability in her life generally and the excellent schooling which RK is receiving at (location removed) Primary, it surprised me that in their evidence-in-chief neither Ms SJ nor Ms YH referred to continuity of schooling as a reason why RK should not be returned to her mother's care. I had initially thought that it was impracticable for a primary school student to travel such a long distance to and from school. Ultimately I asked Ms YH about it. It transpired that RK had been travelling by herself by public transport from (location removed) to (location removed) last year and prior to her apprehension on 20 February 2009. The Department had no concern about her doing the same from (location removed) to (location removed) if I was to return her to her mother's care and her mother has no intention to move her to a school closer to (location removed). In fact, although the journey is long, it can be done via (location removed) using one train and one bus, a trip taking about 65-70 minutes each way. In those circumstances, I consider that the Department is right not to rely on s.10(3)(o) as a consideration adverse to the mother.

This is the last year of RK's primary schooling. On 05 May 2009 she attended a college tour at (location removed) Secondary College with her mother and Ms YH. The landlord of the mother's current accommodation, Mr (name removed) "Mr A", also attended.

RK is starting to demonstrate some of the independent characteristics of an adolescent. She has developed some friendships and she has reconnected with a youth group known as Activate which promotes positive peer socialisation and provides informed guidance in the form of mentorship rather than counselling. RK had originally gone along to Activate because a child of her mother's neighbour was going to that group. RK continues to have phone contact with a couple of older male friends known as "Z" and "J" and has had face to face contact with them in what Ms YH has described as "a contained environment".

11. RK'S HEALTH & ANGER - NO COUNSELLING

RK has had ongoing pain issues with her lower back but there are no signs of sclerosis or spina bifida occulta, which is apparently hereditary on her father's side. It may be that additional weight may be a contributing factor for her back pain and RK has been engaging in

healthy eating options with the support of her carer. She continues to suffer pain in her foot due to a recent injury.

RK has described herself as having an anger management problem which Ms YH has said is “mostly exacerbated around the issues of her mother's drug use”. However, RK has expressed her concern that at times the anger “seems to take hold of her”. RK has instructed her legal representatives that she does not wish to be required to attend counselling. I have not included a counselling requirement in the conditions on the interim accommodation order. I think it would be counterproductive at this stage to require this mature, thoughtful, strong willed young woman to attend counselling if she is opposed to it. The symptoms which she has described to the Department are not sufficiently serious, in my view, to warrant acting against RK's wishes in this regard.

12. MOTHER'S CHARACTERISTICS & DRUG USE

The mother suffers from cerebral palsy as a result of a birth incident. However her disability is not very obvious to the untrained eye.

The mother has advised the Department that both her parents were heroin users and her own father had died of an overdose. It is RK's view that her situation with her mother had deteriorated significantly since her mother started living with Mr (name removed) “Mr MH”. In a conversation that she had with Ms YH on 24 April 2009, she said that she believed her mother started using heroin more heavily about a year before.

Ms YH was asked, "Do you not consider the intervention so far and the steps that the mother has taken have minimised or reduced her drug use to a considerable degree, albeit not completely?" Ms YH said, "It does appear to have reduced and it's a question of balance." However, on 08 April 2009 Ms YH conducted a home visit and noted what she described as the mother's “eyes pinpricked”. She conceded that she did not know whether that was related to prescription medication but added that she had not observed the mother to have pinpricked eyes on any other occasion and she is aware that the mother is continuously on that medication. Other than Ms YH's own observation on 08 April 2009, the Department has received no reports of the mother appearing substance affected during the nearly three month period in which the Department has been involved with RK.

13. MOTHER'S RECENT RELATIONSHIPS

The mother's most recent partner was Mr (name removed) "Mr MH", with whom she had been living in (location removed). She separated from Mr MH at the end of April 2009. She said of that, "He asked me to leave but I left of my own accord and he said to let people know I left of my own accord. He expected me to come home, I just didn't return. We had an argument, he did tell me he didn't want me there, I think he expected me to go back but I didn't. I didn't go back because he wasn't doing anything positive and he didn't want to make any changes in his lifestyle." Asked what sort of changes, she said, "In his substance use and in relation to me and RK being together again. He did a back flip, he offered to do screens and link with services and he decided he didn't want to."

At that time Mr MH was also a heroin user, as was the mother's previous partner, Mr (name removed) "Mr LO", with whom she had been in partnership for just under a year in 2007. It is clear to me from the evidence – especially her own evidence – that the mother has been very controlled and/or very influenced by those two ex-partners. In particular she says that one of the reasons why she missed the first two appointments that had been made with (location removed) Drug and Alcohol Service⁵ was that, "Mr MH prevented me from going to those appointments." On one occasion that was explained as being related to bald tyres on a car and rainy roads.

This is why I have included on the interim accommodation order a condition requiring the mother to engage in personal counselling to assist with her self-confidence and self-assertiveness. However, if the issues underlying her lack of self-assertiveness are assessed to be the same as those underlying her substance abuse, the personal counselling may be subsumed into the drug and alcohol treatment.

14. MOTHER'S DRUG SCREENS

In a home visit on 08 April 2009 Ms YH explained to the mother that the Department wished her to provide urine drug screens twice a week, on Tuesdays & Thursdays. This regime of screens has not really been complied with by the mother. She has provided some screens but during a particular period in which seven screens were requested of her, she provided only two. Since the commencement of the Department's intervention she has provided 15 screens in total but has not provided screens on a significant number of other occasions on which she was requested to do so.

⁵ Hereinafter 'EDAS'.

A screen that was provided by the mother on 15 April 2009 was the subject of a lot of cross-examination in this Court. The sample was assayed as containing 3000 micrograms per litre of morphine. A toxicologist-analytical chemist from Dorevitch, Mr (name removed) "Mr NM", was called to give evidence about what that meant and what the possible sources of the detected morphine were. He was cross-examined at some length but - without disrespect to counsel - I did not feel his credibility was in any way dented and I accept all of his evidence. He said that morphine can come from four different sources: (1) heroin; (2) morphine itself; (3) a metabolite of codeine; and (4) after ingestion of poppy seeds. After putting to Mr NM the scenario that prior to a sample being provided, a person had been using Oxycontin 40 milligrams twice a day, 30 milligrams of Serepax twice a day and two and a half 5 milligram Valium tablets at night, Mr Rigby asked, "How does that relate to a reading of morphine?" Mr NM said, "None of those medications would give a result of morphine essentially." Mr Rigby then asked, "What if Panadeine Forte was taken?" Mr NM said, "That contains codeine which is broken down to morphine. Generally the amounts of morphine seen are below 2000 micrograms per litre. You can get morphine readings of greater than 2000 micrograms per litre but codeine would be there at the same time. Morphine on its own you couldn't get that reading from codeine ingestion." However, in that screen of 15 April no chemical 6-mono-acetyl morphine was detected. Mr NM said that the absence of this chemical indicated that it was unlikely that any heroin had been consumed within 24 hours of the taking of the sample on 15 April. However the period during which heroin can be detected in urine is up to three to four days after use.

In cross-examination Mr Rigby put to the mother that this reading of in excess of 3000 micrograms per litre of morphine was a result of her using heroin. The mother said, "I disagree with that." However, on balance, I am satisfied that that is the significantly more probable reason for that reading.

Further there was also a screen provided by the mother on 06 May 2009 in which opiates were detected. The creatinine level in that sample was 1.5mmol/L, less than the threshold of 1.8mmol/L below which there is a possibility of sample dilution and possible false negative results. Whether this was deliberately diluted or not, the mother's compliance with the Department's request to do drug screens has not been particularly good. That is one of the major reasons why it seems to me that RK should not be returned to her mother's care at this time. It is a question in my view of the mother doing drug screens regularly and her screens being free of any chemical that is a derivative of heroin.

15. MOTHER'S HOUSING

The mother was "kicked out" of Mr MH's relatives' house in (location removed) at the end of April, about 27 or 28 April. She quite quickly found alternative accommodation. On 30 April she saw an advertisement in a shop window in (location removed). That advertisement was posted by a Mr (name removed) "Mr A" who lives in a three bedroom house at (address removed), which is owned by a support agency named "ParaQuad". Mr A is a paraplegic, having been seriously injured in a motor car accident about three years ago. Mr A is 39 years of age.

On 8 May 2009 Ms YH attended Mr A's house and did a safety assessment of the house. The Department has no issues with the house as a physically safe environment for RK. Nor does it have any protective concerns about Mr A. Ms YH said that she managed to see into the fridge when it was opened and it looked empty but conceded that she had not seen inside the freezer or in the door of the fridge. I am not satisfied that the food issue raised by RK in February 2009 remains a live problem.

In my view the Department's one concern about the mother's current accommodation is a valid concern. It is a concern about the viability of the mother's renting arrangement, about whether or not ParaQuad would be prepared to allow Mr A to have the mother - and in due course RK - living in that house. In addition, the house is a transitional property for Mr A who is on a waiting list for a two bedroom property in (location removed). However, from my point of view that is nowhere near as significant an issue as the question as to whether or not ParaQuad will allow Mr A to rent out rooms in its premises. Asked about that, the mother said, "Well Mr A is looking at being there for up to three to four years maybe. He's in the process of trying to find out that it's OK for RK and I to be there as well." She was asked, "When are you expecting him to give an answer about that?" and she said, "Well hopefully within the next week, hopefully sooner, it's not that Mr A has a problem, he's sorting it out with the agency that owns the property."

16. RELATIONSHIP BETWEEN RK & HER MOTHER

The mother says of her relationship with her daughter, "RK says she wants to be back with me now especially since I'm not with Mr MH. She's extremely happy about that. I know she has a good relationship with her carer at the moment. She has told me she cries at night when she goes to sleep, she generally cries herself to sleep. She opened up to me about that probably three to four weeks ago. She puts on a pretty positive front but says at night she cries herself to sleep, so we try not to say too much about missing each other because it upsets

her when it's said, because she does want to be with me now."

From all I have heard, I absolutely accept that. There is a very strong relationship - very strong bond - between mother and daughter. The maintenance of this relationship as RK approaches adolescence is one of the things to which I must give significant weight in balancing the competing factors in this case.

17. PROTECTIVE CONCERNS ABOUT THE MOTHER

The Department's view, expressed by Ms YH in her evidence, is that given the recent positive reading in relation to the mother's screen, there are still concerns about her drug use, including the overt medication for prescribed drugs: "On more than one occasion she has taken more than the prescribed dose of Oxycontin because she was stressed. She has attended one EDAS session but we are looking to see that she is well engaged. The accommodation is not seen as stable at the moment and there are also protective concerns in relation to the mother's capacity for parenting and the need for her to be linked with appropriate services such as parenting services." I agree with the Department's view that significant protective concerns about the mother have not yet been fully addressed.

Although I think it is important to provide the mother with parenting supports to develop her parenting skills in respect of a strong-willed, independent daughter who is not far off becoming a teenager, that in itself is not a protective concern which would bar immediate reunification. Ms YH does not disagree: "Parenting programs can be done with RK living with her mother, also counselling, also cerebral palsy support." Asked what support services she intended to offer by way of parenting support, Ms YH said, "There are a number of options. I would like to discuss that with the mother in working with her. We also take into consideration what's useful and appropriate for the parent rather than a one size fits all service." In my view that is absolutely right.

Ms YH continued, "The main service we are looking at at the moment with RK not in her mother's care is EDAS and seeing her commitment with and engagement with that service. That would also continue in the event that RK is returned." I agree with the Department. The two main reasons why immediate reunification is not in RK's best interests – and they involve the one central concern about the mother's addiction - are that:

1. she has not yet provided drug screens to my – or to the Department's – satisfaction; and
2. she has not yet done anything other than scratch the surface in relation to her drug assessment and treatment with EDAS.

18. RK'S "BEST INTERESTS" ARE PARAMOUNT

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

The relevant principles binding on the Court and the Secretary in relation to RK are set out in s.10 of the *CYFA*. The fundamental principle, set out in s.10(1), is that for the purposes of the *CYFA* the best interests of the child must always be paramount. Section 10(2) requires the decision-maker, when determining whether a decision or action is in the best interests of a child, always to consider the need to protect the child from harm, to protect his/her rights and to promote his/her development (taking into account his age and state of development). Section 10(3) provides that, in addition to ss.10(1) & 10(2), when determining what decision to make or action to take in the best interests of a child, the decision-maker must have regard to 18 listed matters so far as they are relevant. The following 14 matters in s.10(3) appear to have at least potential relevance to the present case:

- (a) The need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.
- (b) The need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child.
- (d) The child's views and wishes should be given such weight as is appropriate in the circumstances.
- (e) The effects of cumulative patterns of harm on a child's safety and development.
- (f) The desirability of continuity and stability in a child's care.
- (g) A child is only to be removed from the care of her parent if there is an unacceptable risk of harm to the child.
- (h) If the child is to be removed from the care of the parent, consideration is to be given first to the child being placed with an appropriate family member or other person significant to the child before any other placement option is considered.
- (i) The desirability, when a child is removed from the care of the parent, to plan the reunification of the child with her parent.
- (j) The capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child.
- (k) Access arrangements between the child and the child's parents, siblings, family members and other persons significant to the child.
- (l) The child's social, individual and cultural identity and religious faith and the child's age, maturity and sex.
- (m) The desirability of the child being supported to gain access to appropriate educational services and health services and to participate in appropriate social opportunities.
- (o) The desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.

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

Like so many cases, a number of the matters set out in ss.10(2) & 10(3) of the *CYFA* are difficult to reconcile and hence require the Court to prioritize them.

19. EMOTIONAL IMPACT OF SEP'N FROM MOTHER

The central issue in this case – and its most difficult aspect - is the balancing of the impact on RK's emotional wellbeing of continued separation from her mother against the impact on her emotional wellbeing if she was returned to her mother immediately and the reunification was to break down due to a relapse by her mother.

I concede that remaining out of her mother's care for the time being – a circumstance which is contrary to RK's strongly expressed wishes – is likely to have a negative impact on her emotional wellbeing. But, in my view, it would be **catastrophic** for RK to be reunited with her mother and for that placement to break down. It would cause her much greater emotional harm than continuing an out of home placement, the negative impact of which can be significantly ameliorated by the provision of lengthy periods of unsupervised and overnight access with each of her parents. This is why I have decided that it is in RK's best interests to make what might seem, on one view, to be very generous access conditions going straight to overnight access with both her mother and her father.

What this case boils down to is a question of balancing the long term impact on RK against the short term impact. Loosely speaking, it is a question of long term gain against short term pain, if I can put it like that. Ms YH's conclusion is essentially the same. Asked whether she believed it would have a negative impact on RK's emotional wellbeing if she was denied return to her mother, Ms YH said, "I find it hard to answer in black and white. In relation to looking at reunification and longer term stability...what we feel needs to take place is for her mother to be more stable and positive for RK in the long term." In my view that is absolutely right.

20. RISK IF IMMEDIATE RETURN TO MOTHER

I am required by s.10(3)(e) to take into account the effects of cumulative patterns of harm on a child's safety and development and, as I have said, it would be **catastrophic** for RK psychologically to be placed with her mother and then for that placement to fail again because of a relapse by her mother. The mother has not yet progressed sufficiently with drug treatment and has not yet provided sufficient clean urine screens for me to be satisfied that her

risk of relapse is an acceptable risk. In those circumstances I consider that it would place RK at **unacceptable risk of emotional harm** to be returned at present to her mother. Hence s.10(3)(g) militates against immediate reunification and the matters contained in paragraphs (e), (f) & (g) of s.10(3) take precedence over those contained in paragraphs (a), (b) & (d). But I can give significant effect to the matters in (a), (b) & (d) by making provision for generous access in accordance with paragraph (k). That is how I have balanced the partly conflicting provisions of s.10.

So it follows, in my view, that while there should be a plan for reunification of RK with her mother pursuant to s.10(3)(i) of the *CYFA*, reunification cannot be immediate. Nevertheless it should not be so far off that the horizon looks an awfully long way away both for the mother and the child. That is why I have set definite dates in the not too distant future for a Directions Hearing and a contest, dates which to some extent have 'jumped the queue' of other cases.

I think that in her heart of hearts, the mother knew immediate reunification was not on. I thought she seemed very insightful in the witness box when she was giving some answers about that. Asked whether she had honoured her verbal commitments to address her substance use, she said, "I've been doing screens. I admit I haven't done all of them. I'm going to continue with EDAS and if parenting programs or whatever are asked for. I'm happy to do that. I'm willing to do anything the Department asks of me to be able to have RK returned to me." She was then asked, "Have you anything to add?" and she replied, "No, other than I miss my daughter. She's been by my side all her life basically. I know she's with a good carer now so that makes me feel at ease...I miss her, and I know she misses me. I want her home. I know she wants to be home but I understand as well there are certain steps which may need to be carried out before that's allowed. I wouldn't have an issue of RK being with her father but I would understand if she has to stay with her carer, unless she has to move to another carer, that would be a concern to me." And I might add a concern to me as well. If I had thought that RK would have to move to another carer, I may have made different orders in this case for that would change the balance of factors impacting on RK's emotional wellbeing.

If the mother is ultimately able to demonstrate that she can remain free of alcohol and illicit substances (by not being observed to be substance affected, by providing consistent screens clean of opiates and alcohol and by engaging in assessment and treatment for drug and alcohol dependence) and that she has stable housing, it may be that when the case returns for a Directions Hearing on 02 July 2009 DOHS will recommend a supervision order or an interim protection order placing RK in her mother's full-time care. If the case does not settle

at Directions Hearing, I will hear a final contest starting on 13 July 2009. However, in that contest I will not revisit all of the evidence I have heard in the last 3½ days. I will just continue the case from this point on. It may be that I will ultimately take the view that RK should be put on a protection order in her mother's care but the addiction and housing issues will need to have been satisfactorily addressed by the mother.

21. MOTHER'S ACCESS

Ms YH was asked how she saw the process of reunification working, what was the Department's view of the time frame for reunification to happen. She said, "I have drawn up a proposed schedule: for two weeks on Wednesday & Thursday and then the next week after that add one day, Friday. For the following two weeks Wednesday, Thursday & Friday overnight to Saturday or if the accommodation is not considered appropriate Wednesday, Thursday, Friday and some time on Saturday at which time it would be reviewed if the mother has not addressed the concerns." I asked why the plan involved a gradual increase, given that RK is not an infant any more. Ms YH said she was "aware it's not a question of building attachment, it's more about having that time to monitor the mother in presenting clean screens and engaging in the services."

Asked how she felt about access, the mother said, "I would love to be able to spend more time with her. I'm happy to see her. If I was able to have her overnight at some point in time, that would be fantastic." Asked how RK would feel about overnight access, the mother said, "Oh. She would love it."

There is no evidence that would enable me to find that in any access visit RK is at risk of physical or emotional harm at the hands of her mother provided that the mother is not substance affected at the commencement of access. I am therefore not satisfied that RK's access with her mother needs to be either supervised or monitored. Given that RK lives at (location removed) and goes to school in (location removed) and her mother lives at (location removed), it is my view that the Department's proposed schedule of Wednesday, Thursday, Friday & Saturday is more likely to impact adversely on RK's schooling than a longer block of overnight access at weekends. In order to minimize the negative impact on RK's emotional wellbeing of continued separation from her mother, it is my strong view that there should be a condition allowing RK unsupervised access with her mother:

- at the mother's home from Friday afternoon until Sunday afternoon; and
- one weekday per week (preferably Wednesday) for up to 2 hours, the access to commence at RK's school and end at the carer's home; and
- at any other times and places as are agreed between the parties.

22. FATHER'S CHARACTERISTICS

The father's circumstances are vastly different from most of the limited number of fathers that we see in this Court. He has completed a Certificate III in Community Services through the Chisholm Institute at (location removed). He is currently studying for a Diploma of Community Development at Chisholm Institute's (location removed) Campus. This involves him in full-time study three days per week. In addition he works part time for approximately 10 hours per week in the community services sector, specifically running an aged men's group and a community kitchen.

The father provided an extremely positive reference from Mr (name removed) "Mr DM", the Manager of the (location removed) Learning Centre, who has known the father since his first work placement as part of his studies at Chisholm TAFE for the Diploma of Community Development. The reference continued:

"The father involved himself as a volunteer with the men's shed group at the centre and eventually established a support group for isolated and disadvantaged men.

The father has been here now for three years and has continued to be immersed in the activities of the centre. He has taken responsibility for the Occupational, Health and Safety issues both in the shed and in the centre. He is now employed for ten hours a week organizing programs for the men's shed - including cooking classes and health forums for men.

The father is a committed and competent leader. I entrusted him with special tasks like the OH&S and the men's group and he has lived up to my expectations. He has prepared submissions for funding and negotiated with different organizations (Rotary, RSLs, Community Groups) to encourage participation of their members in the centre.

The father has been a founding member of our Community Garden Project. He has shown great initiative and responsibility in the different tasks that he has started or been asked to do.

In all matters the father has proved himself reliable and trustworthy. He is concerned for the well being of those he is involved with and I have found him to be a great support for the Centre and myself. The father is punctual and completes the tasks he is set. He is honest and of good character."

There was a time in the father's life when he was a heroin user. As far as ever happens with heroin users, that appears to be in the past. The father is still a user of cannabis. As he is entitled to do, he declined to answer questions about that when he gave evidence. One of the drug screens that he produced was positive for cannabinoids with quite a high reading, I think of above 1000 milligrams per litre. There is, however, no suggestion that he has ever been observed to be affected by cannabis or any other substance during the period of the Department's involvement.

Although Ms YH conceded that the Department had no ongoing protective concerns about the father, the Department raised two issues about him. One related to his cannabis use. The

other is related to the fact that his family had been involved with an organization called The Family, headed by Anne Hamilton-Byrne, and the Department wishes to do a further assessment into that. I heard evidence from the father about his prior involvement with The Family and I am satisfied that his answers to me are correct. To questions which I started and Ms Steiner finished, the father said, "I have no contact with the group other than I have contact with my father who still has contact the group." The father grew up in the group from the time he was born until he left home when he was 16 years old. He resumed some contact with the group at one brief period in 2000, at a time when he had a breakdown and the group helped to support him. He has contact with his father about once a fortnight. He goes to the movies with his father occasionally. On occasions he goes up to his father's house. He says it is a good relationship, a positive relationship. Asked about whether he had treatment for the breakdown, the father said, "No, I left the country and went to England for a while. When I came back I was diagnosed as bipolar so I am medicated for that."

I am not satisfied that either of the issues raised by the Department is an issue which has any potential to cause an unacceptable risk of harm to RK. RK and her father are described by the mother as "being both very similar". Unfortunately for RK, she had not seen her father for many years. Four or so years ago their contact resumed for a little while but then stopped. The mother said of that initial resumption of contact, "She got on very well with her dad. That's why the initial contact started. She wanted to know who her dad was. I grew up being separated from my father. I spoke to the father's father and asked him to contact the father to ask him to contact me." In recent times the father has been involved with RK only since the Department became involved in February 2009 although she was emailing him last year.

It seems that at last the mother and the father have grown up and have sorted out their own relationship issues. In this contest in this Court, I have not got any impression of any ongoing ill feeling between the mother and the father. In fact their positions really are identical in this case. They are certainly not in conflict so far as RK is concerned and basically the father is supportive of reunification of RK with her mother.

The father has lived in a 3 bedroom rental property at (location removed) for the past five years. He shares that property with a Ms (name removed) "Ms LR". For a time they were in an intimate relationship but the father now describes their relationship as "good friends, close friends. She is very supportive of me and RK." Ms LR works an afternoon-evening shift at Bunnings in (location removed). The father has use of a car. His house is about 10 minutes drive from (location removed) railway station which is on the same railway line as (location removed).

Asked about his relationship with RK, the father described it as “a strong, burgeoning relationship”. He added, “I want to be a strong part of her life forever, financial, spiritual, physical.” He is providing some financial support for RK.

23. NO PROTECTIVE CONCERNS ABOUT FATHER

The Department has conceded that it has no protective concerns about the father. The mother was asked her view of RK staying with the father if she could not come back to the mother immediately. She said, “I would be more than comfortable, I don't have any problems about that.”

24. NO PLACEMENT WITH FATHER

In the event that I am not prepared to place RK back immediately in the care of her mother, the father is seeking that RK be placed in his full-time care until she is able to be returned to her mother. Both RK and her mother support that position. That raises for me the relevance of a case called *Fiddler v. Cantor*.⁶ In that case the mother had alcohol problems and the Children's Court had made an interim accommodation order placing the child in the care of the father. The mother appealed because she asserted that the child should have been placed in foster care. Justice Beach dismissed the mother's appeal. His reasons were based on s.87(1) of the *Children and Young Persons Act* 1989 but there is nothing in that section which is distinguishable from s.10 of the *CYFA*. So Justice Beach's reasoning is just as valid now in my view as it was under the previous Act.

However, in my view the present case is distinguishable. The difference is this. One of the things I have to take into account is under s.10(3)(f) of the *CYFA*, namely the desirability of continuity and stability in RK's care. RK has never lived with her father since she was a small infant. I do not believe that it would be in RK's best interests to place RK immediately in her father's care as if she was parcel being moved from one storage facility to another. It is a very different thing to see a child for one or two hours a week than to be responsible for the full-time care of a child for 24 hours a day, seven days a week, less school time. If I was intending to place RK in her father's full-time care I believe it would be necessary to build up their relationship gradually to ensure that the psychological adjustment that both RK and her father would need could be a phased process.

⁶ Supreme Court of Victoria-Beach J, unreported, 28/01/1994.

Further, I do not believe that it would assist the process of RK's reunification with the mother to place her in the full-time care of her father at this time notwithstanding that her mother and her father are no longer in conflict about their daughter. I think it is likely to overload RK emotionally to place her in her father's care while planning and conducting a phased reunification with her mother.

25. FATHER'S ACCESS

Since February 2009 the father has had access with RK for an hour once per week. Until recently that access occurred at the DOHS' (location removed) office and was supervised by DOHS. Only in the last couple of weeks has that access changed to monitored. It is difficult for me to see any reason why the father's access should continue to be either supervised or monitored. I think it is extraordinarily unlikely that the father would present as affected by cannabis in his daughter's presence. Nothing that I have heard suggests that that poses an unacceptable risk. Nor am I concerned about his history and relationship to The Family, given the father's evidence in relation to that. I might be concerned if he was still a member of the Hamilton-Byrne cult but I accept his evidence that he is not.

Nor do I see any reason why the father's access should be restricted to one hour per week. That is scarcely sufficient to develop the relationship between a daughter and a long-lost father. However, the frequency of access with the father should not be such as to diminish the level of access which RK should have with her mother, her primary attachment figure. Balancing these matters, I have included a condition providing for RK to have unsupervised access with her father:

- overnight one weekday per week (preferably Tuesday), the access to commence and end at RK's school unless father, RK & DOHS agree to another arrangement; and
- at any other times and places as are agreed between the parties.

26. NO DRUG SCREENS REQUIRED OF FATHER

Although the Department said in its addendum report of May 2009 that it was seeking a condition for the father to produce screens, Ms YH said in her evidence that she was no longer seeking any such condition. The evidence strongly supports Ms YH's later position. There is no condition on the order requiring the father to provide drug screens.

27. TELEPHONE CONTACT

RK has continued to have phone contact with her mother and father throughout her time in placement. It is apparently quite regular. Ms YH conceded that in answer to a question by me that the Department did not seek to interfere in that phone contact. Hence I have included a phone contact condition - really an unlimited phone contact condition - in the order entitling RK to have telephone contact as agreed between herself and the respective parent.

28. NO FORMAL PROOF OF PROTECTION APPLIC'N

Finally, there has as yet been no formal proof of the protection application. At the outset I raised the question whether or not we could convert this interim accommodation order contest into a final contest. None of the three counsel were enthusiastic about that. The Department said that there may be some other witnesses it might wish to call on the issue of proof. Either Ms Steiner or Mr Taghdir or both were at least not conceding a finding under the 'physical abuse' ground of s.162(1)(c).

The evidence that I have heard so far is of course not complete. In my view what I have heard to date would support a finding under s.162(1)(e). However, I would not be satisfied on the balance of probabilities given what I have heard so far that RK was at risk of significant harm as a result of physical injury. Certainly she has not sustained any such injury and I am not satisfied that there is a possibility that could not be ignored that she was likely to sustain it in the future.

The inadequate food issue might have led at least to an argument about proof under s.162(1)(f), but that ground was not pleaded by DOHS. I think that DOHS was correct not to plead it because I do not think that on what I have heard so far the food issue would come anywhere near justifying a finding under s.162(1)(f).

So what I am saying is that I believe the Department would have no difficulty proving the protection application on the emotional harm ground of s.162(1)(e). Both actual harm from the observations of the change in RK's behaviour observed at school and her own self diagnosis of depression, and the likelihood of emotional harm should the situation have continued without DOHS' intervention.

Having said that, I want to emphasize that I am not making any formal finding of proof because I have not yet heard all the evidence in the case.

29. ORDERS

The case is adjourned to 5 June 2009 at 10 a.m. for rollover. There is no need for any of the parties to attend other than a representative of the Department from the Court Advocacy Unit.

The next significant date is 2 July 2009 for a Directions Hearing at 9.30 a.m. in front of me. I will label the case part heard, but counsel need not consider themselves part heard. It will be up to their instructing solicitors whether they are to be briefed again or not. I hope counsel will continue to be briefed but I cannot direct or control that. This is one of the reasons why I have gone into such detail in this judgment and will provide a copy to each of the parties and their legal representatives. If this case does not settle on or before 02 July 2009 I will continue this hearing on 13 July 2009. I have asked the Court co-ordinator to set aside three days for that.

I can give effect to these reasons in two different ways. I can either extend and vary the existing IAO or make a new IAO. It makes more sense to me to make a new IAO because that is basically what the application is. Accordingly I will make a new interim accommodation order placing RK in out-of home care with (location removed) Emergency Adolescent Care with the following ten conditions:

1. Each parent must accept visits from and cooperate with DOHS.
2. Mother must accept support services – including but not limited to a parenting competencies service - as agreed with DOHS.
3. Father must accept support services as agreed with DOHS.
4. Mother must submit to random supervised drug and alcohol testing not more than 2 times per week as directed by DOHS and must allow the results to be given to DOHS.
5. Mother must engage in:
 - (a) assessment and/or treatment for drug and alcohol dependence with EDAS as recommended by EDAS;
 - (b) personal counselling to assist with her self-confidence and self-assertiveness as agreed with DOHS-and must allow reports about attendance and progress to be given to DOHS. [The treatment referred to in (a) may include the personal counselling referred to in (b) if the underlying issues are assessed to be the same.]
6. Mother must not drink alcohol or use illegal drugs when with RK and must not be affected by alcohol or illegal drugs when with RK.
7. Father must not use illegal drugs when with RK and must not be affected by illegal drugs when with RK
8. Unless mother, RK & DOHS agree to another arrangement, mother may have unsupervised access with RK as follows:
 - (a) one weekday per week (preferably Wednesday) for up to 2 hours, the access to commence at RK's school and to end at the carer's home;

(b) from Friday afternoon until Sunday afternoon, the access to commence at the mother's home, RK to sleep at mother's home on Friday and Saturday nights;

(c) at any other times and places as are agreed between the parties.

If mother presents as substance affected at the start of any access visit, that visit must be cancelled. DOHS or its nominee is to facilitate transport for each access visit for which RK needs private transport.

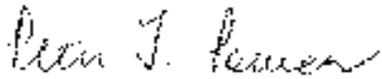
9. Father may have unsupervised access with RK as follows:

(a) overnight one weekday per week (preferably Tuesday), the access to commence and end at RK's school unless father, RK & DOHS agree to another arrangement;

(b) at any other times and places as are agreed between the parties.

DOHS or its nominee is to facilitate transport for each access visit for which RK needs private transport.

10. RK may have telephone contact with mother and with father as agreed between RK and the respective parent.



PETER T. POWER

Magistrate

Melbourne Children's Court