FAMILY COURT OF AUSTRALIA

BLAZE AND ANOR & GRADY AND ANOR ***[2015] FamCA 1064***

FAMILY LAW – CHILDREN - where the applicants are not the child's "parents" - where the applicants are not related to the child - where the mother and the applicants agreed before the child's birth that the applicants would care for the child - quasi-adoption - where the father was not involved in this decision - where the mother resiled from that agreement - where the mother, the father and the Independent Children's Lawyer seek orders to have the child transitioned to the mother's primary care - whether the child's best interests are served by continuing her established attachments to the applicants - whether the child's best interests are served by enhancing her familial attachments and familial connectedness to her parents and siblings - where the child is two years old - principles relating to non-parent applicants - child to live with her mother and spend time with the applicants and spend time with her father.

Acts Interpretation Act 1901 (Cth)
Evidence Act 1995 (Cth)
Family Law Act 1975 (Cth)

Aldridge v Keaton (2009) FLC 93-421
Beckwith v The Queen (1976) 135 CLR 569
Champness & Hanson (2009) FLC 93-407
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
Cox & Pedrana (2013) FLC 93-537
Donnell & Dovey (2010) FLC 93-428
Goode & Goode (2006) FLC 93-286
Hall & Hall (1979) FLC 90-713
Hort & Verran (2009) FLC 93-418
M v M (1988) 166 CLR 69
Maldera v Orbel (2014) FLC 93-602
Marsden & Winch (No 3) [2007] FamCA 1364
Mills v Meeking (1990) 169 CLR 214
MRR v GR (2010) 240 CLR 461
Mulvany & Lane (2009) FLC 93-404
Potts & Bims [2007] FamCA 394
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Re Evelyn (No 2) (1998) 23 Fam LR 73
Rice v Miller (1993) FLC 92-415
Sanders & Sanders (1976) FLC 90-078
Sayer v Radcliffe and Anor (2012) 48 Fam LR 298
SCVG & KLD (2014) FLC 93-582

The Commonwealth v Baume (1905) 2 CLR 405
Transport Accident Commission v Treloar (1991) 14 MVR 289
Yamada & Cain [2013] FamCAFC 64

APPLICANTS:	Ms Blaze and Ms Darnley
RESPONDENT:	Ms Grady
INTERVENER:	Mr Harper
INDEPENDENT CHILDREN'S LAWYER:	Ms Jennifer Boulton
FILE NUMBER:	BRC 2313 of 2014
DATE DELIVERED:	30 November 2015
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane
JUDGMENT OF:	Kent J
HEARING DATE:	19 to 23 October 2015 and 26 to 27 October 2015

REPRESENTATION

COUNSEL FOR THE APPLICANTS:	Ms Cullen
SOLICITOR FOR THE APPLICANTS:	Porta Lawyers
COUNSEL FOR THE RESPONDENT:	Ms Galvin
SOLICITOR FOR THE RESPONDENT:	Journey Family Lawyers
COUNSEL FOR THE INTERVENER:	Ms McDiarmid
SOLICITOR FOR THE INTERVENER:	Delaney & Delaney
COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER:	Mr Cameron
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:	Jennifer Boulton, Solicitor

ORDERS

IT IS ORDERED THAT:

(1) The Mother and the Father shall have equal shared parental responsibility for the child, B born on … 2013.

(2) For the purposes of the child transitioning to live with the Mother, the child shall live with the Mother and the Applicants as follows with all handovers to occur at the Suburb C Shopping Centre, unless otherwise agreed in writing:

<u>With The Mother:</u>

(a) for the first four (4) weeks commencing from Monday 30 November 2015 ("the First Transition Period"):

(i) from 9.00 am Wednesday until 5.00 pm Wednesday in each week; and

(ii) from 5.00 pm Friday until 5.00 pm Sunday in each week.

(b) from the end of the First Transition Period and for the next four (4) week period ("the Second Transition Period"):

(i) from 9.00 am Wednesday until 5.00 pm Thursday in each week; and

(ii) from 5.00 pm Friday until 5.00 pm Sunday in each week.

(c) from the end of the Second Transition Period and for the next four (4) week period ("the Third Transition Period") from 9.00 am Wednesday until 5.00 pm Sunday in each week.

<u>With The Applicants:</u>

(d) at all other times when the child is not living with the Mother in accordance with subparagraphs (a) – (c) inclusive herein.

(3) From the end of the Third Transition Period and for the next eight (8) week period ("the Fourth Transition Period") the child shall:

(a) spend time with the Applicants from 5.00 pm Friday until 5.00 pm Sunday in each alternate weekend; and

(b) live with the Mother at all other times.

(4) During the First, Second, Third and Fourth Transition Periods the child shall spend time with the Father at all such times as may be agreed between the Mother and the Father provided that such "time" does not coincide with the time that the child would otherwise be in the care of the Applicants pursuant to these Orders.

(5) On and from the conclusion of the Fourth Transition Period the child shall live with the Mother.

(6) From the end of the Fourth Transition Period and until the child commences school, the child shall spend time with the Applicants from 5.00 pm Friday until 5.00 pm Sunday on the fourth weekend of each block of four (4) weeks ("the Applicants' Weekend") with changeover to occur at the Suburb C Shopping Centre (unless otherwise agreed to by the parties in writing), with such weekend time to alternate between the weekends the child would otherwise be spending with the Mother and the weekends that she would otherwise be spending time with the Father in accordance with these Orders.

(7) From when the child commences school, the child shall spend time with the Applicants from after school Friday until 5.00 pm Sunday on the fourth weekend of each four (4) week period ("the Applicants' Weekend") with the Applicants to collect the child from her school on the Friday and with changeover on the Sunday at the Suburb C Shopping Centre (unless otherwise agreed to by the parties in writing) with such weekend time to alternate between the weekends the child would otherwise be spending with the Mother and the weekends that she would otherwise be spending time with the Father in accordance with these Orders.

(8) From the end of the Fourth Transition Period and until the child commences school the child shall spend time with the Father at all such times as may be agreed between the Mother and the Father (provided that such "time" does not coincide with the Applicant's Weekend) but failing agreement as follows:

(a) from 4.00 pm Tuesday until 7.30 am Wednesday in each week;

(b) each alternative weekend, from 5:00 pm Friday until 7:30 am Monday; and

(c) for a period of no more than seven (7) days in a row, up to four (4) times per calendar year, with the Father to nominate this time by giving the Mother no less than sixty (60) days' notice in writing.

(9) From when the child commences school, the child shall spend time with the Father at all such times as may be agreed to between the Mother and the Father (provided that such "time" does not coincide with the Applicant's Weekend) but failing agreement as follows:

(a) from after school Tuesday until before school Wednesday in each week;

(b) from after school Thursday until before school Friday in each week;

(c) each alternative weekend, from after school Friday until before school Monday; and

(d) for a period of no more than fourteen (14) days in a row, up to three (3) times per calendar year or half of the child's gazetted school holidays with the Father to nominate this time by giving the Mother and the Applicants no less than sixty (60) days' notice in writing.

(10) In the event that Easter Thursday to Easter Monday inclusive, Mother's Day, the Mother's birthday, the child's birthday, Father's Day, the Father's birthday, Christmas Eve, Christmas Day, Boxing Day, New Year's Eve and New Year's Day fall during the Applicants' Weekend, then the Applicant's time pursuant to these Orders is suspended on those days only and the child shall be returned to the parent with whom the child is otherwise to live or spend time with pursuant to these Orders.

Special Occasions

(11) That on the child's birthday, the child shall spend time with the parent who does not have their care on that day, with such time to be as agreed between the Mother and Father in writing at least seven (7) days prior, or failing agreement, from after day care/school until 7:30 pm if the birthday falls on a day care/school day or from 12:00 pm to 5:00 pm if the child's birthday does not fall on a day care/school day. The parent not having the care of the child on that day is responsible for collecting the child from the other parent's residence or day care/school at the commencement of the birthday time and returning the child to the other parent's residence at the conclusion of the birthday time.

(12) In the event that the Mother's birthday falls on a day when the child is not in the Mother's care, the child shall spend time with the Mother with such time to be agreed between the Mother and Father in writing at least seven (7) days prior, or failing agreement, from after day care/school until 7:30 pm if the birthday falls on a day care/school day or from 12:00 pm to 5:00 pm if the Mother's birthday does not fall on a day care/school day. The Mother is responsible for collecting the child at the commencement of her birthday time from the Father's residence or day care/school and responsible for returning the child to the Father's residence at the conclusion of her birthday time.

(13) In the event that the Father's birthday falls on a day when the child is not in the Father's care, the child shall spend time with the Father with such time to be agreed between the Mother and Father in writing at least seven (7) days prior, or failing agreement, from after day care/school until 7:30 pm if the birthday falls on a day care/school day or from 12:00 pm to 5:00 pm if the Father's birthday does not fall on a day care/school day. The Father is responsible for collecting the child at the commencement of his birthday time from the Mother's residence or day care/school and responsible for returning the child to the Mother's residence at the conclusion of his birthday time.

(14) In the event that Mother's Day falls on a weekend when the child is not in the Mother's care, the child shall spend time with the Mother from 9:00 am to 5:00 pm.

(15) In the event that Father's Day falls on a weekend when the child is not in the Father's care, the child shall spend time with the Father from 9:00 am to 5:00 pm.

(16) For Easter, as follows:

(a) in 2016 and each alternate year thereafter, the child shall spend time with the Father from 4:00 pm on the Thursday prior to Good Friday until 5:30 pm on Easter Monday; and

(b) in 2017 and each alternate year thereafter, the child shall spend time with the Mother from 4:00 pm on the Thursday prior to Good Friday until 5:30 pm Easter Monday.

(17) For Christmas, as follows:

(a) in 2015 and each alternate year thereafter, the child shall spend time with the Mother from 12:00 noon Christmas Eve until 12:00 noon Christmas Day and with the Father from 12:00 noon on Christmas Day until 12:00 noon on Boxing Day; and

(b) in 2016 and each alternate year thereafter, the child shall spend time with the Father from 12:00 noon Christmas Eve until 12:00 noon Christmas Day and with the Mother from 12:00 noon on Christmas Day until 12:00 noon on Boxing Day.

Changeover Location

(18) That in relation to changeover between the Mother and the Father (unless otherwise provided for in these Orders or otherwise agreed):

(a) until the child commences school the Mother will deliver the child to the Father's residence at the commencement of the child's time with him and the Father will return the child to the Mother's residence at the conclusion of the child's time with him;

(b) once the child commences school:

(i) during the school term the Father will collect the child from her school at the commencement of her spending time with him and return the child to her school at the conclusion of her time with him; and

(ii) on all other occasions when the child is spending time the Father, the Mother will deliver the child to the Father's residence at the commencement of the child's time with him and the Father will return the child to the Mother's residence at the conclusion of the child's time with him.

(19) That in relation to changeovers involving the Applicants, unless provided for in these Orders, all changeovers will be at Suburb C Shopping Centre unless otherwise agreed to by the parties in writing.

Telephone Communication

(20) That the Mother and the Father be at liberty to telephone, text message and or call the child via Tango/Skype/Facetime when the child is not in their care at all reasonable times.

(21) That the child be at liberty to telephone, text message and or Tango/Skype/Facetime the Applicants, the Mother and the Father at any reasonable time requested by the child and the other party shall do all things necessary to encourage and facilitate such communication.

Passports and Overseas Travel

(22) That upon the request of either the Mother or the Father, the Mother and the Father shall sign any passport application and necessary documentation in order for the child to obtain a passport within fourteen (14) days of the request.

(23) That in the event that the Mother or the Father shall neglect or fail to sign any passport application and necessary documentation in accordance with paragraph (22) hereof, a Registrar of the Family Court of Australia shall sign in lieu thereof any passport application and supporting documentation necessary to allow the child to travel overseas.

(24) That the Mother and the Father agree that in the event that either of them wish to travel overseas with the child, the travelling party will provide to the other party at least twenty-eight (28) days prior to departure, the following:

(a) details of the time and place of departure from Australia and the time and place of arrival on their return to Australia;

(b) copies of documentation and return tickets that evidences when the child will be returning to Australia;

(c) a brief itinerary as to where the child will be travelling and the addresses where the child will be staying when overseas;

(d) contact telephone numbers so that each party has telephone communication with the child whilst they are in the care of the other party at all reasonable times.

Specific Issues Orders

(25) That the parties use text message and email to communicate with respect to the child's care, welfare and development.

(26) That the Applicants, the Mother and the Father are restrained from criticising, denigrating, demeaning, belittling or ridiculing each other or any member of each party's family or household in the presence or the hearing of the child and

the parties who are present shall forthwith remove the child from the presence of any person who is doing so.

(27) That the Applicants, the Mother and the Father advise each other in writing of any changes to their residential address, landline telephone number and mobile number within forty-eight (48) hours of such change occurring.

(28) That the Mother and the Father keep each other advised in writing of the activities, playgroups, extra-curricular activities, medical practitioners or other professionals that the child attends and advise within forty eight (48) hours of any change to those details.

(29) That the Mother and the Father be at liberty to attend the child's school and extra-curricular events and activities and to contact the child's school and teachers to ascertain how the child is progressing. These Orders authorise the child's school and relevant educational institutions to provide a copy of the child's reports, school notices, newsletters, school photographs and any other information concerning the child to the Mother and Father.

(30) That the Applicants, the Mother and the Father advise each other as soon as practicable of any emergency involving the child and providing details including the name of the treating doctor, hospital and relevant contact numbers.

(31) That the Mother and the Father be at liberty to contact all of the medical practitioners treating the child from time to time and these Orders authorise the child's medical practitioners to provide information or reports concerning the child to the Mother and the Father.

(32) Within twenty-eight (28) days of the date of these Orders the Applicants, the Mother and the Father do all things reasonable and necessary and sign all documents to ensure that the Father's name is recorded on the child's Birth Certificate as her father.

(33) The Mother and the Father are permitted to register the name, "*N*", in the child's name with the Registrar-General for the State of Queensland, provided that the name, "*N*", is incorporated as one of the child's middle names and the Mother and the Father are hereby restrained from registering the name "*B-N*" as the child's name with the Registrar-General for the State of Queensland.

(34) The Mother and the Father are permitted to change the child's surname from "*Darnley-Blaze*" to "*Harper-Grady*" and to register that name as the child's surname with the Registrar-General for the State of Queensland.

(35) The Applicants, the Mother and the Father shall within twenty-eight (28) days of the date of these Orders enrol in a parenting orders program and thereafter complete such program and follow any recommendations or referrals made by the facilitator of the said program.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Blaze & Anor & Grady & Anor* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: BRC 2313 of 2014

Ms Blaze and Ms Darnley
Applicants

And

Ms Grady
Respondent

And

Mr Harper
Intervener

And

Independent Children's Lawyer

REASONS FOR JUDGMENT

1. The central question raised in these parenting proceedings[1] concerning the child B, born in 2013 and aged two years and four months at trial ("the child"), is whether the child's best interests are best achieved by orders now made which:

    a) Maintain the position of the child remaining in the primary care of the applicants, as sought by them, that being the position that has obtained since the child's birth; **or**

    b) Transition the child into her mother's primary care; as is sought by the mother and the child's father and the Independent Children's Lawyer ("the ICL") appointed to independently represent the interests of the child in these proceedings.

2. The answer to that central question depends upon assessing and balancing the benefits to the child of the continuity of her primary care by the applicants and

[1] Pursuant to Part VII of the *Family Law Act 1975* (Cth) ("the Act").

any detriments to the child of disrupting her established attachment to the applicants; as against assessing the benefits to the child of enhancing her familial connectedness with each of her parents and with her siblings.

3. That central question and the assessments referred to arise in the following unusual circumstances.

4. The child's mother, Ms Grady ("the mother") is the mother of three other children, namely Ms D born in 1996 who is 19 years of age; E born in 2004 who is now 11 years of age and F born in 2005 who is now 10 years of age.

5. As at the time of trial, Ms D and E were primarily living with their father, the mother's ex-partner Mr G, and E was spending each alternate weekend with the mother. F was continuing to live primarily with the mother.

6. In about the latter part of 2012 and during her pregnancy with the child, the mother determined and agreed with the applicants, Ms Blaze and Ms Darnley, a same-sex couple, that upon the child's birth the child would be relinquished by the mother into the care of the applicants, albeit with the mother and her other children having some ongoing relationship with the child.

7. Each of the mother, Ms Blaze and Ms Darnley are profoundly deaf. The mother and Ms Blaze were long term friends and Ms Blaze's relationship with Ms Darnley had the consequence that the mother and Ms Darnley came to know each other.

8. During her pregnancy the mother thought or believed that the child's father was a man already in a relationship with another woman and which relationship had produced a child. The mother's belief in this respect seems to have informed the mother's view at the time of her pregnancy that she was unlikely to receive any support from this man either for herself or for the child. At that time the mother had the primary care of all three of her children and on the evidence her financial circumstances were constrained. These features informed, at least to some extent, the mother's decision to relinquish the child's care to the applicants upon her birth. In the event, DNA testing undertaken subsequent to the child's birth confirmed that the man who was the putative father referred to was not in fact the child's father.

9. From 10 February 2013 and until the child's birth on 25 June 2013 the applicants lived with the mother and her children as part of the mother's household. The applicants assisted the mother with the household and daily living tasks and with the care of the mother's children and their financial contribution to the household comprised them being primarily responsible for purchasing groceries for the family in that period.

10. The mother and the applicants sought counselling with a psychologist in March 2013, apparently in an endeavour to gain an understanding of any implications that may arise as a result of their agreement for the mother to

surrender the care of her child to the applicants. A written "birth plan" was executed by the applicants and the mother under which the applicants were to take responsibility for the child's care immediately following her birth.

11. The mother and the applicants, soon after the child's birth, entered into a Parenting Plan prepared by a lawyer. A copy of that document is Annexure "TAG-01" to the mother's affidavit filed on 13 October 2014.

12. The Parenting Plan provides for, in summary, the applicants to have equal shared parental responsibility for the child and to be her carers. The Parenting Plan also provides for the child to have a relationship with the mother and her three children, however does not specify the amount of time or how that was to occur.

13. The mother provided both affidavit and evidence at trial under cross-examination that she did not consider such a stipulation to be necessary at the time due to her then close friendship with the applicants.

14. As the Recitals to the Parenting Plan confirm, the applicants had been longstanding friends of the mother. The evidence confirms that this was particularly so as regards the mother and Ms Blaze.

15. As already noted, each of the mother and the applicants are profoundly deaf and Recital E in the Parenting Plan records that the mother saw it as important that her child be raised by the applicants, rather than being placed for formal adoption with State authorities. Recitals D, H and I record the facts, respectively, that the applicants had been unable to have their own child through assisted reproductive therapy; that the parties were unable to enter into a formal surrogacy arrangement; and that a formal adoption (under applicable State law) was not available.

16. I here note that the child has no hearing impairment.

17. Following the child's birth and discharge from hospital the applicants cared for her at the home of a friend at Suburb H, Queensland, for what they say was a period of approximately two weeks, at which time they relocated to their home in Melbourne, Victoria. It was apparently always known to the mother that the applicants would be returning with the child to live in Victoria. However, the duration of the period that the applicants and the child remained in Queensland immediately after the child's birth is disputed by the mother. She suggests that they left Brisbane on 28 June 2013.

18. The applicants contend that the mother was supportive of them returning to their home in Melbourne, Victoria with the child, expressing to them to the effect "go home and start your new life, I am happy for you to leave."[2] The applicants maintain that their transition to caring for the child was a seamless,

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[2] Affidavit of Ms Blaze filed on 10 October 2014 (at paragraph 18).

enjoyable and positive experience. There is no forensic need to determine this aspect of the dispute.

19. The child's father, Mr Harper ("the father") did not know he was the child's father either when the mother was pregnant; nor at the time of the child's birth; nor for a significant period following the birth. The father thus did not participate in, or know about, the decision by the mother to relinquish the child to the applicants, nor was the father a party to the Parenting Plan. The father has never cohabitated with the mother on a permanent basis. They each describe their relationship to the effect that it is a casual dating relationship.

20. In about August or September 2013, some two or three months subsequent to the child's birth the father was informed by the mother that he may be the child's father. DNA testing undertaken on or about 14 March 2014 confirmed the father's paternity.

21. Subsequent to the child's birth and the applicants, with the child, relocating to Victoria the applicants returned to Queensland with the child in October 2013 for a visit. The duration of the period of the visit is in dispute. However, during the first week of the visit the applicants and the child stayed with the mother and her children in the mother's household and the remainder of that time was spent staying at the house of the mother's ex-partner, Mr G. The applicants contend that the reason for them not staying with the mother for the entirety of the visit was due to what they assert was an unhygienic environment in the mother's household.

22. It seems to have been at the time of the mother's 40th birthday party, held on 19 October 2013, that the mother first informed the applicants of her belief that the father was the child's father. The applicants met the father at that time. The father met the child for the first time on the following morning at the mother's home, at which time the applicants encouraged the father to undertake a paternity test in order to confirm whether or not he is the child's father.

23. It is the mother's position that, relating to the October 2013 visit, the applicants did not allow her or her children to spend sufficient time with the child. The mother has maintained that requests were made for her or her daughter, Ms D, to see the child during this period which she says were denied. The applicants dispute this to be so and have asserted that the mother did not give any clear indication of wanting to see the child. In any event, it seems clear enough that it was at about the time of the October 2013 visit, or in response to what had occurred during the visit from her experience, that the mother's position in relation to the child remaining in the ongoing care of the applicants, changed. That is, the mother determined that the child ought be in her care.

24. The father provides evidence that it was in November 2013 that the mother commenced to communicate to him to the effect that she wanted the child to be returned to her care. It seems that it was at this time that the father confirmed

that he would be willing to undertake a DNA test to verify his paternity and, should the test be positive, the father expressed his willingness and eagerness to play an active and ongoing role in the child's life, and support for the mother in having the child in her care.

25. Following the October 2013 visit the applicants and the child again returned to Queensland in March 2014. On 11 March 2014, pursuant to arrangements that had been made, the mother and the applicants attended upon a counselling session with the psychologist earlier referred to. It appears that the applicants were willing to engage in counselling services in order to address the issues that had arisen surrounding the child's care and the mother's concerns surrounding that. It is clear that the mother had, prior to 11 March 2014, determined that she would "reclaim" the child. On that date the mother attended the psychologist's office with a police officer in attendance who apparently informed the parties that he was there to maintain the peace. It seems that the psychologist had recommended that the child be returned to the mother's care and thus facilitated that occurring in the context of the counselling session referred to. Thus it was that on 11 March 2014 the mother, contrary to the wishes of the applicants, took the child into her care.

26. On the same date of the child's removal by the mother, the applicants requested that the police perform a welfare check. The father deposes that the mother brought the child to his residence where they both cared for the child on that day. On each of 12 and 17 March 2014 police attended the father's home and were apparently satisfied that his residence was suitable for the care of a child.

Proceedings prior to trial

27. On 13 March 2014 the applicants filed an Initiating Application in the Federal Circuit Court for, inter alia, an order for the child to be returned to their care. The application was initially heard on 20 and 21 March 2014 at which time the father obtained leave to intervene as a party in the proceedings. On 21 March 2014 orders were made (amended on 4 April 2014) by Judge Purdon-Sully in the Federal Circuit Court. Those orders were made by consent on an interim basis and were predicated upon the applicants' undertaking to relocate to Brisbane, which they did.

28. The interim orders provided for the child to live with the applicants in Brisbane; for the parties to have equal shared parental responsibility for the child; and for the child to spend time and communicate between 9.00 am Saturday to 9.00 am Sunday each alternate weekend with the mother; and with the father between 9.00 am Friday to 9.00 am Saturday on the other alternate weekend; and with both parents between 9.00 am to 5.00 pm each Wednesday. Orders were also made for the appointment of an ICL; for a family report to be prepared pursuant to s 62G of the Act; and for the proceedings to be transferred

to this Court. Those orders for the child's care arrangements remained as the operative orders as at trial.

29. It is thus the case that the child has lived primarily in the care of the applicants, and has spent time with her parents as provided for in orders made on 21 March 2014, since those orders were made. It is clear that the mother and the father have often invited the other to spend time with the child during their individual allocated time under the orders in an effort to maximise the time they have both spent with the child in each week since the orders were made. This has also obviously facilitated the mother's other children, the child's siblings, having opportunities to spend time with the child.

Final trial

30. One complicating circumstance of the trial of these proceedings is that each of the applicants and the mother are profoundly deaf and communicate in Auslan, the sign language of the Australian Deaf Community. The father is severely deaf as distinct from being profoundly deaf. He mainly utilises hearing aids and lip reading for comprehension (he also has some ability in Auslan) and he communicates verbally in spoken English.

31. For the purpose of facilitating this trial the Court engaged six qualified and accredited Auslan interpreters who were sworn to interpret. The interpreters respectively provided interpretation of the evidence given by any hearing impaired witness as well as providing each of the parties with interpretation of what was being said in Court throughout the seven days of trial.

32. It was necessary for the Court to engage six such Auslan interpreters because of the need to allow the interpreters respite without affecting the continuation of the proceedings. That is, it was recognised that the demands of undertaking Auslan interpretation meant that every 15 minutes or so the interpreter providing the interpretation of evidence given to the Court was interchanged with another interpreter. Similarly, there were interchanges of the interpreters providing interpretation to the respective parties.

33. I record here, as I did during the trial, that I am comfortably satisfied that each of the Auslan interpreters performed the task of interpretation of evidence competently and accurately. Specifically, I am satisfied that the interpreters provided accurate interpretation of the questions and answers given to questions during the course of examination of each relevant witness requiring interpreter assistance.

34. One impressive feature of the interpreters was their apparent ability not only to translate into the spoken word the message sought to be conveyed by the witness, but to do so with the use of inflection and intonation of speech reflecting the emphasis the witness sought to convey.

35. Exhibit 2, comprising a written transcript of relevant answers given by the applicants respectively during the course of their respective cross-examinations, was admitted because counsel for the applicants asserted, subsequent to the completion of their respective cross-examinations and re-examination, that it was a consequence of "language difficulty" that neither applicant identified, during cross-examination, the same concerns they had expressed in affidavit material about the mother, concerning her parenting capacity, and the risks they asserted the mother might pose in this respect if the child were in her care.

36. I was not persuaded that the applicants' respective "failures" in this respect could be attributed to any difficulty of language or interpretation.

37. I am comfortably satisfied that each applicant was given ample opportunity in the course of their cross-examination (by the three counsel for each of the other parties respectively) to identify and express any relevant concerns each held about the mother and her capacity, because I am satisfied as to the accuracy of the task performed by the Auslan interpreters.

38. I rejected the application of the applicants to be recalled to give further evidence subsequent to completion of their respective cross-examinations. In my judgment, in the face of what was clear evidence given under cross-examination, there could be little probative value in further (revised) evidence of the applicants, they having realised the contrast between their affidavit evidence in this respect and their evidence given in cross-examination, to revisit the same topic in further, subsequently given, evidence.

39. Some days after the mother had completed her evidence in cross-examination one of the applicants (Ms Blaze) via her counsel raised, for the first time, an issue concerning what were alleged by Ms Blaze to be some errors or omissions in the interpretation of the mother's evidence. Leaving aside the belatedness of this issue being raised I did not then consider, and I record now, that there was any substance to the complaint raised.

40. In my judgment any difference between the Auslan accredited and independent interpreters, on the one hand, and a party on the other, as to the evidence given in the course of the trial is readily resolved in favour of the interpreter. I am fortified in that conclusion by the observation, in addition to those already made, that, aside from the feature that the interpreters were engaged by the Court independently of the parties, over many hours and days of this trial when such interpretation was undertaken only minor or limited complaints, relative to the overall extent of interpreted evidence undertaken, were raised.

Parties' respective proposals

Applicants' proposed orders

41. The applicants' proposed orders are contained in a document headed "Amended Final Orders" which was admitted and marked as Exhibit 6 in the proceedings.

42. Obviously, the full detail of the applicants' proposed orders appears in Exhibit 6. However, summarising the central features of the applicants' proposed orders, the applicants seek an order for the child to live with them and to spend time with each of her parents. There is a differentiation between the period from now "until the child turns of Prep School Age" ("the first stage") and thereafter. At the first stage the applicants propose that the child would spend from 3.00 pm Friday to 3.00 pm Sunday each alternate weekend alternating between each of her parents respectively; and one third of "holiday time"[3] "with each parent respectively." In addition, the child would spend one day each week, between 9.00 am and 5.00 pm, with each parent respectively.

43. From when the child attains "Prep School Age" the applicants propose that the child would spend one out of each three weekends with her mother from 3.00 pm Friday to 9.00 am Monday and likewise one in three weekends with her father; and the other weekend in the three week period would be spent with the applicants.

44. Curiously, the orders proposed for when the child is of Prep School age, in respect of holiday time, provide for that time for no more than seven days in a row albeit up to three times per calendar year. That is curious because that is not the proposal with respect to the first stage as to "holiday time".

45. The applicants also make provision in their proposed orders for special occasions such as Father's Day and Mother's Day and for Easter periods.

46. The applicants propose that changeovers continue to occur in the current manner, that is, in the food court of the Suburb C Shopping Centre and there is provision for communication by way of telephone, text and/or Skype.

47. There is also provision in the proposed orders for overseas travel.

48. Orders for specific issues are sought including an order for the mother to partake in random drug testing and provide the results to other parties at three month intervals "upon demand by any of the parties."

49. The applicants specifically seek an order that the child's name not be altered from the name by which she is presently known as her birth name without the consent of all parties.

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[3] This is to be understood as referring to gazetted school holiday periods.

50. In respect of parental responsibility the applicants' proposed orders refer to "all parties" having equal shared parental responsibility for the child but this is to be understood to be a reference to the applicants and each of the parents respectively rather than including the ICL.

Parents' proposed orders

51. Exhibit 7 in the proceedings are the final orders sought by the mother in written form. Exhibit 8 in the proceedings are the final orders sought by the father. As each of these effectively are a mirror image of each other the parents' proposed orders may be referred to collectively.

52. In relation to parental responsibility for major long-term issues the parents propose orders that the parents equally share that responsibility.

53. The parents further propose that there be a transition of the child from her current primary care with the applicants to primary care with the mother. That transition is proposed to occur over a period of months with a gradual increase of time in each of those months to the point when, at the conclusion of the period, the child would be living with the mother and spending time with the father (otherwise than as agreed between the mother and the father) on overnights Tuesdays and Thursdays and on each alternate weekend as well as holiday time.

54. From the child's commencement at school there would be some minor adjustments to the regime and with it to include school holiday periods.

55. On the parents' proposed orders the child would spend time with the applicants once per calendar month on either the first or second weekend of the month from 5.00 pm Saturday to 5.00 pm Sunday with such time to alternate between weekends the child would otherwise be spending time with her mother and weekends that she would otherwise have been spending time with her father.

56. Further provisions are made for special occasions to be shared between the parents such as birthdays; Mother's Day and Father's Day and Easter and Christmas periods.

57. The specific issues orders addressed by the parents mainly are referrable to orders as between themselves rather than being inclusive of the applicants.

58. The parents also propose that there be an order that the parents be at liberty to change the child's name to include a hyphenated Christian name of their choice and that the child's surname be a hyphenated combination of the parents' respective surnames.

59. The parents' proposed orders also include a notation, in the event that the Court orders a "shared care arrangement between all three parties" as to the parties attending upon "specialised adoption counsellors".

ICL's proposed orders

60. The minute of orders proposed by the ICL was submitted as part of the submissions stage of the trial and that minute of orders was admitted and marked as Exhibit 9 in the proceedings.

61. Again, as with respect to those of the other parties, the full detail of the ICL's proposed orders is contained in the written document referred to.

62. In summary, the ICL supports the parents' position that an order should be made for the parents to have equal shared parental responsibility. The ICL further supports orders that would see a transition of the child to live with the mother on a graduating basis with respective periods, initially of four weeks each, being provided for in the proposed orders.

63. Essentially the ICL's proposed orders would see a transition of the child into the primary care of the mother after some 20 weeks have elapsed from the time of orders, but an essential difference between the ICL's position and that of the parents is with respect to the time the child should spend with the applicants in the longer term.

64. On the ICL's proposed orders, after the transition period described in those proposed orders, and until the child commences school, the child would spend time with the applicants from 5.00 pm Friday until 5.00 pm Sunday on the fourth weekend of each block of four weeks, rather than one overnight per month as the parents propose.

65. From when the child commences school, the ICL proposes an order that the child would spend time with the applicants from after school Friday until 5.00 pm Sunday on the fourth weekend of each four week period.

66. The ICL's proposed orders also contain specific orders for the child to spend time with the father both in the period prior to the child commencing school and thereafter. There are provisions for special occasions similar to those which are contained in the parents' version.

67. A further difference between the ICL's proposed orders and those proposed by the parents is with respect to the child's name. The ICL proposes that the Christian name selected by the parents be used as the child's middle name rather than being part of a hyphenated Christian name, but the ICL supports the parents' proposal that the child's surname be able to be changed to a hyphenated version combining the parents' respective surnames.

68. Relevant to the parties' respective proposals is Exhibit 4 which comprises a series of tables prepared by the ICL setting out in tabulated form a representation of the comparisons between the then existing proposals of the applicants on the one hand and the parents' proposals on the other, both before and after the child commences preparatory schooling. Those tables were particularly designed to show in that form the numbers of changeovers for the

child from one household to another on the applicants' proposal on the one hand as compared with the proposals of the parents.

Central issues

69. As these are parenting proceedings Division 12A of Part VII of the Act applies to them including the principles applying to their conduct (s 69ZN); the duties giving effect to those principles (s 69ZQ) and the provisions about evidence (ss 69ZT to 69ZX).

70. Consistent with the Court actively directing, managing and controlling the proceedings, at the trial I sought to obtain the parties' consensus as to what appeared to be the central issues in the case, having regard also to the expert evidence via the two family reports of Ms I, Family Consultant, prepared in advance of the trial.

71. This resulted in the identification of the following issues, some of which overlap and are not listed in any particular order of importance:

    a) The child's primary attachment to the applicants (and the effect of disruption to that attachment);

    b) The potential for, and likely effect of, future conflict between the adults involved;

    c) The child's relationships with her siblings;

    d) Whether the applicants truly recognise the importance of the child's parents in her life;

    e) The strength and/or stability of the relationship between the applicants;

    f) The strength and/or stability of the relationship between the mother and the father;

    g) The mother's parenting capacity and whether she has historically been neglectful of her other children;

    h) Whether the applicants are likely to continue living in Brisbane;

    i) The capacity of the mother and the father to support the applicants having a role in the child's life;

    j) The effect upon the child if she has only limited contact with her biological family.

72. An issue which may be added to the above list, because it assumed some prominence in the course of the trial as reflected in the proposals of the parties earlier outlined, concerns the potential change of name of the child. The parents, in addition to seeking an order that they (the parents) share parental responsibility for the child, seek an order that they be permitted to change the

child's name to a hyphenated Christian name and to change the child's surname to a combination of their surnames, namely to "Harper-Grady".

How is Part VII to be applied when the parties to parenting proceedings include non-parents?

73. Part VII of the Act (ss 60A to 70Q) provides the statutory framework for the Court's jurisdiction and power to make parenting orders.

74. However, it can be seen that a number of these statutory provisions expressly refer only to a "parent" or "parents".

75. For example, the objects expressed in s 60B(1)(a) and (d); the principles expressed in s 60B(2)(a), (c) and (d); the s 60CC(2)(a) "primary consideration"; and the "additional considerations" expressed in each of s 60CC(3)(c), (ca), (e), (g) and (i) make reference only to "parent" or "parents".

76. The effect of s 61B and s 61C is that, by law, "parents" have parental responsibility for a child, subject to Court order. The presumption of equal shared parental responsibility expressed in s 61DA refers only to "parents" and likewise s 65DAA refers to "parents".

77. It would seem to be well settled that "parent" when used in Part VII means a biological or adopted parent and does not include a person who stands in *loco parentis* to a child.[4]

78. Having regard to the case outlines and/or summary of argument documents filed on behalf of the applicants, and to some extent the manner in which some of counsel's final submissions proceeded, it appeared to be assumed, to some extent or in some respects, that the relevant statutory provisions ought be considered and applied as if each of the applicants and the parents are to be treated as a "parent" or "parents" where that descriptor is used within Part VII and specifically the s 60CC considerations.

79. As but one example, the applicants' summary of argument filed on 13 October 2015 contained the contention, under the heading "Statutory Presumptions" (at paragraph 24 and referenced to s 61DA(1) of the Act):

> There is a statutory presumption that **parties** ought to share equally parental responsibility.
>
> (emphasis added)

80. Self-evidently s 61DA(1) expressly refers to "parents" not " parties".

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[4] *Donnell & Dovey* (2010) FLC 93-428 (excluded from this are cases involving children born as a result of artificial conception procedures and, possibly, the application of s 61F of the Act with respect to persons treated as a parent by Aboriginal or Torres Strait Islander customs where s 61F applies).

81. It is necessary to outline, then, how the provisions of Part VII are to be applied in this case where the parties include both of the child's parents and the applicants, who are not relatives of the child.

82. Section 60B of the Act sets out that the objects of Part VII are to ensure that the best interests of children are met and details how those objectives are achieved (s 60B(1)); and specifies the principles which underlie those objects (s 60B(2)). Section 60B(1) provides:

> (1) The objects of this Part are to ensure that the best interests of children are met by:
>
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

83. Section 60B(2) provides:

> (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
>
> (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
>
> (d) parents should agree about the future parenting of their children; and
>
> (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

84. Section 60CA of the Act requires that, in deciding whether to make a particular parenting order in relation to a child, the Court must regard the best interests of the child as the paramount consideration.

85. Section 60CC of the Act identifies the "primary considerations" (s 60CC(2)) and the "additional considerations" (s 60CC(3)) the Court must consider in determining what is in the child's best interests. The primary considerations are:

> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
>
> (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

86. Section 60CC(2A) requires that in applying the primary considerations the Court is to give greater weight to the consideration set out in paragraph (2)(b).

87. Section 65D of the Act provides the source of the Court's power to make a "parenting order". This section expressly provides that this power is subject to, inter alia, s 61DA of the Act. Section 61DA(1) requires the Court to apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. The presumption does not apply in circumstances of abuse or family violence of the kind referred to in subsection (2) and further, the presumption may be rebutted by evidence that satisfies the Court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility (s 61DA(4)).

88. The effect of s 65DAA of the Act is that if the Court makes an order providing that a child's parents are to have equal shared parental responsibility for the child then it must go on to consider whether it is in the best interests of the child and reasonably practicable for the child to spend equal time with each of the parents, and if it is, to consider that order and, if not, the Court must consider whether it is in the best interests of the child and reasonably practicable to make an order for substantial and significant time with each of the parents.

89. In parenting proceedings where the parents only, and not non-parents, are parties, the operation of the statutory framework and the manner in which the Court approaches its application including the determination of the s 60CC "best interests" considerations is well settled by authority (see, for example, *Goode & Goode* (2006) FLC 93-286; *MRR v GR* (2010) 240 CLR 461; *Sayer v Radcliffe and Anor* (2012) 48 Fam LR 298; *Cox & Pedrana* (2013) FLC 93-537 and *SCVG & KLD* (2014) FLC 93-582).

90. Whilst substantial amendments to Part VII of the Act took effect from 7 June 2012 which, inter alia, significantly widened the definition of "family violence"

as it now appears in the amended Act; the guidance or guidelines provided by those of the cases referred to which were decided prior to the amendments is not materially affected by them, save only that it is to be recognised that s 60CC(2A) now requires greater weight to be given to the second of the two primary considerations.

91. Part VII has been subjected to criticism for its complexity and/or lack of clarity including in the area where, as here, the parties to parenting proceedings are not only the child's biological parents but other "non-parent" parties.

92. For example, in *Mulvany & Lane*[5] Finn J observed (at [15]):

> 15. It is indeed unfortunate that given the now very detailed provisions of Part VII and the acknowledgement in that Part of the important roles that persons who are not natural parents of a child can have in a child's life (see, for example, s 60B(2)(b)), that the legislation does not give some clearer indication of the weight to be attached to the child's relationship with a person other than his or her parent, compared with the child's relationship with the natural parent in the determination of proceedings between a parent and a person other than a parent.

93. In *Potts & Bims*[6] at [8] and [9] Moore J discussed the statutory provisions in the context of a case involving both of the parents and the maternal grandparents as parties. Her Honour determined that to the extent the objects and principles set out in s 60B(1) and (2) of the Act; and the "considerations" in ss 60CC(2) and (3) might be relevant, they could only be considered by reference to those factors that do not specifically refer to "parent" or "parents"; and in particular under the catch-all provision of s 60CC(3)(m): "any other fact or circumstance that the court thinks is relevant". Moore J said:

> 8. The provisions about children's arrangements are to be found in Part VII of the Family Law Act 1975. The concept of best interests of the child is at the heart of it and that is designated to be the paramount consideration in making any parenting order. Some Part VII provisions refer to *'parent/s'* which, given the word's ordinary meaning and in the absence of an expanded definition or some other descriptor such as *'party'*, means a number of sections **do not apply** when assessing *'best interests'* in proceedings that are not between parents but between a parent and a non-parent [eg. relative]. Section 60B(1) and (2) set out the objects of Part VII and the principles underlying them. However, a number are expressed to apply to *'parent/s'* **and so are excluded** in proceedings of the latter

[5] (2009) FLC 93-404.
[6] [2007] FamCA 394.

kind. For example, paragraphs 60B(1)(a), (c), and (d) **fall away** and what remains is paragraph (b); namely, the object of protecting children from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence. Similarly, paragraphs 60B(2) (a), (c) and (d) **fall away** as underlying principles and there remains paragraph (b); namely, *['except when it would be contrary to a child's best interests'] 'children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)'*. With objects and underlying principles as a guide, the determination of what is in a child's best interests requires the court to consider both *'primary considerations'* and *'additional considerations'* set out in s 60CC. But again the use by the legislature of the word *'parent/s'* in a number of those considerations **operates to exclude those factors** in proceedings between a parent and non-parent. Falling within that group is the *primary consideration* in paragraph 60CC(2)(a) and the *additional considerations* at paragraph (c), (e), and (i). However, that does not mean those considerations are to be ignored if the facts of the case raise them as issues because they can be addressed under other considerations such as paragraph (f) [capacity to provide for needs] or, if nowhere else, under paragraph (m) [any other fact or circumstance relevant]. On that same analysis, the presumption of equal shared parental responsibility imposed by s61DA and, if it applies and the order is to provide for equal shared parental responsibility, consideration of the child/ren spending equal time or substantial and significant time, as set out more particularly in s65DAA, are not prescribed pathways in the reasoning process towards a best interests conclusion in proceedings between a parent and non-parent. Nonetheless, the particular applications may make it necessary to address those outcomes in any event.

9. In this case the parents agree about the outcome as between themselves and oppose the outcome sought by the grandparents. It follows that the determination of the grandparents application against their united opposition will fall to be evaluated by the fewer provisions just mentioned.

(*original emphasis*) (**emphasis added**)

94. Left to consider the approach taken by her Honour Moore J, absent Full Court authorities binding upon me which I will shortly come to, I would have some considerable difficulty reconciling her Honour's approach with each of conventional common law approaches to statutory interpretation having regard

to the terms of Part VII; s 15AA of the *Acts Interpretation Act 1901* (Cth); and s 43(1)(c) of the Act.

95. Section 60CC does not prescribe the relative weighting to be given, or result following from, any particular consideration; and it is well settled that a "primary consideration" does not outweigh or displace any or all "additional considerations".[7] The obligation or prescription upon the Court to "consider" a particular matter is to be distinguished from any statutory prescription as to the result of that consideration.

96. It follows that, perhaps ironically, in a given case an "additional consideration" can be of primary importance and a "primary consideration" of lesser importance in the overall determination of a child's best interests.

97. To my mind in a case such as this including non-parents as parties it would be consistent with principles of statutory interpretation for the Court to consider, as a "primary consideration", the benefit to the child of having a meaningful relationship with both of the child's parents (s 60CC(2)(a)) and to also consider, as an additional consideration under subsection 60CC(3)(m), the benefit to the child of having a meaningful relationship with the non-parent party. That party has presumably met one of the criteria expressed in s 65C to be an applicant for a parenting order and having regard to that criteria it would seem to follow that the benefit to the child of a relationship with that party would be a relevant consideration.

98. It is instructive that under the terms of s 65C, a parent or grandparent qualifies by that status alone to be an applicant for a parenting order, whilst "any other person" must meet the criteria of being a person "concerned with the care, welfare or development of the child", described as a "threshold question" in some authorities.[8]

99. Given that I am bound by that Full Court authority I will shortly refer to, I will confine the discussion of the difficulty of the approach to which I have referred to a brief overview.

100. Part VII of the Act in its current form is significantly different from earlier iterations, particularly in its form prior to each of the substantial amendments to it made in 1995 and 2006 respectively. This needs to be kept in mind in considering cases decided prior to those respective tranches of amendments.

101. In its current form Part VII can, in overview, be seen as statutorily prescribing **rights** of a child or children vis-à-vis parents on the one hand, and prescribing **duties, obligations and responsibilities** of parents vis-à-vis their child or

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[7] *Marsden & Winch (No 3)* [2007] FamCA 1364 per Warnick and Thackray JJ at [77] and [78]; *Champness & Hanson* (2009) FLC 93-407; *Mulvany & Lane* (supra) at [84]; *Aldridge v Keaton* (2009) FLC 93-421at [74] and [75] and *Donnell & Dovey* (supra) at [102] to [104].
[8] See, for example, *Aldridge v Keaton*.

children on the other. One simple example of the emphasis upon children's rights is the 2012 amendment inserting s 60B(4): the additional object of giving "…effect to the Convention on the Rights of the Child done at New York on 20 November 1989."

102. From the starting point that the focus of the legislation is upon children's **rights** on the one hand; and parental **duties**, **obligations** and **responsibilities** on the other; any contentions framed as a presumption "in favour of" a natural parent; or to speak of a preferential position "in favour of" a parent; or "weight to a particular (parent) applicant" is antithetical to that foundation. These kinds of contentions were raised and discussed in a number of cases including *Rice v Miller*[9]; *Re Evelyn (No 2)*[10] and *Aldridge & Keaton*.[11]

103. Having regard to the focus upon children's rights it would seem that such presumptions as might be seen to be inferred from the legislation can only operate "in favour of" the child or children the subject of the proceedings.

104. The prescription of a child's or children's rights in Part VII assumes some significance when regard is had to s 43(1)(c) of the Act which relevantly provides as follows:

> **43 Principles to be applied by courts**
>
> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> …
>
> (c) the need to protect the rights of children and to promote their welfare;
>
> …

105. Section 60B of the Act was first introduced by the 1995 amendments to Part VII and the 2006 amendments included some amendments to that section.

106. The role and significance of s 60B was recently considered and discussed by the Full Court of this Court in *Maldera v Orbel*.[12] Whilst the Full Court discussed the applicable principles of statutory interpretation of a section as an "objects" clause and the effect of that, nothing in the conclusions expressed by the Full Court would appear to be at odds with observing that the expression of the principles in subsection (2) of s 60B constitutes an expression of a child's

[9] (1993) FLC 92-415.
[10] (1998) 23 Fam LR 73.
[11] (2009) FLC 93-421.
[12] (2014) FLC 93-602.

or children's rights in parenting proceedings. Section 60B(1) makes it plain that those presumptions give way if the contrary be shown in a child's best interests.

107. As already noted s 60B(2)(a) and (b) provides, relevant to children's rights, as follows:

> (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);
>
> …

108. Whilst it may be accepted that s 43(1)(c) of the Act does not give rise to a separate head of power, as discussed by the Full Court in *Rice v Miller*, s 43(1)(c) mandates that in exercising its jurisdiction under the Act the Court must have regard to, inter alia, the need to protect the rights of children. It is worth noting that *Rice v Miller* was decided in 1993, well prior to the statutory prescription of rights of the child or children affected by the amendments made to Part VII since that case was decided.

109. The objects expressed in s 60B(1)(a) and (b) each find obvious reflection in the two "primary considerations" expressed in s 60CC(2) as follows:

> *Primary considerations*
>
> (2) The primary considerations are:
>
> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
>
> (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
>
> Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

110. Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides:

> 15AA Interpretation best achieving Act's purpose or object

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

111. In *Mills v Meeking*[13] Dawson J in the High Court provided the following explanation of the effect of the equivalent Victorian provision as follows:

> …the literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the *Interpretation of Legislation Act* must, I think, mean that the purposes stated in Pt 5 of the *Road Safety Act* are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose: *Miller v The Commonwealth* [(1904) 1 CLR 668 at 674]; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [(1978) 140 CLR 503 at 513]. The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes.
>
> (footnotes omitted)

112. It follows that s 15AA (and equivalent provisions in State legislation) do not permit a Court to ignore the actual words of a statute and a court is bound to

[13] (1990) 169 CLR 214 at 235.

give effect to clear language in a statute even if in the Court's opinion the result might be anomalous or unfair. [14]

113. In this context there is ample authority for the general principle that courts are not at liberty to consider any word or sentence in legislation as superfluous or insignificant. Prima facie, all words in a statute must be given some meaning and effect.[15]

114. That principle has been held to be more compelling if the words or phrases used in the legislation have been added by amendment.[16] In this respect it is instructive that within the amendments referred to (for example compare s 60B(2)(a) with (b)) there is a plain distinction even within the section between "parents" on the one hand, and "other people" on the other.

115. Subject to the overarching and paramount best interests consideration in s 60CA of the Act, a number of presumptions would seem to follow from the terms of s 60B. For example, the presumption that children's best interests are met by each of the objects expressed in s 60B(1). The presumption or starting point that children benefit from both of their parents having a meaningful involvement in their lives is unsurprising when, almost 30 years ago now, the High Court in *M v M* (1988) 166 CLR 69 said at page 76:

> …The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents…

116. Moreover, s 60B(2) as noted would seem to prescribe a child's or children's rights by the manner of expression of those principles.

117. For these reasons, it seems to me that the Court is bound to apply, rather than "exclude", statutory provisions where they can be applied and as I have indicated above, it seems to me that at a practical level the provisions referred to can be applied even though the proceedings include non-parents as parties.

118. Viewed from the perspective of a child's rights, it would seem that the approach outlined by Moore J in *Potts & Bims* produces an odd result. As but one example, a child the subject of parenting proceedings between the child's

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[14] See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 per McHugh, Gummow, Kirby and Hayne JJ.

[15] See, for example, *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; *Beckwith v The Queen* (1976) 135 CLR 569 at 574 per Gibbs J; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 per McHugh, Gummow, Kirby and Hayne JJ.

[16] *Transport Accident Commission v Treloar* (1991) 14 MVR 289 at 304 per Brooking J.

parents has the right, when the Court considers that child's best interests, that the Court is mandated to consider as a "primary consideration" (s 60CC(2)(a)) the benefit to that child of having a meaningful relationship with both of the child's parents. However if, for example, a non-relative of the child is a party to the proceedings, that right "falls away" because it is said s 60CC(2)(a) "falls away" and is rendered inoperable, simply by virtue of the fact that a non-parent is a party to the proceedings.

119. However, the approach of Moore J in *Potts & Bims* has been endorsed by the Full Court of this Court in *Aldridge & Keaton*. At [112] the Full Court, having set out at [8] from Moore J's judgment, also set out above, said of it "…we think it accurately encapsulates the relevant legal principles to be applied when determining a parenting application which involves a non-parent/s".

120. Further, in *Donnell & Dovey* ("*Donnell*"), the Full Court of this Court (Warnick, Thackray and O'Ryan JJ) gave consideration to the application of Part VII in cases where the Court is considering competing proposals of a "parent" of the subject child on the one hand, and a "non-parent" on the other. In the course of that consideration, the Full Court referred to a number of cases including *Aldridge v Keaton*; *Potts & Bims*; *Mulvany & Lane*; *Hort & Verran* (2009) FLC 93-418; *Marsden v Winch (No 3)* and *Champness & Hanson*.

121. At [122] in *Donnell* the Full Court specifically referred to *Aldridge v Keaton* having approved of the relevant passage from *Potts & Bims*, without expressing any disagreement with that approval.[17]

122. I consider that, by reference to *Donnell* and the discussion of the earlier cases by the Full Court in *Donnell*, the following central propositions emerge (referenced in some instances to the relevant paragraphs of the Full Court judgment) as to the manner in which Part VII is to be applied in cases where the parties to the proceedings include a non-parent:

a) The "overarching" provision of Part VII is s 60CA, which provides:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

It contains no distinction between parents and non-parents, so the child's best interests remain the paramount consideration regardless of the biological (or other) connection of the child to the parties to the proceedings. ([79] and [80]).

b) "Parent", when used in Part VII, means a biological or adopted parent, and does not include a person who stands in *loco parentis* to a child.

[17] See also *Yamada & Cain* [2013] FamCAFC 64.

([90] to [93]) (excluded from this are cases involving children born as a result of artificial conception procedures discussed in *Aldridge v Keaton* at [16] to [22]; and, possibly, the application of s 61F of the Act with respect to persons treated as a parent by Aboriginal or Torres Strait Islander customs where s 61F applies).

c) "Parental responsibility", defined by s 61B to mean, "…all the duties, powers, responsibilities and authority which, by law, parents have in relation to children", vests only in "parents" of a child absent an order of the Court or a parenting plan (s 61C). ([83]).

d) Parenting orders, defined by s 64B, including orders for "parental responsibility" may be made in favour of non-parents as well as parents. (ss 64B(2) and 65(c)). ([82]). An order can be made for a non-parent to have parental responsibility or to share that responsibility with another person who may or may not be a parent. ([83]).

e) The presumption as to the equal allocation of parental responsibility provided for in s 61DA and the considerations of equal time or substantial and significant time mandated by s 65DAA are not prescribed as part of the reasoning process to the "best interests" conclusion in proceedings between a parent and a non-parent. ([86], [121] and [122]).

f) There are distinctions between a parent and non-parent by reference to ss 60B(1) and (2), which set out the objects of Part VII and the principles underlying those objectives, respectively. ([76]). The objects expressed in s 60B(1)(a), (c) and (d) specifically refer only to "parents" (or parenting), as do the principles expressed in s 60B(2)(a), (c) and (d). ([121] and [122]).

g) Section 60CC, which sets out the "primary considerations" and the "additional considerations" to which the Court must have regard in determining "best interests" maintains clear distinctions between a parent and a non-parent. ([94]). It follows that:

   i) Any consideration of the benefit to the child of having a meaningful relationship with the non-parent is not a primary consideration within the meaning of s 60CC(2)(a) because it refers to "both of the child's parents". ([100] and [101]).

   (ii) The additional consideration in s 60CC(3)(c) (as the section then provided, since amended), "the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent", does not apply to proceedings between a parent and non-parent.

(By necessary inference this applies to the present subsections (c) and (ca) introduced by amendment subsequent to *Donnell*).

iii) Notwithstanding i) and ii) above; in a particular case the maintenance of a meaningful relationship with a non-parent may be an important consideration in determining "best interests"; and in a case involving a non-parent (who may have played and seeks to play a significant role in the child's life) it is essential to address that person's willingness and ability to facilitate the relationship between the child and the child's parent. ([97] and [101]). Consideration of those matters proceeds pursuant to s 60CC(3)(m), which mandates that the Court consider "any other fact or circumstance that the court thinks is relevant".

iv) The additional considerations in ss 60CC(3)(e) (practical difficulty of spending time and communicating) and (i) (demonstrated attitude to the child and to the responsibilities of parenthood) likewise do not apply, but if the facts of the case raise them as issues, they can be addressed under paragraph (f) (capacity to provide for needs) or paragraph (m) as referred to above.

123. It bears emphasis that at [103] in *Donnell* the Full Court said:

> 103. On our analysis, the various factors contained in ss 60CC(2) and (3) may be seen as a series of signposts the legislature has determined are potentially important for the court to take into account in exercising its very wide discretion. Some of the signposts will lead nowhere. In some cases one of the designated signposts will provide more assistance in pointing the court in the right direction than it will in another. Sensibly, the legislature has recognised that it cannot provide an exhaustive set of signposts as the destination is uncertain and the routes by which it may be reached are as infinite as the factual circumstances that present themselves in courtrooms every day.

124. As the determinations of the Full Court are binding upon me I propose to apply Part VII to the relevant facts and issues in this case in the manner directed by the Full Court in *Donnell* in determining parenting orders in the child's best interests.

Short-term or long-term view of the child's best interests?

125. As a general proposition both long-term and short-term future prospects or aspects are relevant to the overall assessment of a child's best interests. That noted, in many instances where a child is as young as the subject child that feature of itself may legitimately elevate focus upon more immediate or

shorter-term aspects, not least because longer-term aspects are often more difficult to predict.

126. Put another way, the more difficult it is to predict longer-term aspects the more likely it usually is to place greater emphasis or focus upon short-term aspects in assessing a child's best interests.

127. In *Hall & Hall* (1979) FLC 90-713 at 78, 824 the Full Court (Evatt CJ, Asche SJ and Hogan J) said:

> It is permissible for any court to take a longer view of the child's future than the immediate future before it; but this must be done with caution. In the end the decision must accord with the overall welfare of the child. It might not always be legitimate to look so far into the future that a child should be taken from surroundings where he is well and happy, and placed in other surroundings, on some conjectural basis that in the ultimate, he will prosper better in the latter surroundings.[18]

128. However, in the unusual circumstances of this case and for reasons which will be further discussed, longer-term prospects for this child loom large on the evidence, particularly the expert evidence, which results, in my judgment, in longer-term prospects assuming particular importance in the overall assessment of this child's best interests.

Expert evidence

129. Whilst the applicants' Summary of Argument filed on 13 October 2015 shortly before the trial foreshadowed an application being made at the trial for leave to file and read an affidavit of a clinical psychologist, that did not occur. That is, it was confirmed by counsel for the applicants at the outset of the trial that such application was not being pursued.

130. Thus the sole source of expert evidence relied upon by all parties was that provided by Ms I, Social Worker and Family Consultant.

131. Ms I provided two written family reports. The first report is dated 28 July 2014 and was compiled following, inter alia, a series of interviews undertaken by Ms I on 17 June 2014 and thus when the child was about 12 months of age.

132. The second report is dated 18 September 2015 following interviews on 3 September 2015, not long before the trial, and thus when the child was aged two years and two months.

133. For convenience, the family report dated 28 July 2014 will be referred to as the "first family report" and the family report dated 18 September 2015 as the "second family report".

[18] See also *Sanders & Sanders* (1976) FLC 90-078.

134. The sources of information relied upon by Ms I for her respective reports are set out in each of them, as is her curriculum vitae.

135. In addition to her written reports Ms I gave oral evidence at trial and was cross-examined by counsel for each party respectively. Generally, rather than any party directly challenging or seeking to controvert directly any opinion expressed by Ms I, the focus of each party seemed to be upon emphasising particular aspects of her opinions or drawing more out from some of the opinions she had expressed as compared with others.

136. In advance of Ms I giving oral evidence, she was provided with some social science literature or studies by one or other of the parties and was requested to have considered these for the purpose of her giving oral evidence under cross-examination.

137. I am satisfied that Ms I has "specialised knowledge" within the meaning of s 79 of the *Evidence Act 1995* (Cth) and that her expressed opinions are based wholly or substantially upon that knowledge and are thus admissible under the section referred to. No party submitted otherwise.

138. Moreover, no party submitted as to there existing any inadequacy of expert evidence and I am likewise satisfied as to its adequacy.

Findings relevant to applicable s 60CC considerations

139. In the second family report Ms I assessed the child as presenting as a confident and thriving toddler appearing to be "well meeting" all of her developmental milestones and as having good language development.[19]

140. I accept that assessment. It is corroborated by other evidence including that of the applicants and indeed that of the parents and the paternal grandparents. It is an assessment which reflects well on the applicants' capacity to have provided for the child's needs over the period since her birth in circumstances where the child has been in their primary care over that period.

141. This is not to ignore the role played by the child's parents, and her siblings, particularly since the consent orders of 21 March 2014 were made, but is to properly recognise the applicants' capacity given their role as the child's primary carers to date.

142. Ms I also assessed the child to be fortunate to be loved not only by the applicants and her parents but also by their extended families. She further assessed it to be common ground between the parties that "everyone" is motivated by what they believe to be in the child's best interests.[20] Subject to

[19] Second family report at paragraph 58.
[20] Second family report at paragraph 67.

further observations concerning the applicants' case about the mother's motivations, I also accept these assessments.

143. The assessments referred to were reflected in Ms I's oral evidence when cross-examined concerning the competing proposals as to the child's future primary care.

144. Ms I gave oral evidence at one point to the effect of it being "a really fine balance" between potential detriments for the child as to her future care arrangements. That is, on the one hand, the potential detriments to the child of remaining in the primary care of the applicants and thus not living with her biological family; and on the other hand, the potential detriments of disturbing her current primary care and attachments with the applicants as a result of the child moving to the primary care of her mother and biological family.

145. That noted, Ms I also confirmed in her oral evidence to the effect that there is little or no research as to the effect on a child of transferring from the care of a primary attachment figure or figures to the care of biological parents with whom the child has also developed an attachment.

146. As will be later discussed in these Reasons, there was within Ms I's evidence and opinions, both in her reports and oral evidence under cross-examination, a clear distinction made by Ms I between the child's short-term needs or short-term best interests and longer-term aspects to her needs or best interests, the latter obviously involving some greater degree of speculation.

Nature of child's relationships – benefit to the child of meaningful relationships

147. Ms I expresses opinions in both of her reports to the effect that the child's primary attachment is to the applicants. In her oral evidence Ms I expressed confidence in her assessment that the child has attachments to the applicants as her primary attachments.

148. This was so despite Ms I acknowledging both in her second family report and in her oral evidence that she had not undertaken a full investigation or full report on the nature or quality of the child's attachments. Ms I confirmed in her oral evidence that in order to assess attachment thoroughly much more time and more resources are required than was available to her in the setting of the preparation of family reports.

149. The second family report, and the opinions therein expressed by Ms I, need to be understood in the context that in the interviews for those reports it was then the parents' united position that there ought be a transitioning of the child into the mother's primary care from that of the applicants and that there be effectively a discontinuance thereafter of any relationship between the child and the applicants. It was thus necessary for Ms I to address in the second family report the potential detriments to the child of a termination of the child's relationship with the applicants on the parents' then proposal.

150. In the event, and no doubt having had the benefit of reading the second family report, the parents' position as at the commencement of trial was different. That is, as the parents' above proposed orders reflect, it was their position at trial that there should be some continuing time and communication between the child and the applicants albeit with time spent being limited to one overnight period per month.

151. I interpolate here that in her first family report Ms I canvassed the termination then of the relationship between the child and the applicants if the child were to be returned to the primary care of the mother or parents. It is perhaps unsurprising that the parents had apparently adopted that approach when interviewed for the second family report. Ms I's second family report necessarily had regard to the feature that the child had spent the further period leading up to the second family report in the primary care of the applicants.

152. It can be accepted on the evidence of Ms I that currently the child's primary attachment is to the applicants. It was sought to be emphasised in the applicants' case that this was so; and equally emphasis was placed on potential detriments to the child of that primary attachment being disrupted by placement of the child in the primary care of her parents. In cross-examination by counsel for the applicants Ms I thought it likely that the child would experience some distress by such a disruption.

153. That noted, Ms McDiarmid of counsel for the father explored in some depth with Ms I in cross-examination not only what is meant by a child having an attachment or primary attachment, but she also explored with Ms I the nature of the child's attachments to the parents and the longer-term aspects to this.

154. These aspects were also explored to some extent by Ms Galvin of counsel for the mother.

155. In cross-examination by counsel for the mother, Ms I explained that attachment occurs for a baby from infancy by being provided with a safe and secure responsive relationship. She explained that attachment is about a relationship and growing within that relationship. Ms I explained that the attachment figure is usually the person who is the child's primary care giver from birth. Ms I explained that as babies get "a little bit older" that they are increasingly able to form multiple attachments. Ms I confirmed that as children develop and get older they are able to form attachments with more than one person which are of equal importance.

156. Specifically, Ms I confirmed that as the child gets older she might form a strong attachment to her biological parents such that any primary attachment becomes less important whilst other relationships and bonds increase in importance.

157. In cross-examination by counsel for the father, Ms I confirmed that at the core of attachment or attachment theory is the disposition of a child to seek close proximity to an attachment figure. Ms I confirmed in her answers that the child had demonstrated attachment behaviour towards the mother in the interview process for the purpose of the first family report.

158. Likewise Ms I confirmed, as appears in her first family report, that the child was seeking proximity with the father in the interview process. Ms I confirmed that the child exhibited typical attachment behaviour towards the father in holding out her arms to be collected by the father and being "happy" and "joyful" to do so. Notably, that was in circumstances where the interviews for the first family report occurred on 17 June 2014 in circumstances where the first regular visit between the father and child occurred in early April 2014.

159. Ms I confirmed that the applicants had acknowledged even at that stage (at about two months of the father having a relationship with the child) that the child had "a beautiful relationship with her father" and that the father had begun to develop a close relationship with the child. The expert confirmed that as at the time of the second report it was clear from her observations that the child "delights" in a relationship with her father. Likewise Ms I confirmed that in the second family report interview observations made by her the child was similarly engaged with her mother. Taken to paragraph 60 of the second family report Ms I confirmed in oral evidence that the child was exhibiting seeking out behaviour towards her parents and her siblings when they were in the waiting room, with the child protesting or demanding that she wished to be with them, and that such seeking out constitutes "an attachment behaviour".

160. Cross-examination by counsel for the father also elicited evidence or opinions of Ms I to the following effect:

a) There can be strong biological components to attachment in that a parent and child might share characteristics such as temperament or looks (and I accept the evidence that the child bears physical resemblances of the father);

b) That a social science study undertaken had found a special infant/father relationship where infants, despite seeing their fathers relatively infrequently, nevertheless delighted in the relationship and "somehow" knew that the man was their father and evoked a strength of attachment disproportionate to the frequency of visits or contact;

c) That the child here is plainly aware that the father is her father and that this contributes to building the attachment between them;

d) That it could certainly be the case in this instance that this is a special infant/father relationship between the child and her father;

e) That after the age of three years the significance of a particular attachment figure diminishes and that as relationships change and grow so does a child's preference of "where they want to be" also changes and grows;

f) That the child is already displaying that she has relationships with her parents and her siblings (particularly her next oldest sister F) and that there is no reason to think that the child will not develop very strong relationships with them if she were to be placed in the care of her mother and biological father;

g) That sibling relationships are very important relationships for children because they can be lifelong and offer support in a lifelong way;

h) That for a child to have multiple attachments does not mean that one is lesser than the other simply because it is primary and that the primary attachment becomes less important as a child moves from infancy.

161. I accept the evidence and opinions of Ms I in these respects.

162. I interpolate here that as the child has no hearing impairment; and the father's hearing impairment is not such as to preclude him from oral communication; the child can share with the father a usual method of communication which she cannot share with the other adults. Likewise, the child communicates normally by speech with her siblings who likewise are not hearing impaired.

163. Counsel for the father also explored with Ms I in cross-examination the longer-term aspects or needs of the child in her best interests.

164. At paragraph 106 of the first family report Ms I expressed the opinion:

> 106. Given the information available to me at the time of this report it is my view that, on balance the long term needs of [the child] will best be met by returning to her family of origin. This will enable her to know and have relationships with her extended biological family. It is important that she also has the opportunity to maintain her relationship with [the applicants] who have clearly provided excellent love and care for her.

165. Counsel for the father explored that expressed opinion at the time as to the child's longer-term needs being best met by returning to her family of origin. In answer to that Ms I said:

> At that time, I thought that [the child] would have – have an ongoing relationship with her biological family, which would be something that she would be seeking out. I thought there was also the relationship with her siblings that would be important for her in – in future and a significant relationship with – with her father that was, you know, clearly – at that stage seemed clear was going to develop. By the next report, she had also – it's – it's difficult for children to transition so I guess the longer you –

> you leave a child in a…in a placement and unfortunately this matter has taken a long time to – to be heard but the more cemented they become - - -

166. Ms I confirmed that the long-term needs she was referring to were the child's sense of identity, a sense of inclusion in her family of origin and Ms I made references to adoption research as to avoiding a child's sense of being rejected or of feeling loss of the child's biological family.

167. Ms I confirmed at that time, that is at the time of her first family report, that those considerations outweighed that the child's primary attachments were to the applicants.

168. Counsel for the father also took up with Ms I part of what is contained in paragraph 76 of the second family report where Ms I had opined:

> …if [the child] were to have limited contact with her biological family she will face the risks of a child not having a relationship with their biological family including feelings of loss, grief, guilt/shame, rejection, diminished identity, and the development of intimate adult relationships.

169. In cross-examination Ms I confirmed that these are the core issues related to adoption.

170. Ms I confirmed in her oral evidence that this case could be considered a case of "quasi" adoption as she had said at paragraph 10(b) of the second family report. Counsel for the father took up with Ms I the psychological impact and challenges faced by adopted children and their families. In that context Ms I gave evidence to the following effect:

    a) Adoption-related issues means that the experience of adoption makes the adopted child deal with complex emotional issues at an early age;

    b) Such issues include rejection and grief;

    c) That from the age of about five years to seven years adopted children will realise that their situation is different to their peers and they will want to know why they were adopted;

    d) They will feel that they were given up; may have a sense of feeling they are not good enough; or in the words of some children that "they were not a keeper";

    e) That the first significant issue that arises from adoption is the child's sense of loss;

    f) That children may have a realisation that they have lost the chance to be normal like their friends who are growing up in their birth families;

    g) That part of themselves "is gone" because their biological family is part of who they are;

h) That children long to live with their biological parents and often that longing becomes stronger as they become older, that is by age seven or eight years and then sometimes that peaks again in adolescence;

i) That seeing their biological family but living with other carers can lead to emotional ambivalence;

j) It can ultimately also lead to acting out behaviours;

k) That for adopted children loss is not a single event but a series of ongoing losses throughout life on, for instance, birthdays and events such as Father's Day and Mother's Day;

l) That the second major issue that arises from adoption is grief as a reaction to the sense of loss;

m) That in primary school this can result in behavioural changes such as anger; aggression; sadness; oppositional behaviour; depression; and self -image problems;

n) That such problems can be reflected onto the adoptive parents and make the parenting of the child more difficult;

o) That for a child the meaning of adoption is not fully understood until adolescence and in adolescence grief can be expressed with anger and defiance;

p) That in this case the added complication is that it would need to be explained to the child that she was given up by her mother, but not her father, and that they both subsequently wanted her to live with them but a Court decided that was not best (if that was the Court's decision), which in itself could provide the child with a sense of helplessness;

q) That an adopted individual can develop a sense of "deserving" loss or rejection, leading to feelings of guilt and shame;

r) That such an individual may become sensitive to any hint of rejection or disapproval and avoid situations in which they may be rejected;

s) That these things impact on the individual's ability to develop adult relationships;

t) That the issues that arise in adolescence arise at a time when the adolescent is forming an identity; that forming an identity is a difficult development task in any event; so that the usual identity crisis experienced by an adolescent is increased for an adopted child;

u) Part of the reason for that is that the adopted child has to deal with the dual identity of both birth and adoptive parents;

v) That in this context a dynamic for this child is that one set of her "parents" is in a same-sex relationship – itself something the child has to come to terms with in terms of the development of her identity;

w) Further, that another feature is that three of the adults are profoundly deaf and one is severely deaf;

x) That resolving issues of adoption is a lifelong process.

171. Ms I confirmed in her oral evidence that some of these issues will already have to be faced by the child. That is, that the child will already have to face as part of her "life story" that she was relinquished at birth, so that a number of these issues have arisen in any event.

172. In re-examination by counsel for the ICL, Ms I confirmed that if as a result of final orders made by the Court the child was not living with her biological parents that could potentially give rise to the added complication that it may result in the child developing resentment towards all of the adults, both the applicants and her biological parents.

173. In that context it is relevant to note that Ms I confirmed in her oral evidence that it is "almost inevitable" that as she gets older the child will be drawn to her biological family including her siblings with potential problems of the kind referred to by Ms I if she is not living in the same household as her biological family including her siblings.

174. In her oral evidence Ms I emphasised that given the nature of her relationship with the applicants, any potential detriments of disruption to that relationship ought be at least minimised, if not eliminated, by continuation of a relationship with them. On Ms I's recommendation that is achieved by the recommendation in her report for there to be, in the event the child is living with her biological family, time with the applicants for one weekend a month supplemented by forms of electronic communication such as Skype or Tango given the hearing impairments of the applicants rendering telephone communication not feasible.

175. I accept the evidence of Ms I. I accept that it follows from her evidence that there needs to be particular focus upon the longer-term aspects surrounding the nature of the child's relationships with both her parents and biological family on the one hand and the applicants on the other, given the analogies drawn by Ms I in her evidence to the adoption issues referred to.

176. As already noted, the child was aged two years and four months as at trial and will soon reach the age of three years referred to by Ms I in relation to the significance of primary attachment. There is also the evidence of Ms I concerning the age at which the child would likely confront issues concerning adoption or quasi-adoption were she to remain in the primary care of the applicants and was not living with her biological family and the potential effect upon her respective relationships, of those issues.

177. In this respect it bears emphasis that the Court does not take the approach, in assessing future risks or future hypothetical possibilities, of considering only those risks or possibilities about which it can be said they more probably than not will occur. That is the standard of proof for establishing past events or facts. In respect of the future the Court must evaluate relevant future possibilities which, of course, defy precise calculation.[21]

178. I consider that Ms I gave careful consideration to the issues in the case both as reflected in her reports and as reflected in the oral evidence she gave, and I am comfortably satisfied that her opinions in the respects referred to are well considered and well-based.

179. I am satisfied on the evidence, including that of Ms I, that the child has a strong attachment with the applicants.

180. I am also satisfied that the child has strong attachments with each of her parents and with her siblings. I am comfortably satisfied on the evidence that the child seeks out her sister F and looks up to and idolises F. That is not to say that she does not have significant attachments with her older siblings but it is clear on the evidence that the child particularly gravitates towards her next oldest sibling.

181. It is clear from the observations made by Ms I as recorded in her respective reports that the child has developed attachments with her siblings. That is also the evidence of her parents. Further, Mr J Harper, the paternal grandfather gave evidence as to his observations of the child with her siblings and described the interactions as being "full of fun" and it being obvious that the child enjoys her interactions with her siblings. Mr J Harper referred in particular to F and the obvious closeness of the bond between F and the child.

182. Each of the mother's older children, and the child's siblings, were interviewed for the purpose of the first family report. Ms D impressed Ms I as being thoughtful and considered in her responses. On Ms D's report to Ms I she and her siblings had previously enjoyed a close relationship with the applicants and Ms D referred in particular to F's close relationship with Ms Blaze, but that this relationship had now changed. Notably all of the siblings enjoy a close relationship, on Ms D's report which I accept, with the father.

183. It is interesting to note that Ms D reported to Ms I that her brother E enjoys a particularly close relationship with the child. I accept that to be so.

184. At that stage E was aged 10 years and he reported to Ms I both that the child is happy to see him, and he her, but complained at that stage that they "only have a short time together". E described the child in very positive terms to Ms I and

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[21] *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638.

it is clear that his contemplated change in circumstances at that time to live with the father was driven by financial considerations.

185. E spoke positively of his relationship with his own sister F and he became emotional at the thought of the child remaining in the care of the applicants and the risk, as he perceived it, of him not seeing the child as a result.

186. At the time of the first family report F was eight years of age. She spoke positively of her relationship with her mother and with the father. She is described by Ms I as speaking "with fondness" about the child and described the child as always hugging her and her brother.

187. There cannot be any doubt that the child has developed attachments and relationships with her siblings and that her siblings view the child with obvious affection, and that both E and F in particular relate very well to the child. It seems to me that the importance of these relationships, that is, the sibling relationships, has particular resonance in terms of the child's future care arrangements.

188. To similar effect the paternal grandmother ,Ms K Harper, gave evidence to the effect that the child "looks up to her big sister with admiration" (referring to F) and also made reference to E playing "the clown" in the enjoyable interactions for the child which she described.

189. These descriptions of the relationship between the child and her siblings have particular resonance with the expert evidence of Ms I concerning the importance of sibling relationships.

190. It is also clear that the child has begun to establish some attachments with each of her paternal grandparents.

191. I interpolate here that both of the paternal grandparents, Ms K Harper and Mr J Harper, spoke in positive terms of their respective relationships with the mother. Ms K Harper now lives in L Town but has had opportunities to visit the mother and her home on numerous occasions. I interpolate here that Ms Harper made positive observations about the mother's household. For his part Mr J Harper has taken the trouble to undertake a basic course in Auslan to assist him in his communication with the mother. He too spoke positively about the mother and the household.

192. The child has also had the opportunity to develop some relationships with the applicants' respective extended family members albeit that those opportunities have been reduced in circumstances where the applicants relocated at the interim stage of these proceedings to reside in Brisbane whilst their extended family members reside interstate. Whilst the prospect of some extended family members of the applicants or either of them relocating here was raised, that has not occurred.

193. Whilst for reasons already discussed the benefit to the child of having a meaningful relationship with the applicants is not a "primary consideration" within the meaning of s 60CC(2)(a) of the Act, it is nevertheless an important consideration in this case given the history referred to.

194. The only caveat upon the benefit to the child of maintaining a relationship with the applicants expressed by Ms I, was potential ongoing conflict between the adults.

195. In her oral evidence Ms I expressed an opinion to the effect that if the Court were to determine that the child should live with her parents, but there was ongoing conflict between the parties, it may be better for the child for her relationship with the applicants to "die off" as Ms I put it, rather than having the child exposed to such conflict.

196. Put another way, on the evidence of Ms I which I accept, eliminating the child's exposure to conflict between the adults if the child is living with her parents (in some combination) is of higher priority in the longer-term than is the child maintaining a relationship with the applicants. I accept that opinion.

197. That noted, ideally in terms of optimum outcomes, the child would have a continuing relationship with the applicants so that the question of assessing the risk of future conflict arises in this context.

198. I should note here that at no point did Ms I postulate an opinion to the effect that under any circumstances the child's relationship with the parents or her biological family should be terminated. That is, Ms I did not opine to the effect that if the child remained in the primary care of the applicants that potential exposure to conflict might or would necessitate termination of her having any relationship with her biological family. Certainly in her first family report Ms I referred to the dynamic of potential conflict potentially having the consequence that the child's time with the adults with whom she was not primarily living might have to be "more limited", Ms I did not opine to the effect that in the converse situation of the child remaining in the primary care of the applicants that she should have no relationship with her biological family if it meant potential exposure of the child to conflict.

199. Within Exhibit 3 being the documents tendered with the consent of all parties is a communication book maintained by the adults for this year from about February 2015 until shortly prior to the trial.

200. Counsel for the applicants emphasised the contents of the communication book as showing that the parties have the capacity to communicate reasonably with each other in the interests of the child and more specifically to show that their interactions have occurred without conflict.

201. Whilst it can be accepted that the communication book evidences such capacity, it is clear that there are some fundamental conflicts that have not been

able to be successfully negotiated between the adults in the relatively short period between October 2013 (when conflict seems to have first arisen) and the trial.

202. One prime example of that is that the applicants, on the one hand, and the parents on the other, have been completely unsuccessful in formulating a common approach to something as simple as toilet training for the child. Other conflicts have arisen in relation to matters such as medical treatment.

203. More fundamentally though it was evident at the trial that there are significant underlying resentments between the adults involved.

204. For their part it is clear that the applicants mount a case seriously critical of the mother in various respects as will be further discussed. It is clear that the applicants see the mother's motivation in these proceedings as, at least in part, that by having the child in her primary care this enhances her prospects of a continuing and close relationship with the father. From the evidence advanced in their case, particularly that of their witnesses, the applicants elevate serious questions about the mother's motivations in these proceedings and her parenting capacity.

205. To this may be added the dynamic, as referred to by Ms I in the second family report, of the involvement or participation by members of the Deaf Community some of whom who apparently have been enlisted to the "cause" of the applicants. There is evidence via social media of significant criticisms from these sources of the mother published in that forum for all to see. That has led to the mother's withdrawal from the Deaf Community, seemingly an historical source of support to her. None of this or the experience of the trial itself is likely to have helped the underlying resentments between the adults.

206. There is underlying and understandable resentment on the part of the applicants that the mother "changed her mind" about the child being in their care and indeed in her evidence Ms Blaze raised as the one specific concern she had about the child being in the primary care of the mother, that the mother might "change her mind again".

207. There is something of an internal inconsistency in the applicants' case to advance, on the one hand, the proposition that the parties have now been able to successfully negotiate past differences and can now work together in the child's interests, yet at the same time the applicants mount such a negative case about such fundamental issues as the mother's motivations and her parenting capacity and like criticisms.

208. It was clearly the plan of the applicants that they would be living in Victoria, and it is difficult to accept that they would not have some resentment that their future plans were disrupted by having to return to live in Brisbane where they

have no extended family members by reason of these proceedings. I accept their evidence that they plan to remain living in Brisbane.

209. For the parents, and the mother in particular, there are underlying resentments sourced to what the mother apparently believed would be the situation in future. Rightly or wrongly, it is clear that the mother feels that she was somehow led to believe that there would be an ongoing and continuing close relationship between her and her children, on the one hand, and the applicants on the other, but that this did not actually eventuate once the child was placed in the applicants' care.

210. For all the reasons already discussed, there cannot be any doubt that it is for the child's benefit that she have a meaningful relationship with both of her parents and with her biological family.

211. It would also clearly be in the child's best interests for her to be able to maintain a meaningful relationship with the applicants.

212. In my judgment, the risk of future potential conflict in all of the circumstances of this case would be less than otherwise if the child were in the primary care of the mother and her parents and was having a relationship with the applicants in that setting along the lines proposed by Ms I. On that scenario, I accept Ms I's opinion to the effect that the parents would support and abide by orders of the Court to that effect and in that context would manage any underlying resentments.

213. In that scenario, I would also see the applicants as being able to manage any underlying resentments or potential future causes for conflict. That is, I am satisfied that the applicants having the child's best interests at heart and knowing that future conflict potentially impedes their future relationship, would manage future situations of potential conflict accordingly.

214. In my judgment, the potential for future conflict would be dramatically heightened if the child remained in the primary care of the applicants. In that scenario, that potential would exist not simply by choices made by the adults involved, but by reason of all of the dynamics earlier discussed concerning the evidence of Ms I in a "quasi" adoption situation by the child herself having to navigate the issues she would face in that scenario.

215. In summary, there is benefit to the child in maintaining meaningful relationships with each of the applicants, on the one hand, and the parents on the other, and for the reasons identified, that benefit would be best achieved (as regards minimising future potential conflict) if the child is living primarily with her parents.

Likely effect of any changes in the child's circumstances

216. Much of the preceding discussion resonates with this consideration.

217. Plainly it would not be in the child's best interests for her strong relationship and attachments with the applicants to be terminated and it is not now the proposal of either the parents or the ICL that that should occur.

218. Nevertheless Ms I pointed to the likelihood of the child experiencing some level of distress and perhaps confusion about any disruption to the child's experience to date of her primary care with the applicants.

219. Plainly, any likely distress or confusion is ameliorated by the transitioning process both the parents and the ICL propose in their orders. It would also be ameliorated by the extent of the child's ongoing experience of the applicants in terms of time and communication. Whilst the parents propose one overnight period per month in the longer-term the ICL, based upon the evidence of Ms I, proposes orders in the child's best interests that there be one weekend per month, that is, a full weekend.

220. In my judgment, based upon the foregoing discussion and findings concerning the evidence of the expert, the shorter-term potentially adverse effects of a transition of the child to care by her biological family is significantly overshadowed by the longer-term adverse risks of the child remaining in the primary care of the applicants.

221. A significant difficulty with the proposed orders of the applicants is the lack of stability and disruption to the child in terms of her day-to-day circumstances that is produced by the orders proposed by the applicants in the interests of the child having the relationships they propose she should have with her parents and biological family.

222. That is, their appropriate recognition of the child's needs to have substantial and significant time with her parents (and biological family) results in them proposing orders which inherently involve numerous changeovers for the child between households.

223. Taken to her proposed recommendation at paragraph 82 of her second family report (if the child were to continue living primarily with the applicants), but also taking into account her oral evidence of the child spending a weekend per month with the applicants, Ms I confirmed that on that scenario a lot of changeovers were involved for the child which would still only achieve an alternate weekend and a day with each biological parent; and one weekend per month with the applicants in the longer-term.

224. In other words, that even in the context of an order being made for the child to live with the applicants, the child would on their proposals (or any realistic proposal to maintain familial connections) be only spending four days per week with the applicants if she was also having one overnight period with each parent, and essentially the child would be involved in a "shared care regime" between three parties/households. Ms I confirmed that this would potentially

be disruptive and that it "could be very difficult" for the child. I accept her opinion.

225. It is obvious that a likely effect of a transition of the child to the primary care of her mother and biological family is that she will have the opportunity to further develop her established relationships with her family members as already referred to and avoid those potential risks to her development earlier discussed, in the context of quasi-adoption. Moreover, on that scenario the child can maintain her relationship with the applicants, in the opinion of Ms I which I accept, by spending one weekend with the applicants each four weeks. Plainly nothing like the same degree of disruption for the child is involved.

226. I do not ignore what Ms I observed about the existing fact that the mother relinquished the child into the applicants' care and that is already part of the child's life story that is to be confronted. However, as a matter of common sense, there is a significant difference between that life story being explained (in the years ahead when the child has enough cognitive development to process the information) in the context of orders now made seeing the child transition, prior to the age of three years, into the primary care of her mother, as opposed to that life story being entrenched by orders seeing her remain in the primary care of the applicants.

227. In my judgment, particularly having regard to potential long-term consequences, overwhelmingly the likely effect of change for the child of a transition into the primary care of the mother, balancing competing considerations, is an overall positive change for all that it carries with it in terms of benefits for the child and avoidance of risks.

228. In the primary care of the mother, the child will be able to live with her sibling F and develop her relationships with her father and her biological family members in ways that cannot be achieved, even in the context of orders as proposed by the applicants, if she were not living with her family.

229. As this consideration necessarily entails some contemplation of potential future hypothetical events there are some other aspects that are conveniently addressed in this context.

230. There was some focus in the trial upon the feature that there was, for a very temporary period, a separation of the applicants albeit that they continued to share the same accommodation during that separation. Some emphasis and focus was placed upon this by other parties as to the potential effects in future should a separation between the applicants occur.

231. Similarly to the way that Ms I has expressed in her second family report, I am satisfied that the applicants are in a committed relationship. Save for the short period of disruption in their relationship they have now been together as a couple for more than a decade. To the extent that hypothesising about human

relationships and their future is possible, there would not appear to be any significant or substantial risk of the applicants' relationship ending.

232. That noted, it was nevertheless the evidence of Ms I that in the event that the applicants did separate in future there would be difficulties and complexities presented for the child. As Ms I put it, a child "can only be spread so far" and there would be obvious difficulties and complexity about any sharing arrangement involving four households rather than three.

233. Similar potential problems would arise, albeit not to the same extent given that they are already living in separate households, if the parents' currently good relationship were to change. The obvious difference is that the applicants currently propose orders that would see all four adults sharing parental responsibility and in the event that they were to separate there would need to be a revisiting potentially of time the child spends with each of four adults.

234. The other future hypothetical events involve the prospects of a further child being born in either relationship, that is, that of the applicants on the one hand or in that of the parents on the other.

235. It is clear that Ms Blaze has long-held the ambition or desire to have her own biological child. Whilst in the recent second family report (at paragraph 14) Ms Blaze reported to Ms I that "…she has put her plans to fall pregnant on hold while the current proceedings are taking place" self-evidently that plan remains. In evidence at trial it is clear that Ms Blaze maintains this desire.

236. Thus it appears likely that the applicants will pursue that plan at some point in future subsequent to these proceedings.

237. Ms I referred in her evidence to the potential significant difficulties for the child, if she were living in the applicants' household, if a biological child was introduced as part of the family unit. In short, Ms I's evidence placed focus upon the difficulties for an adoptive child in the same household where a biological child is introduced.

238. In contrast, in the event that the parents have a further child the same problems do not arise. To the contrary, Ms I pointed to some positive benefits for the child if she were to have another biological sibling as part of her household.

239. It should be noted that the parents have no firm plans as to a further child but it is at least a prospect which is "in the mix" depending upon what the future holds for their relationship.

240. Whilst I do not place undue emphasis upon either of these future hypothetical events in respect of both couples respectively, given their speculative nature, all that needs to be observed about them is that should they occur, or either of them occur, the child would confront less difficulty in dealing with them in the event that she was, as a result of final orders now made, transitioned into the primary care of her mother and biological family.

Capacity to provide for the needs of the child – capacity to promote relationships

241. There would appear to be no issue as to the capacity of the applicants to provide for the physical needs of the child. The only qualification as to their capacity to provide for her emotional and intellectual needs concerns their willingness and capacity to promote the child's relationship with her parents and biological family.

242. In the first family report (at paragraph 100) Ms I then observed that to that date the applicants:

> …have had some reluctance for [the child] to have a substantial and meaningful relationship with her mother and siblings. Whilst they maintain they would stay in Brisbane to support this relationship now in the past it has not been a priority for them. Similarly they are positive about [the child's] relationship with her father now but had not sort [sic] a relationship with him previously.

243. It seems to me that a high point example of the applicants' "reluctance" referred to by Ms I is evidenced by the conflict that occurred between the parties when the mother wanted to have a tattoo of the names of all four of her children she had given birth to. This is referred to at paragraph 48 of the first family report. The applicants reported to Ms I that they viewed the mother's desire in this respect as "…an indication that she [the mother] did not see [the child] as being their baby". It seems that Ms Darnley in particular, on the evidence, was concerned about this and the applicants eventually persuaded the mother into having the names of her three older children tattooed in the same place on her body and a "symbol of peace including the child's names and their names tattooed on the other side of her chest". The mother subsequently regretted acquiescing to the applicants' views.

244. As symbolic as this might be it evidences, in my judgment, the clear demarcation the applicants sought to achieve in terms of the child being "their" child rather than the child of the mother.

245. In contrast to the above, in the second family report (at paragraph 16) Ms I reported:

> 16. In this interview both [the applicants] reported an understanding of the importance for [the child] to have a relationship with her birth family. Since the previous interview they reported that they have overcome their initial caution about [the child's] relationship with her birth family and recognise the significance of this relationship for [the child]…

246. In her oral evidence Ms I confirmed that she assessed the applicants as being genuine in their revised views concerning the importance or significance of the child having a relationship with her biological family.

247. Having observed the applicants under cross-examination and having regard to the evidence they gave; and also having regard to the case negative of the mother which they advanced, as will be further discussed, I do not share Ms I's confidence that the applicants truly recognise the importance and significance of the child having a relationship with her parents and biological family, at least so far as this concerns the mother. That is, whilst I accept that the applicants recognise the importance of the father it did not seem to me that they viewed the mother in the same light.

248. As already referred to, it is clear that the applicants bear some underlying resentment of the mother for changing her mind about the child remaining in their care. That is one thing, but it seems to me it is quite another to mount the criticisms that the applicants mounted with respect to the mother on the case they advanced.

249. In her evidence Ms Blaze expressed as her concern for the child's welfare if she was in the primary care of the mother that the mother may again "change her mind".

250. It is clear that historically there has been conflict in particular between the mother and Ms Darnley and that Ms Blaze found herself in the middle of such conflict.

251. The applicants were required to relocate to Brisbane at the interim stage despite their plans to have remained living in Victoria. Whilst they both gave evidence that they had become accustomed to living in Brisbane and liked living here, it is the fact that they are separated from family members who live interstate albeit that there is some suggestion of some family members relocating also to Queensland.

252. The obvious concern is the applicants see the need to appear to recognise the importance of the biological family, as opposed to actually holding to the view of this importance, perhaps partly in consequence of having read the first family report and knowing as a result that the expert identified the importance of the child's relationship with her biological family.

253. In summary, I am not convinced over the longer-term if the child were placed or remained in the primary care of the applicants, that they would necessarily act in response to an identified and truly held view that the child's relationship with her mother is as important and as significant to the child, as is identified by Ms I. It does seem, however, that the applicants recognise the importance and significance of the child having a relationship with her father.

254. In relation to the father there is really no issue as to his capacity to provide for the child's physical needs. The father is in fulltime employment and is providing financial support to the mother and expressed a clear willingness to continue to provide sufficient financial support to her were the child in the mother's primary care.

255. I found the father to be a most impressive witness. I was impressed with his obvious commitment to his child and his focus upon doing whatever he could do to further the child's best interests. His evidence was to the effect that he wants to be the best father he can be, and I accept that to be so. I consider that the father gave thoughtful and balanced evidence. His own parents gave evidence of the father's obvious commitment to his child and I accept their evidence.

256. It is clear that the father was disappointed, to say the least, with the mother's initial conduct leading to him not having a relationship with the child from the very outset from her birth. Equally though, I was satisfied that he was genuine in expressing that he had resolved those difficulties with the mother and was actively pursuing a positive relationship with her and positively supported her in these proceedings in the interests also of his own relationship with his child.

257. One issue which arose on the evidence was the capacity of the father, and the mother, to promote the child's relationship with the applicants.

258. During the report process with Ms I both parents had expressed some concerns for the child, if she remained living with the applicants, having to deal with the fact that the applicants are a same-sex couple. There is reference in the family report to concerns about the child having to explain to others this feature and Ms I confirmed in her oral evidence that this aspect was only raised by the parents seemingly in the context of potential bullying of the child by other children in a school setting, because of the child being placed under some pressure because of the feature of the applicants being in a same-sex couple.

259. At trial, the evidence of both the mother and the father with reference to the applicants' sexual orientation took something of a quantum leap. Both of them in evidence at trial expressed concerns to the effect that there would be some risk for the child herself becoming homosexual if she were exposed to the applicants in the context of her living with them.

260. When observing the mother give evidence to this effect, I formed the impression that the views to this effect that she was expressing were probably either a reflection of other influences, perhaps aligning herself with the father's view, or alternatively that she was constructing a negative about the applicants and their proposals in order to advance her own case.

261. It is not possible to reconcile the mother having made a considered decision to place her child in the care of the applicants from birth, with the kinds of fears

she purported to hold concerning the influence upon the child's sexual orientation she suggested might occur as a result of the child living with the applicants. I am not persuaded that the mother genuinely holds to the views she expressed under cross-examination and I consider that her evidence was disingenuous in this regard. The mother purported that she had given instructions to the applicants, in advance of relinquishing the child to their care, to the effect that they were not to exhibit any kind of personal affection from one to the other in any respect in the child's presence. I do not accept that evidence.

262. In summary, I do not accept that the mother genuinely holds to any view to the effect that the child's sexual orientation would in fact be influenced by her exposure to the applicants as a same-sex couple.

263. In respect of the father, I assess that he genuinely holds to the view, at least as a possibility if not a probability, that potentially there could be such influence upon the child's sexual orientation if she were living with the applicants long-term. However, it is instructive that the father did not raise this as a particular concern of his at either stage of the family report processes, that is, in either of the interviews for the family reports. Thus whilst it would seem that the father has some doubts or fears to this effect, it does not seem to have been ever elevated by him to the level of an unequivocal belief.

264. Overall, in respect of all of the adults concerned, Ms I assessed all of them to be primarily motivated by what is in the child's best interests. The adults have received the message loud and clear both from the family reports and opinions of Ms I and through the trial process, that it would be potentially very damaging to the child if she is exposed to conflict between the adults and moreover if she were to be exposed to criticism or denigration of any of the adults by any of the others, given her own loving relationship with each of the adults concerned.

265. I am satisfied that if the child were living primarily with her biological family whatever may be the underlying true views of each adult concerned, that they have the capacity to put these aside in the child's interests in the knowledge that doing so serves her best interests which is at, in my judgment, the forefront of the beliefs, thinking and motivations now of all the adults concerned. For reasons earlier discussed, I am not confident that would be so if the child remained living primarily with the applicants, as regards the parents.

266. Relevant to the mother's parenting capacity and the attitudes of the applicants, within the applicants' case there was a consistent theme of criticisms of the mother's parenting capacity being raised by the applicants.

267. That case was summarised in the applicants' Summary of Argument filed on 13 October 2015 at paragraph 31 in the following terms, referenced to various paragraphs of the affidavit of Ms Blaze filed on 13 March 2014:

31. The evidence amply deposes to a situation involving a Respondent neglecting her children. In summary:

a. She left her other children for a weekend without adult supervision and with a child who attempted suicide in her absence;

b. The Respondent's residence was as set out in affidavit material inappropriately untidy and unclean;

c. The Respondent would fail to bathe the children for up to ten days at a time;

d. The Respondent ignores the nutritional needs of her children;

e. The Respondent has been observed yelling and swearing at the children on a frequent basis;

f. The Respondent exhibits a lack of affection for her children;

g. The Respondent failed to timely seek medical attention for a child;

h. The Respondent failed to apply prescribed medication to a child.

268. To the above list may be added allegations concerning the mother's historical use of drugs as an ongoing concern as is reflected in the proposed order of the applicants that the mother be required to undergo ongoing random drug testing.

269. Some of these contentions are based party, or wholly, upon observations the applicants contend they made of the mother and her household in the period commencing 10 February 2013 when the applicants lived in the mother's household prior to the birth of the child on 25 June 2013.

270. As cross-examination demonstrated, the criticisms mounted in this respect did not reflect well on the applicants. They were adults living in the same household as part of that household. On the evidence they were primarily responsible for the supply of groceries for the household as their contribution to it. That does not rest comfortably with assertions that the mother neglected the children's nutritional needs. The applicants also assumed some responsibility for contributing to the care of the mother's older three children in circumstances where, of course, she was pregnant with the child.

271. It thus does the applicants no credit that they would assert unhygienic conditions in a household for which they were at least equally responsible as the mother at the time. Likewise, contentions to the effect that the children were left unwashed or unbathed for days at a time defy belief in that it would follow that the applicants simply acquiesced in that occurring when they were supposedly adopting some kind of quasi-supervisory and caring role for the

children, or a supportive role to the mother in caring for her children and household of which they were a part, during the mother's pregnancy.

272. In my judgment, the complaints of the applicants in terms of the mother's parenting were not credible and I do not accept them.

273. There is a significant element of hypocrisy about the applicants raising complaint about the mother concerning drugs when by her own admission Ms Blaze participated in taking the hallucinogenic drug Ice on the occasion of the mother's 40th birthday celebration, as did the mother.

274. As earlier referred to, Exhibit 2 reflects that under cross-examination neither applicant raised these types of concerns held for the child's welfare if she were in the care of the mother. Notably also, the applicants consented to interim orders made on 21 March 2014 pursuant to which the child commenced to spend regular overnight periods in the mother's unsupervised care.

275. It is clear on the evidence that the mother is in a different place, in terms of demands upon her, currently as at the time of trial than she may have been historically.

276. The mother acknowledges having, historically, significant difficulties concerning her relationship with her oldest daughter Ms D. Ms D herself acknowledged to Ms I in the first family report her own responsibility for causing problems for her mother historically.

277. At paragraph 88 of the first family report it is recorded that Ms D described having difficulties historically in her relationship with her mother but said that her mother had always been there for her and her siblings. Ms I records that Ms D took responsibility for some of the difficulties they had in their relationship describing herself as being "rebellious and stubborn". Ms D also referred to the feature that when her parents were together there was conflict between them but she reported that her mother and father now get along much better.

278. The mother also frankly acknowledged difficulties in the conflictual relationship she historically had with her ex-partner Mr G. She acknowledged exposure of the children, particularly Ms D, to her ex-partner's conduct historically and its consequences for Ms D.

279. However, the evidence of the mother and Mr G, which I accept, confirms that they have achieved vast improvement in their relationship and that is also evident from what Ms D reported to Ms I as referred to.

280. Ms D was involved in an episode of self-harm when she was 16 years of age and the Department of Communities, Child Safety and Disability Services ("the Department") were involved. However, that the applicants select that event as being indicative of the mother's parenting capacity does not do them credit. Obviously enough, Ms D was at that stage a "rebellious and stubborn"

teenager and had confronted the difficulties consequent upon the conflict that occurred between her own parents.

281. As at the period leading up to the birth of the child, the mother was primarily responsible for the care of her three older children as well as being pregnant with the child. She was obviously concerned about the fact that she thought she was unlikely to receive any kind of support from the putative father earlier referred to. Her financial circumstances were restrained.

282. In terms of changes for the mother, it is the fact that her two oldest children now primarily live with her ex-partner Mr G and consequently the demands upon the mother are not the same. It is clear that the mother and Mr G now have a positive co-parenting relationship and I accept Mr G's evidence to that effect. Moreover, it is clear that the mother has drawn significant benefit from the support she receives from the father both in a financial sense but also in terms of emotional and other like support.

283. Results of random drug screening of the mother, pursuant to interim orders made in the lead up to trial, corroborate the mother's evidence to the effect that she ceased her participation in drug taking or excessive alcohol consumption.

284. More particularly, there is the evidence of the father. I have already made observations concerning the positive impression as a witness that the father made. I have also referred to his obvious commitment to his child and his focus upon her best interests. He has had ample opportunity to make observations of the mother generally and of her parenting over a significantly long period leading up to this trial. It beggars belief, if he had observed any concerning behaviours in the mother, that his support for her in these proceedings would be as unqualified as it obviously is.

285. Assertions by the applicants to the effect that the mother is somehow distant from her other children or has estranged relationships with them or cannot show affection for them, is at odds with the presentation of those children to Ms I as recorded in her family reports as well as statements of the children she records. It is also contrary to the evidence of the paternal grandparents who both gave evidence positive about the mother from their observations. I accept the evidence of the paternal grandparents.

286. In the category of evidence within the applicants' case critical of, or negative about, the mother is the evidence of Mr M and Ms M. I must record that I did not find either of these witnesses to be particularly convincing. It is clear that this case has become well known within the Deaf Community. Indeed a member of Ms Blaze's family used social media in an attempt to garner support to the "cause" of the applicants, seeking donations of funds to contribute to their legal fees. It would seem that there are a body of people within the Deaf Community that have aligned themselves to support of the applicants whilst the mother has found it necessary to withdraw from the Deaf Community because

of criticisms she has experienced including via social media. In my judgment, Mr and Ms M demonstrated a significant lack of independence or capacity to provide independent evidence uninfluenced by personal views, by their obvious alignment with the applicants.

287. Part of the content of Ms M's evidence, asserted to be sourced to the mother herself from statements that the mother made (which the mother denied), required evidence to be obtained directly from the mother's now adult daughter Ms D. Essentially Ms D's evidence was to refute very serious allegations to the effect that the mother effectively permitted or acquiesced in Ms D being raped when she was then only 15 or 16 years of age and the perpetrator was an adult male. In the face of the affidavit evidence that was provided by Ms D herself that allegation fell away and Ms D was not required for cross-examination.

288. The point is I do not accept that the mother relayed any such information to Ms M. In my judgment it is more likely than not that, as the mother contended, that this is a product of the rumour-mongering that has occurred within the Deaf Community adverse to the mother.

289. In any event I did not find the evidence of either of these witnesses persuasive.

290. In the end, and mainly in reliance upon the father as a witness of truth, I am satisfied that there is no substance in the criticisms mounted in the applicants' case concerning the mother's parenting capacity. I note that Ms I saw no deficit in the mother's capacities in this respect and I also note that both of the paternal grandparents who gave evidence and who have had the opportunity to make observations of the mother were likewise positive about her.

291. I also reiterate that Exhibit 2 as previously discussed demonstrates that in their respective evidence under cross-examination neither applicant raised specific concerns concerning the mother's parenting capacity notwithstanding the opportunity to so do.

292. Finally, I would note that on the applicants' proposed orders the child would be spending significant time in the care of the mother and that it is entirely inconsistent, as a proposal, with any continuing concerns of any significance as to the mother's capacity to provide for the child's needs.

293. I have earlier referred to the evidence of Ms I concerning her assessment that all adults involved have the capacity to provide for the child's needs, which obviously includes the mother. Notably, as is recorded in the first family report, one of the sources of information relied upon by Ms I was subpoenaed material obtained from the Department. At paragraph 92 of the first family report Ms I summarises this material. Thus it is clear that Ms I reached her conclusions having also had regard to that material.

294. I reiterate that the mother's former partner Mr G provided affidavit evidence and was required for cross-examination. Whilst it is clear that the mother and Mr G have historically had a conflictual relationship which involved episodes of domestic violence perpetrated by Mr G it would seem, and I find, that the mother and Mr G have reached a position where conflict is not any longer a feature of their relationship and they have been able to successfully negotiate the co-parenting arrangements for their children in recent times.

295. I also reiterate that given my view of the father as an entirely impressive, credible and thoughtful witness who is fundamentally concerned with his child's welfare; and who has had ample opportunity to observe the mother's parenting capacity particularly over the period since March 2014; that his unqualified support for the mother speaks volumes in a positive sense about the mother's capacity to provide for the needs of the child.

296. In her final submissions counsel for the applicants maintained submissions directed to highlighting concerns held by the applicants about the mother's parenting capacity but acknowledged that the father and his role was a "protective factor".

297. As stated, I find that the father's involvement goes further than simply being a "protective factor". My acceptance of his evidence carries with it the acceptance that the mother no longer participates in drug taking or drug abuse such as to compromise her parenting capacity.

298. Moreover I reject submissions to the effect on behalf of the applicants that there is some need to protect the child from harm within the meaning of s 60CC(2)(b) in terms of the mother's parenting capacity whether by reference to historical events concerning her other children, as referred to by counsel for the applicants, or otherwise.

299. I reiterate that it would be inconsistent with there existing any relevant risk to be guarded against for the applicants to propose the orders they propose with respect to the mother's care, even in the context of random drug testing as they contend for.

Whether it is preferable to make the order least likely to lead to further proceedings

300. In my judgment the earlier discussion concerning the longer-term view of the child's best interests resonates also with this consideration.

301. That is, in my judgment it would be preferable in the circumstances of this case to consider the order least likely to lead to further proceedings. For the reasons earlier discussed, in my judgment that overwhelmingly favours an order seeing the transition of the child into the primary care of the mother and hence her consequent enhanced connections with her biological family.

302. That is because it would seem inevitable on the evidence of Ms I, which I accept, that the child will hereafter increasingly gravitate to her biological family. It would seem to me inevitable that if the child remained in the care of the applicants she would increasingly have difficulties in understanding or assimilating any reasons why she is living with non-biological relatives but at the same time is seeing her parents and her siblings with whom she does not primarily live.

303. Moreover, the issues earlier discussed relating to adoption on the expert evidence inevitably means that there is a significant risk of the child seeking closer connections with her biological family if she were to remain living with the applicants.

304. In summary, in my judgment, orders made now seeing the child transitioning into the primary care of the mother is desirable from the perspective that it is an order that will not only avoid the risks referred to but is the order which is preferable to make as being the order which is least likely to lead to the institution of further proceedings in relation to the child.

Balancing of relevant s 60CC considerations

305. If the child were to remain in the primary care of the applicants, she would have the benefit of continuing to experience the primary care of the two people who have provided that care to date and have demonstrated their capacity to provide the child with exemplary care in her short life to date. It is obvious that both of the applicants love the child and that she loves them.

306. That outcome would avoid the risks to the child of disruption of her relationship with her primary attachment figures and the potential adverse consequences of such disruption for the child.

307. However, it is an outcome, given the proposed orders reflecting the need for the child to have and maintain relationships with her biological family, that carries with it the immediate and inherent disruptions to the child's stability of circumstances by the changes from one household to others that those proposed orders entail.

308. More fundamentally and more importantly it is an outcome which is likely to be placed under ever-increasing pressures as time moves on. As the child shortly reaches the level of cognitive development, in the not too distant future, where she is likely to ever-increasingly seek to gravitate to her biological family, then increasingly the perceived benefits of her present situation may become more perceived than real. Such a scenario carries with it all of the risks of an adopted child as earlier discussed by reference to the expert evidence as, for example, questions of identity and rejection and the like increasingly present themselves for the child by the circumstances in which she finds herself.

309. In my judgment, the benefits for the child of remaining in the primary care of the applicants are significantly outweighed by the potential risks of that to the child in the longer-term and the benefits to the child immediately available to her by transitioning into the primary care of the mother. That transition would have the consequence that the child's relationships, not only with her mother and her father, but also with her siblings, will be enhanced. She will be living with her sibling F and she will have increased opportunities to enhance her relationships with her other siblings.

310. Living with the mother enhances the child's opportunities to further develop her already favourable relationship with her obviously committed, devoted and capable father.

311. In my judgment, any distress as will be likely experienced by the child of disruption of her present care arrangements will be minimised, if not eliminated, by several aspects. First, it is the fact as assessed by Ms I that the child's stability of circumstances as provided by the applicants and the quality of their care has enabled the child to readily form attachments with her biological family members. The transitioning process contemplated will enable the child to further assimilate these relationships and to assimilate a progression from the primary care of the applicants to that of the mother and the associated connections with biological family that this entails.

312. Moreover, commencing the transitioning now will minimise the potential adverse consequences for the child that part of her life story is in fact that her mother relinquished her care from birth to the applicants. That is, the child from now will have the opportunity to experience her mother's primary care and that of her father; as well as her connections with her biological family members; for a period prior to her cognitive appreciation and need to process that part of her history. As a matter of common sense and logic, it must be far easier for that to occur in circumstances where the child transitions now to her biological family rather than that process being delayed.

Parental responsibility

313. In circumstances where the child's best interests dictate that she be transitioned into the primary care of the mother and experiencing effectively the primary care of her parents, it is difficult to see how it would be in the child's best interests for parental responsibility to be shared, not only by the parents, but also with the applicants.

314. There is a history of conflict between the adults and conflict over parenting issues and obviously such future conflict would render a sharing of parental responsibility counter-intuitive. However, potential conflict aside, there is no reason to conclude that between them the mother and the father do not collectively possess the capacity to discharge the obligations of parental responsibility in the child's best interests. That is, there would not exist, in my

judgment, any deficit in the capacity of the parents collectively to adequately discharge the responsibilities of what is entailed in parental responsibility in the child's best interests.

315. Conversely, it would not seem to be necessary on the expert evidence for the applicants to maintain some share of parental responsibility in order for the child's relationship with them to be maintained in the manner proposed by Ms I.

316. For these reasons in my judgment, it is consistent with the child's best interests for there to be an order for the parents to have equal shared parental responsibility for the child.

317. As I propose to make an order for equal shared parental responsibility as between the parents, the considerations in s 65DAA arise.

318. As earlier noted, both parents are united in the proposed orders sought as to the time the child is to spend with them collectively and separately.

319. To date the parents have utilised separate provisions for time to enable the other parent to have increased opportunities to spend time with the child. It is clear that is likely to continue irrespective of the formal orders made.

320. Neither parent seeks orders for equal time and obviously the orders proposed would see the child spending substantial and significant time within the meaning of the Act with both parents and that is reasonably practicable within the meaning of the section referred to.

Change of child's name

321. I accept the submissions on behalf of the ICL, based as they are on the expert evidence of Ms I, that because the child identifies with and well knows her present Christian name, there ought not be a change of her Christian name to make it a hyphenated name with the name chosen by the parents.

322. This child will have enough to deal with in terms of changes than confronting a change of her Christian name with which she is obviously familiar and comfortable. It makes far more sense so far as any questions of the child's confusion for the parents' chosen name to be used as a middle name for the child rather than as part of a hyphenated Christian name.

323. Unsurprisingly given the child's age and level of development, there is no firm evidence that she identifies with her current surname or even appreciates or understands that this has been her surname, and consistent with the outcome that she transitions into the mother's care and that her parents share parental responsibility for her, it obviously enhances her familiar connectedness that she have as proposed by the parents, and supported by the ICL, a surname which combines the surnames of her parents.

Orders

324. In my judgment, the orders proposed by the ICL best meet the child's best interests and are to be preferred to those proposed by the parents where they differ in the respects earlier identified.

325. Obviously enough the most significant of those differences is the amount of time the child spends with the applicants in circumstances where she has transitioned into the primary care of the mother. As earlier noted, the parents' approach is that time should be limited to one overnight period per month, whilst the ICL contended for one weekend per month.

326. Ms I explained in her oral evidence that in recommending a "weekend" within the recommendation in her report in this context, Ms I meant a full weekend including Friday and Saturday overnight. Ms I confirmed in her oral evidence that she saw it as important that there be one weekend per month as explained in order for the child to maintain her relationship with the applicants.

327. The ICL's proposed orders are consistent with the expert evidence of Ms I which I accept. That is, I accept that it is in the child's best interests in terms of maintaining her relationship with the applicants, for the time as recommended by Ms I and as proposed within the orders proposed by the ICL to be made.

328. For these reasons I make orders consistent with the orders proposed by the ICL and as set out at the commencement of these Reasons.

I certify that the preceding three hundred and twenty-eight (328) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Kent delivered on 30 November 2015.

Associate:

Date: 30 November 2015