Supreme Court

New South Wales

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| Case Name: | Secretary, New South Wales Department of Family and Community Services by his delegate, Principal Officer, Barnados Australia v HR & CD |
| Medium Neutral Citation: | [2016] NSWSC 1926 |
| Hearing Date(s): | 24, 25, 26 October, 9 November 2016 |
| Date of Orders: | 21 November 2016 |
| Decision Date: | 21 November 2016 |
| Jurisdiction: | Common Law |
| Before: | Sackar J |
| Decision: | See paragraph [391] |
| Catchwords: | EQUITY – adoption – whether adoption by the proposed applicants will promote the welfare of the child – whether dispensing with the birth parents' consent is in the best interests of the child – whether the best interests of the child will be promoted by the making of an adoption order and preferable to any other action that could be taken by law in relation to their care – whether the Paternal and Maternal Adoption Plans should be registered – whether the court should order the child's surname to be changed |
| Legislation Cited: | Adoption Act 2000 (NSW)<br>Adoption Amendment (Same Sex Couples) Act 2010 (NSW)<br>Children and Young Persons (Care and Protection) Act 1998 (NSW) |
| Cases Cited: | Adoption of BS (No 3) [2013] NSWSC 2033<br>Adoption of NG (No 2) [2014] NSWSC 680<br>Adoption of RCC and RZA [2015] NSWSC 813<br>Adoption of SVS [2015] NSWSC 2043<br>Application of A - re D [2006] NSWSC 1056 |

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| | Application of A; Re D (2006) 36 Fam LR 142<br>Deputy of Community Services v D (2007) 37 Fam LR 595<br>DFaCS (NSW) and Abbey [2013] NSWChC 3<br>Director-General, Dept of Community Services v D & Ors (2007) 37 Fam LR 595; [2007] NSWSC 762<br>Re Adoption of RCC [2015] NSWSC 813<br>Re H (Adoption: Parental Agreement) (1982) 3 FLR 386<br>Re JLR [2015] NSWSC 926<br>Re O (Contact: Imposition of conditions) [1995] 2 FLR 124<br>Re: William and Jane [2010] NSWSC 1435<br>W (A Child) [2016] EWCA Civ 793 |
| Category: | Principal judgment |
| Parties: | Secretary, New South Wales Department of Family and Community Services by his delegate, Principal Officer, Barnados Australia (plaintiff)<br>H R (first defendant)<br>C D (second defendant) |
| Representation: | Counsel:<br>T Stevens (plaintiff)<br>C Sperling (first defendant)<br>Self-represented (second defendant)<br><br>Solicitors:<br>Crown Solicitor's Office (plaintiff)<br>Self-represented (second defendant) |
| File Number(s): | A87 of 2015 |
| Publication Restriction: | anonymised for publishing |

## JUDGMENT

*Nature of the proceedings*

1 By way of Further Amended Summons dated 9 November 2016, the plaintiff seeks orders under the Adoption Act 2000 (Cth) ('Adoption Act') in relation to the child, CJD.

2 CJD is a female born 1 May 2012 and currently 4 years old. She is now in the parental responsibility of the Minister for Family and Community Services pursuant to orders of the New South Wales Children's Court.

3 Ms Vihtonen is the plaintiff, the principal officer of Barnados Australia ('**Barnados**') and a delegate of the Secretary of the NSW Department of Family and Community Services under section 206(2) of the *Adoption Act.* Under section 206(2)(a), Ms Vihtonen may be conferred with any of the functions delegated to the Secretary by the Minister, or, under section 206(2)(b), any of the Secretary's other functions under the *Adoption Act* or the regulations. Pursuant to this section, Ms Vihtonen may be given all of the powers of the Secretary. The most notable of these powers are listed in section 10 of the *Adoption Act*, giving Ms Vihtonen the ability to make the present application for orders to be made for CJD's adoption. They also, by virtue of section 91 of the *Adoption Act,* require Ms Vihtonen to produce a written report concerning CJD's adoption before a court can make the proposed orders. Ms Vihtonen has provided this report to the court for the purpose of these proceedings.

4 CJD's birth parents are HR ('**birth mother**') born on 5 October 1980 and CD ('**birth father**') born on 9 April 1986. They both oppose the proposed adoption.

5 CJD has lived with the proposed adoptive parents JLL and KGH ('**adoptive parents**') continuously since 9 September 2013.

*Factual background*

6 On 10 July 2004, the birth mother gave birth to her first child, JR (CB 12). On 16 January 2005, JR died at the age of 7 months and the birth mother was charged with manslaughter. On 23 October 2006, the birth mother was arraigned before a jury, which eventually found her guilty of that offence.

7 In passing sentence, the presiding judge Howie J determined that JR's cause of death was "methadone and benzodiazepine toxicity with methamphetamine a possible contributory factor": the remarks on sentence in the Supreme Court . The judge sentenced her to four and a half years imprisonment, with three years non-parole. The judge further noted that the birth mother displayed "insufficient concern for the child's safety. For example, there was evidence of her driving a motor vehicle with the child lying unprotected in the well of the front passenger's side of the vehicle. She delayed having the child immunised". He went on to state at [8]:

> "Nor was the offender a particularly reliable witness. She did not give evidence at the trial but had engaged in a lengthy formal interview with police. She had also participated in a videoed interview in a police vehicle retracing her steps on the night the child died and later back at the unit. She told at least one lie in her account of the circumstances leading up to the child's death: she said that she was driven to premises where she sought help for the child when it was clear that she was the driver. This may have been because she was concerned about driving a motor vehicle without a licence, but she persisted in the lie and embellished it in a way that destroys her general credit. She denied giving any illegal drugs to the child but I am satisfied beyond reasonable doubt that she did."

8 However, his Honour also explained at [24] that "the evidence is all one way that she loved the child and was distraught at his death. It is difficult to find that there is any contrition for causing his death because she does not accept that she did," and at [5] that "there was no evidence of the offender ever mistreating the child and to the best of her ability she was a caring and loving mother".

9 In October 2008, the birth mother was released on parole (CB 623), but in June 2009 was returned to prison for breaching the conditions of her parole by consuming illicit drugs, being "around a child under the age of 16" and "driving a vehicle without a licence" (T 127; CB 623).

10 In June 2010, the birth mother was again released from prison and in September 2011, commenced a relationship with the birth father (CB 623).

11 On 1 May 2012, CJD was born, with evidence of methadone in her urinary and meconium drug screen (CB 13, 44). She was also monitored for neo-natal abstinence syndrome (CB 13, 44).

12 On 4 May 2012, CJD was assumed into the care of the Minister and placed with short term carers because of the Minister's concerns about the birth mother's long history of poly-drug use, limited insight into JR's death, lack of demonstrated change in her drug use and concerns about the birth father's mental health (CB 13).

13 On 31 May 2012, the New South Wales Children's Court found that CJD was in need of care and protection pursuant to section 71(1)(d) and 71(1)(e) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (CB 13).

14 In August 2012, the Children's Court clinician proposed that CJD be restored to her birth parents' care and filed a care plan supporting restoration to the birth

mother in two years, with supervision and undertakings (CB 14, 352). However, Community Services became aware of the birth mother's continued use of benzodiazepines on 2 January 2013 and on 19 January 2013, revised the care plan to propose that parental responsibility be allocated to the Minister (CB 14, 374, 433).

15 In January 2013, the birth parents separated (CB 514).

16 In March 2013, the birth father sought restoration in the Children's Court (CB 514) after the birth mother conceded that there was no realistic possibility of restoration of CJD to her: *DFaCS (NSW) and Abbey* [2013] NSWChC 3 at [7]. On 19 July 2013, the Children's Court gave judgment and made final, long term orders for parental responsibility to be allocated to the Minister (CB 577). In making these orders, the President of the Children's Court, Judge Johnstone commented in *DFaCS (NSW) and Abbey* [2013] NSWChC 3 at [110]-[124]:

> "[110] I was surprised in the present case that consideration was ever given to any restoration to the mother so soon after her release from prison for her involvement in the death of her other child, James, and given her long history of drug dependence and the shortness of the period of claimed abstinence from drugs of addiction. Her conduct subsequent to her release to parole, and since her final release, all serves to create ongoing doubts as to the sincerity of the mother and the true extent of her asserted abstinence, and as to the potential for her to relapse.
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> [111] The mother's continuing drug use after release, her behaviour surrounding drug testing, the subsequent discoveries by the Department surrounding the obtaining of the prescription for benzodiazepines, and the deceit that entailed, including the failure to disclose the fact to the Department despite the existence of the Care Plan, her subsequent consumption of the drug and the nature of the excuse proffered for doing so, are but circumstances that merely confirm the ongoing risks inherent in drug dependence and the deceitful behaviour it drives. The Department's change of position in relation to restoration was in the circumstances predictable and inevitable.
>
> [112] Both parents have underplayed and sought to minimise the significance of James's death, and the extent of the mother's role in it. This has also caused me considerable concern.
>
> [113] Even on the most benign interpretation of the mother's involvement in the death of her son, James, that death gives rise to heightened concerns in the making of any assessment of risk posed by the mother to Abbey. For my part, however, I do not accept the mother's version of the level of her involvement. Her credibility about the events on that fateful day is totally lacking. Firstly, there are the various discrepancies in her accounts of the events, both in the ensuing days, and over time. Second, the inherent logic of those events is such that huge question marks remain.

[114] I agree with the submissions that it is not necessary to conclusively determine, on the balance of probabilities, that the mother did administer the methadone that killed James. It is sufficient, however, for that to exist as a scenario, against which the assessment of future risk must be measured.

[115] The suddenness of the separation of the parents also gives rise to factors relevant to the risk of harm to Abbey. This is exacerbated by the contradictory nature of the respective versions given by those parents as to the true nature of the separation, such that it may well be asked whether it was a device to enhance the restoration of Abbey to the father, as an interim measure, pending a future s 90 application. Whether and to what extent the separation of the parents is genuine, the very fact of the separation, and the timing of it must be viewed with concern, such that it becomes another factor in the risk assessment. In short, the mother continues to present an unacceptable risk of harm to Abbey, and the separation does very little to alleviate that risk.

[116] Nor, in my view, does this father have the capacity to parent Abbey on his own. If it was perceived that a realistic possibility of him being able to do so existed, it was only ever in the context of an ongoing relationship with the mother, with her presence and support making up for his demonstrated deficiencies and shortcomings. His nominated supports are illusory and inadequate, insufficient to compensate for his failings.

[117] I don't for one moment doubt the father's desire, and the sincerity of that desire, to care for Abbey. She is his only child. The evidence does not conclusively define whether her birth was a planned event, at least on his part, or not, but having become a father, he genuinely wants to bring her up. Having regard, however, to the totality of the evidence, I agree with the submissions of the Independent Legal Representative that the father simply does not possess the wherewithal to do so in a way that would sufficiently provide for Abbey's safety, welfare and well-being.

[118] The father has ongoing mental health issues, which appear to be under control, but which exist, combined with demonstrated learning difficulties. His shortcomings in relation to comprehension were, if I may say so, totally evident from his presentation in the witness box, but confirmed in greater detail from more extended observation by the Clinician.

[119] Furthermore, in my view, the father would be completely inadequate as a gatekeeper when it comes to the risk posed by the mother to Abbey.

[120] I gave the father an abundance of opportunity to overcome the Department's evidence on this issue, but when he gave his "heart of hearts" evidence, I was comfortably satisfied that he just can't bring himself to accept that the mother presents any unacceptable risk to Abbey, notwithstanding what happened to James. This, of itself, gives rise to an unacceptable risk of harm to Abbey.

[121] This is, in the end, a case where the possibility of restoration has been inaptly confused with the mere hope that the father's situation may improve. There is no reality surrounding the possibility of a restoration to him, and any such possibility is unrealistic and sentimental, based on what I view as unlikely hopes for the future.

[122] I find, therefore, that the father is unlikely to be able to satisfactorily address the issues that led to the removal of the child.

> [123] I am also comfortably satisfied that the circumstances of the child are such that restoration to the father is contra-indicated. The risk associated with a restoration to the father supports that proposition.
>
> [124] The mother has conceded there is no realistic possibility of restoration to her, and I accept the assessment of the Director-General in that regard. I also comfortably accept the assessment of the Director-General that there is no realistic possibility of restoration to the father."

17 On 19 September 2013, at six months old, CJD was placed with the adoptive parents. They are a same sex couple.

18 In March 2015, CJD was referred to a psychologist because of an escalation in her "challenging behaviours" (CB 19). In May 2015, a behaviour plan was created for CJD to manage these challenging behaviours (CB 20). In June 2015, CJD moved to A Family Day Care and her behaviour improved (CB 21).

19 On 28 August 2015, the birth parents were served with notices of CJD's adoption and refused to accept service (CB 667-668).

20 In October 2015, CJD's challenging behaviours continued and she continued to receive support from a child psychologist (CB 664).

21 In January 2016, CJD moved with her proposed adoptive parents to Wollongong (CB 665).

22 On 3 March 2016, expert psychologist Ms S interviewed all the relevant parties and met CJD at a contact visit for the purposes of preparing a report for use in these proceedings (CB 667).

23 During March 2016, CJD and the proposed adoptive parents also met with Ms BD, a psychologist in Wollongong (CB 666).

24 In July 2016, another expert psychologist, Ms RN, met with the birth mother so as to prepare a report to be used by her in these proceedings.

25 Between 29 July 2013 and 23 December 2015, there were numerous contact visits between CJD, her birth parents and/or her grandparents (CB 26, 29, 667).

26 On 4 February 2016, a preliminary hearing was conducted in the New South Wales Supreme Court by Justice Kunc.

27 The matter was initially listed for five days commencing 18 July 2016. However, the parties appeared before me on 13 July 2016 and informed me that Legal Aid had been withdrawn from both birth parents. I then vacated the initial hearing dates and stood the matter over until the week commencing 24 October 2016, to give the birth parents an opportunity to obtain legal representation and, or, assistance. The birth mother was able to obtain legal representation for the hearing, while the birth father was given legal assistance prior to the hearing, but was unrepresented during it.

*Orders sought*

28 The plaintiff seeks numerous orders. First, an order that the birth parents' consent be dispensed with under section 67(1)(d) of the *Adoption Act 2000* (Cth). Secondly, that an order be made for the adoption of CJD in favour of the adopting parents. Thirdly, that the surname "H-L" be the surname of CJD. Fourthly, that both the Maternal and Paternal Adoption Plans dated 26 October 2016 be registered under section 50(3) of the *Adoption Act 2000* (Cth). I note that these Adoption Plans were modified by the plaintiff on the 26 October 2016 (with minor amendment again on 9 November 2016), to encourage a greater degree of communication between the birth parents and proposed adoptive parents.

*Issues in dispute*

29 These proceedings give rise to a number of distinct issues:

(1) Whether adoption by the adoptive parents should be ordered;

(2) In the alternative whether CJD should be restored to the care of the birth mother;

(3) Further and in the alternative whether CJD should be restored to the care of the birth father;

(4) If the order in (1) above is to be made whether dispensing with the birth mother and birth father's consent is appropriate;

(5) If the order in (1) above is to be made whether the proposed name change is in CJD's best interests;

(6) Again if the order in (1) above is to be made whether the proposed arrangements in the Paternal and Maternal Adoption Plans as modified, particularly the arrangements for contact with the birth parents, are in CJD's best interests and proper in the circumstances, and should be registered accordingly;

(7) If the orders sought in (1), (2) and/or (3) above are not made, whether some other order is appropriate.

*Legal principles and legislative framework*

30 The objects of the *Adoption Act 2000* are found in section 7 and relevantly include:

- To emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice: s 7(a);
- To make it clear that adoption is to be regarded as a service for the child concerned: s 7(b);
- To ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage: s 7(c);
- To recognise the changing nature of practices of adoption: s 7(d).

31 Section 8(1) requires that, as far as is practicable or appropriate, when making a decision about the adoption of a child, a decision maker is to have regard to the principles specified at s (8)(1)(a) – (g) including, relevantly:

(a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,

(b) adoption is to be regarded as a service for the child,

(c) no adult has a right to adopt the child,

(d) the child's given name or names, identity, language and cultural and religious ties should as far as possible, be identified and preserved

(e) undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare.

32 Section 8(2) requires the Court to have regard to the principles at s 8(2)(a) – (k) when determining the best interest of the child, namely:

(a) Any wishes expressed by the child,

(b) The child's age, maturity, level of understanding, gender, background and family relationships and any other characteristics of the child that the decision maker thinks are relevant,

(c) The child's physical, emotional and educational needs, including the child's sense of persona, family and cultural identity,

(d) Any disability that the child has,

(e) Any wishes expressed by either or both of the parents of the child,

(f) The relationship that the child has with his or her parents and siblings (if any) and any significant other people (including relatives) in relation to whom the decision maker considers the question to be relevant,

(g) The attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood,

(h) The nature of the relationship of the child with each proposed adoptive parent,

(i) The sustainability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child,

(j) The need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour,

(k) The alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption is determined among all alternative forms of care to best meet the needs of the child.

33 Where a birth parent does not give consent to the adoption of the child, s 67(1)(d) allows the Court to make a 'consent dispense' order if:

(a) An application has been made for the adoption of the child by authorised carers with whom the child has established a stable relationship; and

(b) Where the adoption of the child by those carers will promote the child's welfare.

34 Section 67(2) prevents the Court from making a 'consent dispense' order unless satisfied that to do so is in the best interests of the child.

35 Section 90 requires the Court to be satisfied as to certain matters before making an adoption order. In the present case, the relevant considerations pursuant to s 90(1) are:

(a) That the best interests of the child will be promoted by the adoption, and

(b) That, as far as practicable and having regard to the age and understanding of the child, the wishes and feelings of the child have been ascertained and due consideration given to them, and

(c) If the prospective adoptive parent or parents are persons other than a step parent or relative of the child that the prospective

adoptive parent or parents have been selected in accordance with this Act, and

(d) That consent to the adoption of the child has been given by every person whose consent is required under this Act or that consent has been or should be, dispensed with, and

(e) In the case of a child (other than an Aboriginal or Torres Strait Islander child) – that the culture, any disability, language and religion of the child and, as far as possible, that the child's given names, identity, language and cultural and religious ties have been taken into account in the making of any adoption plan in relation to the adoption.

36 Section 90(2) provides that the Court may not make an adoption order if the parties to the adoption have agreed to any adoption plan unless it is satisfied that the arrangements proposed in the plan are in the child's best interests and are proper in the circumstances.

37 Section 90(3) provides that the court may not make an adoption order unless it considers that the making of the order would be "clearly preferable" in the best interests of the child than any other action that could be taken by law in relation to the care of the child.

38 The expression "clearly preferable" indicates that s 90(3) requires "something more than a slight preponderance of consideration in favour of adoption over the alternatives". It does not require satisfaction "beyond reasonable doubt". The word 'clearly' serves only to emphasise that the Court should feel a degree of conviction in favour of adoption which is commensurate with the gravity of the decision: *Re JLR* [2015] NSWSC 926 at [99] (per Bergin CJ in Eq); *Application of A; Re D* (2006) 36 Fam LR 142 at [53] (per Palmer J). It requires that adoption be "obviously, plainly or manifestly preferable to any other action that could be taken by law": *Deputy of Community Services v D* (2007) 37 Fam LR 595 at [25].

39 In *Adoption of NG (No 2)* [2014] NSWSC 680, Brereton J described the principles applicable with respect to section 8 at [12]-[17]:

> "[12] It is worth recording that these inquiries are concerned much more with the future than with the past: at their core is the best interests and welfare of the child, now and in the future, and not the rights or wrongs of past conduct and decisions - whether of the birth parents, the adoptive parents or the Department.

[13] In making decisions about adoption, the court must apply the principles listed in Adoption Act, s 8(1) …

[14] In speaking of adoption being a "service to the child", the Act requires decisions in connection with adoption to be made on the basis that the prime consideration is benefit to the child, as distinct from providing a service to people who wish to adopt a child. However, that does not mean that no service is provided to a child by adoption just because his or her needs are already being adequately met.

[15] *Adoption Act*, s 90(3), provides that the Court may not make an adoption order unless it considers that the making of the order would be clearly preferable in the best interests of the child than any other action that could be taken by law in relation to the care of the child. This requires something more than a slight preponderance of considerations in favour of adoption over the alternatives. While not amounting to a requirement for satisfaction "beyond reasonable doubt" [*Re D; Application of A* [2006] NSWSC 1056, [53]], the requirement that the Court consider that an adoption order be "clearly preferable" is one that adoption be obviously, plainly or manifestly preferable to any other action that could be taken by law [cf *Director-General, Dept of Community Services v D and Ors* [2007] NSWSC 762; (2007) 37 Fam LR 595, [25]].

[16] The answer to the question whether adoption is "clearly preferable" is informed by various other considerations, referred to in s 8(2), which may generally be summarised as follows:

- Concerning the child: his physical, emotional and educational needs, including sense of personal, family and cultural identity, and any disabilities; his wishes, and other relevant characteristics including age, maturity, level of understanding, gender, background, and family relationships;

- Concerning the birth parents: their wishes; the nature of the child's relationship with them; their parenting capacity; and their attitude to the child and to the responsibilities of parenthood; and

- Concerning to the proposed adoptive parents: their suitability and capacity to provide for the child's needs; their attitude to the child and to the responsibilities of parenthood; and the nature and quality of the child's relationship with them.

[17] In addition, all these are informed by the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to, ill-treatment, violence or other behaviour; and the alternatives to adoption, in the light of the short and long term effects of adoption."

40 His Honour went on to explain:

"[74] Consideration of whether adoption would promote the child's best interests, and whether it is clearly preferable to any other order that could be made, involves identification of the likely effects of adoption, and of the various available alternatives, and examining their respective benefits and detriments from the perspective of the best interests of the child, so as to conclude whether adoption is, or is not, clearly preferable to all the others. In the light of

the proposals of the parties, the alternatives to adoption that require consideration in this case are:

- restoring the child to the care of the birth mother;
- allocating parental responsibility in favour of the applicants;
- maintaining the status quo, with the Minister having parental responsibility and the child in foster care; and
- deferring determination of the question until the child is older, either maintaining the status quo or making a parental responsibility order in the meantime."

…

[83] Once an adoption order is made, the possibility of restoration is practically foreclosed, and future decision-making in respect of the child is vested in the adoptive parents. Because of the permanency of an adoption order, and the general preference based in human nature and experience that, where practicable, children are best raised by their birth parents, the Court would not likely make an adoption order if there were a realistic prospect of the child being restored to the care of one or both of his birth parents. However, if there is no real prospect of restoration, then the disadvantages of the permanent nature of an adoption order are minimal, and no greater than those of natural legal parenthood; and the advantages of permanency are considerable. Future contingencies in relation to contact can still be addressed and accommodated after an adoption order is made [*Re TVK* [2012] NSWSC 1629].

[84] The starting point for consideration of whether there is a realistic prospect of restoration is that there is in place an order of the Children's Court allocating parental responsibility to the Minister until the child attains 18 years of age. Implicit in that order is a conclusion that restoration is improbable. That conclusion does not bind this court, and between the time when a care order is made in the Children's Court, and an adoption application is considered in this court, much can change. *The Children and Young Persons (Care and Protection) Act* 1998 (NSW) itself admits, by s 90, of an application for restoration (by way of rescission of the care order) in the event of a change of circumstances, notwithstanding that a final order allocating parental responsibility to the Minister until 18 is in place. Nonetheless, in this type of case, there has already been a judicial decision, by a specialist court, that the child cannot be satisfactorily cared for by the birth parents, such as to require long-term removal."

41 I also note the pertinent remarks of Sir Thomas Bingham MR in *Re O (Contact: Imposition of conditions)* [1995] 2 FLR 124, who stated that "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems".

*Dispensing with the consent of the birth parents*

42 In *Re Adoption of RCC* [2015] NSWSC 813, Brereton J stated:

> "[11] … It is not the role of this Court in these proceedings to review the decisions that have been made by the Children's Court in respect of parental responsibility; nor even to determine whether in the different circumstances that prevail today such an order would still have been made; but rather to judge which of the competing proposals (and any viable alternatives) will best serve the interests of these children now and in the future, given what has already happened.
>
> …
>
> [17] … Dispensing with consent is a grave step, not lightly to be taken. The law permits the consent of birth parents to be dispensed with only in limited cases. Prior to 2006, they were limited to cases in which the birth parent was unable to be identified or found, or there was serious cause for concern for the child's welfare. In 2006, the ground provided by s 67(1)(d) was introduced, permitting consent to be dispensed with where a child has been in the long-term care of authorised carers and has established a stable relationship with them, and the interests and welfare of the child would be promoted by adoption by those carers. This was explained, in the second reading speech (Hansard, Legislative Council, 25 October 2006), as enabling consent to be dispensed with where adoption would enhance a child's sense of belonging and permanence in the carers' family notwithstanding that there is no concern about the child's current welfare (as distinct from the child's welfare at the beginning of the placement). As the Court of Appeal observed in *Re Sarah* [2013] NSWCA 379, [68] - endorsing what Slattery J had said in *Director General Department of Family and Community Services; Re Stephen* [2011] NSWSC 1521, [59] - the focus of s 67(1)(d) is not the capacity or quality of the parent or person with parental responsibility, but the child's present situation. Essentially, this reflects a policy decision that once a child has, by judicial decision, been removed from his or parents and placed in permanent out-of-home care, the rule that the legal parental relationship is not to be severed without the consent of the parents is displaced if the court is satisfied that the interests of the child will be best served by adoption. Because one of the conditions for dispensing with consent under this power is satisfaction that it is in the best interests of the child to make a consent dispense order, this is necessarily interwoven with consideration of whether adoption is clearly preferable to any other action that could be taken by law in relation to the care of the child." (see also *Adoption of NG (No 2)* [2014] NSWSC 680 at [105] and *Adoption of RCC and RZA* [2015] NSWSC 813 at [17])

*Adoption as opposed to restoration or other order*

43 Brereton J explained in *Adoption of BS (No 3)* [2013] NSWSC 2033:

> "[24] A clear sense of identity is an important life foundation for children, and this is particularly so against an early background of ambiguity or instability.
>
> …
>
> [28] Security and stability are also important life foundations for children, all the more so against an early background of instability."

44 Relevantly, Brereton J said in *Adoption of SVS* [2015] NSWSC 2043 at [25]-[28]:

"[25] Consideration of this question, as usual, commences with the generalities. The best resort the Court can have to understand the respective benefits of long term foster care and adoption is to what the social science, soft as it may be, tells us, and it was deployed in this case through the evidence of the parties' single expert Jenny Howell, forensic psychologist. She referred to the works of Triseliotis and of Bohman & Sigvardsson, which are commonly referred to in this area, and said:

> Research examining outcomes connected to adoption and long term fostering found as the key differences between the two forms of substitute parenting high levels of emotional security and the sense of belonging and general wellbeing in children who were adopted (T riseliotis 2002).
>
> Attention has been drawn to the sometimes ambiguous position of children in long term foster care, suggesting that, unlike adoption, many children in long term care feel unusually insecure and lack a strong sense of belonging (Bohman and Sigvardsson 1990).

[26] Studies have identified that the insecurities were concentrated in two areas: anxiety and uncertainty on the part of the child and carers due to the impermanence of their position, and the lack of certainty in their position.

[27] The practical effect of adoption in a case such as the present is to perfect the child's membership of the family of which in every other sense she is a member, and which is essentially the only family she has ever known. It brings the legal relationship of parentage into conformity with the reality of the situation. It also means that the child becomes a child of the adoptive parents, not just until she attains 18 years of age, but for life. It confirms her identification with the family with which she lives and which she sees emotionally and psychologically, as well as physically, as her family. It ends her status as a ward of the Minister and means that she is no longer in "out-of-home care" but in "in home care". It removes any residual doubts, remote as they may be, as to the future security of her placement.

[28] On the negative side, adoption severs the legal relationship with her birth family. But it has to be said that that has been a very limited relationship. She has had no relationship, so to speak, with her birth father, whose surname she bears. Her relationship with her birth mother has been limited to occasions of contact. Severing the legal relationship will not sever the biological relationship, nor will it detract from the potential for developing a meaningful relationship through ongoing contact. In terms of developing and sustaining a relationship between SVS and KF, I do not see that adoption has significant detriment as distinct from the status quo."

45 In *Application of A - re D* [2006] NSWSC 1056, Palmer J explained at [47]-[51]:

"[47] It would be inappropriate for the Court, by undertaking a review of the literature in the field of child psychology and adoption, to come to the view that, as a general rule, adoption is more likely to be in the best interests of a child than long-term fostering or, indeed, any other form of care. When the Court comes to the consideration required of it by s.8(2)(k) and s.90(3), no general rule can be applied. The *Adoption Act* regulates adoptions in a very wide range of different circumstances: an orphaned infant from Korea; a baby abandoned by parents incapable of caring for it; a teenager removed from abusive parents; a married adult wishing to be adopted by a step-parent.

> [48] The choice between long-term fostering as an alternative to adoption will, by definition, arise where the child is fairly young. Even so, the age of the child in itself will inevitably give rise to different considerations in different circumstances. The case of a baby some months old, or a child under the age of two, with no possibility of ever being returned to its parents, is very different from the case of a ten year old who has a real prospect of returning to parental care; what a child has experienced before coming into foster care may have a considerable impact on the child's need for future stability and security.
>
> [49] For these reasons, s.8(2) emphasises that the Court must have close regard to the particular circumstances of each case in order to assess whether the child's interests are best served by an adoption order or some other form of care: s.8(2)(k).
>
> [50] Research, and the literature in child psychology, confirm ordinary human experience: in order to attain normal, healthy, emotional, intellectual and physical development, children need to feel stable and secure in a nurturing environment, and they need to feel a sense of identity and belonging within their family and in their community. Human experience also tells us that we very often identify ourselves, both to ourselves and in our community, by reference to who and what the State says we are. We are treated as citizens if we have a passport; we are regarded as capable of driving a car if we have a driving licence; we are identified as the children of those persons whose names appear as our parents on our birth certificates.
>
> [51] I do not intend to suggest that learned literature in the field of child psychology has no value in the courtroom in adoption cases. However, the results of research are often disputed and open to different interpretations. In the end, decisions in adoption cases as to what form of care is in a child's best interests are intuitive, founded on the Judge's impression of the particular facts of the case formed in the light of the Judge's experience of life."

46 In *Adoption of RCC and RZA* [2015] NSWSC 813, Brereton J discussed the possibility of restoration and its importance at [69]-[72]:

> "[69]…[B]ecause of the permanency of an adoption order, and the general preference based in human nature and experience that, where practicable, children are best raised by their birth parents, the Court must in any event consider that once an adoption order is made, the possibility of restoration is practically foreclosed, and future decision-making in respect of the children is vested in the adoptive parents. However, although I have previously suggested that the Court would not likely make an adoption order if there were a realistic prospect of restoration [see, for example, Adoption of NG (No 2) [2014] NSWSC 680, [83]], on reflection that overstates the position, which is more accurately stated as that the Court would not make an adoption order unless satisfied that the advantages of adoption clearly outweighed the benefits of preserving the possibility of restoration.
>
> [70] The concept of a "reasonable possibility of restoration" is one derived from the Care and Protection Act, s 83(1), which provides that on an application for a care order, the Secretary must assess whether there is a realistic possibility of a child being restored to his or her parents, having regard to the circumstances of the child and the evidence that the parents are likely to be able to satisfactorily address the issues that have led to the child's removal. In In the matter of Campbell [2011] NSWSC 761, Slattery J (at [55]ff) explained that a possibility involved something less than a probability – that is, something

> that is not impossible; and that to be realistic, it had to be real or practical - not fanciful, sentimental or idealistic or based upon "unlikely hopes for the future".
>
> [71] There is no equivalent statutory concept in the Adoption Act. Moreover, in a case such as the present, there will already be in place an order of the Children's Court allocating parental responsibility to the Minister until the children attain 18 years of age, implicit in which is a conclusion that restoration is not a realistic possibility. While that conclusion does not bind this court - and between the time when a care order is made in the Children's Court, and an adoption application is considered in this court, much can change (indeed, the Care and Protection Act itself admits, by s 90, of an application for restoration, by way of rescission of the care order, in the event of a change of circumstances, notwithstanding that a final order allocating parental responsibility to the Minister until 18 is in place) - nonetheless, there will have already been a judicial decision, by a specialist court, that the children cannot be satisfactorily cared for by the birth parents, such as to require long-term removal, and that restoration is not a realistic possibility.
>
> [72] If this Court were satisfied that restoration, now or in the future, was in the best interests of the children, it could not be satisfied that adoption was "clearly preferable". But short of such a conclusion, while the Court should take into account, on the one hand, that an adoption order would practically preclude the possibility of restoration, that must be weighed on the other against any disadvantages of preserving that prospect, and the advantages of adoption. Typically, countervailing considerations will include the undesirability of uncertainty and associated instability and insecurity, the risks associated with disturbing an established and functional status quo, and the relative parenting capacities of the birth parents and the adoptive parents."

47 Courts in the United Kingdom have taken a similar stance. In *Re H (Adoption: Parental Agreement)* (1982) 3 FLR 386, Lord Justice Ormrod, speaking for the Court of Appeal, asked rhetorically at 388:

> "…..
>
> 'What do the adoptive parents gain by an adoption order over and above what they have already got on a long term fostering basis?' To that answer is always the same – and it is always a good one – adoption gives us total security and makes the child part of our family, and places us in parental control of the child; long-term fostering leaves us exposed to changes of view of the local authority, it leaves us exposed to applications, and so on, by the natural parent. That is a perfectly sensible and reasonable approach; it is far from being only an emotive one."

48 Again, most recently in *W (A Child)* [2016] EWCA Civ 793, Lord Justice McFarlane, speaking with agreement of the other two members of the Court of Appeal, stated at [64]:

> "One of the principal benefits of adoption is to achieve a secure, stable, reliable, permanent, lifetime placement for the child in the adoptive family as the adoptive son or daughter of the adopters."

*The appropriate name of the child*

49 In relation to the change of a child's surname, Brereton J observed in *Adoption of RCC and RZA* [2015] NSWSC 813 at [104], re-iterating his own comments in *Adoption of NG (No 2)* [2014] NSWSC 680 at [109] and *Adoption at BS (No 3)* [2013] NSWSC 2033 at [86]:

> "*Adoption Act*, s 101, relevantly provides that on the making of an adoption order, an adopted child who is less than 18 years of age is to have as his or her surname and given name or names such name or names as the Court, in the adoption order, approves on the application of the adoptive parent or parents. Before changing the surname or given name or names of a child, the Court must consider any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child's wishes. The Court must not approve a change in the given name or names of a child who is more than one year old unless the Court is satisfied that the name change is in the best interests of the child. The adoption principles set out in s 8 include, in (e), the principle that a child's given name or names, and identity, should, as far as possible, be preserved."

50 At [105], Brereton J went on to explain:

> "Upon adoption, a child under 18 years of age ordinarily assumes the surname of the adopting parents, so that the child's family name accords with that of his or her legal family. Indeed, children see that outcome as one of the most significant indicia of the sense of "belonging" that adoption is intended to nurture, and not to do so would detract from the benefits of adoption. The proposed surname P accords with this approach, and will recognise the children's place in the adoptive family and reinforce their sense of permanency and belonging, in that they will be in name as well as in law a member of the adoptive family. Moreover, the children have expressed a wish to have the surname P."

51 Brereton J had earlier observed to similar effect in *Adoption at BS (No 3)* [2013] at [89]:

> "In my view, the prima facie position, reflected in the reference in s 101(1)(b) to "on the application of the adoptive parent or parents", is once it is determined to make an adoption order, priority is given to the wishes of the adoptive parents, so long as they are not inconsistent with the interests of the child and the adoption principles, although regard must also be had to the wishes of the child. Thus upon adoption, a child under 18 years of age ordinarily assumes the surname of the adopting parents, so that the child's family name accords with that of his or her legal family. Indeed, children see that outcome as one of the most significant indicia of the sense of "belonging" that adoption is intended to nurture, and not to do so would detract from the benefits of adoption."

52 Albeit in the context of section 92 and not section 101 of the *Adoption Act 2000* (NSW), Brereton J made pertinent comments in relation to the change of a

child's name in *Director-General, Dept of Community Services v D & Ors* (2007) 37 Fam LR 595; [2007] NSWSC 762 at [258]-[262]:

> "[258]…The name of a child is an aspect of parental responsibility. Without any order, the persons having parental responsibility are entitled to change the name of a child. In my view power to make orders with respect to parental responsibility must carry with it power to make orders with respect to the child's name.
>
> [259] Issues of changing the surname of a child have been considered in a number of cases in the Family Court of Australia [George & Radford (1976) FLC ¶90-060; 1 Fam LR 11,510; Chapman & Palmer (1978) FLC ¶90-510; 4 Fam LR 462; Beach & Stemmler (1979) FLC ¶90-692; Kelley & Kelley (1981) FLC ¶91-002; Skrabl & Leach (1989) FLC ¶92-016; 13 Fam LR 83; and Mahoney & McKenzie (1993) FLC ¶92-408]. Usually, they have arisen in the context of applications for injunctions to restrain one parent from causing or allowing the child to be known by a new name. A convenient summary of the cases and the principles to be extracted from them is to be found in the judgment of Kay and Holden JJ in Flanagan & Handcock (2001) FLC ¶93-074. Relevantly, they establish that the welfare of the child is the paramount consideration, and that the court should have regard to the short and long-term effects of any change in the child's surname; any embarrassment likely to be experienced by the child if his or her name were different from that of the parent with whom the child resides; any confusion of identity which may arise for the child if his or her name is changed or not changed; the effect which any change in surname may have on the relationship between the child and the parent whose name the child bore during the marriage; and the effect of frequent or random changes of name [Chapman & Palmer (1978) FLC ¶90-510; 4 Fam LR 462]. Further considerations include the advantages in the short and long-term of the name remaining unchanged, and the degree of identification that the child has with the various parties [Beach & Stemmler (1979) FLC ¶90-692].
>
> [260] In support of the submission that a change of name should be authorised, it is contended that E will live in the household of Mr and Mrs F who will be responsible for her day to day education, sporting and leisure activities, all of which will require her to be enrolled or registered, such that it would be in her interest to be able to use Mr and Mrs F's surname. To that might be added that, at present, E more closely identifies with Mr and Mrs F than with D, and that she already uses their surname.
>
> [261] On the other hand, a change in surname will be a further breach in the connection between her and her birth mother and family, and may make it more difficult for her to be accepted by her family of origin.
>
> [262] Names are important to children. They are a significant aspect of their sense of belonging. At least in the short term, E will identify more closely with Mr and Mrs F than with D. She already uses their surname. She will continue to reside with them for the foreseeable future. While the position in the longer term is not so clear, the probabilities are that even then she will identify more with Mr and Mrs F. To change now from their name will be productive of confusion and distress. Retaining E's present surname as a middle name will preserve the connection with D's family. In my view, her greater identification in the short term, and probably the longer term, with Mr and Mrs F, the circumstance that she already uses their name, so that from her perspective

> no "change" would involved, and the undesirability of causing identity confusion at this stage, indicate that Mr and Mrs F should be permitted, in exercise of their parental responsibility for E, to change her surname to their own, provided that if they do so, E's current surname be retained as her middle name."

*Adoption by same sex couples*

53 In this case, as I have already observed the proposed adoptive parents are a same sex couple.

54 As a result of the *Adoption Amendment (Same Sex Couples) Act 2010* (NSW), the law in New South Wales clearly allows same-sex couples to adopt a child. In the case of *Re: William and Jane* [2010] NSWSC 1435, Palmer J considered a factually analogous case, where a same-sex, male couple sought orders to adopt two children. Although that case was an uncontested adoption, Palmer J's comments remain relevant to my determination in the current proceedings. His Honour comprehensively reviewed and discussed the legislative background to the eligibility of same-sex couples to adopt in New South Wales. Bergin CJ in Eq approved his Honour's remarks in *Re JLR* [2015] NSWSC 926 at [100]. Although the following quotation is lengthy, I respectfully adopt what Palmer J said at [61]-[78]:

> "[61] Section 7 of the *Adoption Act* states that the first and foremost object of the legislation is "to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice". In furtherance of this object, s 8(1)(a) of the Act provides that in making a decision about the adoption of a child, the Court is to have regard (as far as is practicable or appropriate) to the principle that the best interests of the child, both in childhood and in later life, must be the paramount consideration.
>
> [62] The Act emphasises that an adoption order is made for the benefit of, and in the interests of, the child and not for the benefit of, or in the interests of, the person seeking to adopt. Section 7(b) provides that amongst the objects of the Act are to make it clear that adoption is to be regarded as a service for the child concerned. Section 8(1)(c) provides:
>
> > "(c) no adult has a right to adopt the child …"
>
> [63] I place these considerations at the forefront to emphasise that this case is not about the rights of same sex couples generally nor is it specifically about the rights of homosexual adults to adopt children. That is because adults – whether homosexual or heterosexual, whether married or single – have never had rights to adopt children, as s 8(1)(c) of the *Adoption Act* makes unequivocally plain.
>
> [64] What the *Adoption Amendment (Same Sex Couples) Act 2010* addresses is not rights to adopt, but eligibility to adopt. Before the Amending Act, s 23(1) of the *Adoption Act* provided that the Court may make an adoption order

"solely in favour of one person or jointly in favour of a couple". The Act said nothing at all about the sex, or sexual orientation, of a single applicant for adoption. Accordingly, a single homosexual man or woman was just as eligible to adopt a child as was a single heterosexual man or woman. Sexual orientation affected eligibility only when the applicants were a "couple", because "couple" was defined by the Dictionary in the Act as meaning:

> "… a man and a woman who:
>
> (a) are married, or
>
> (b) have a de facto relationship."

[65] "Married" was, and still is, relevantly defined in the Dictionary as "a man and a woman who are actually married". "Actually married" must mean "validly married in accordance with the laws of Australia", i.e. validly married in a marriage which is recognised by the *Marriage Act 1961* (Cth). Section 5(1) of the *Marriage Act* defines a marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". To make it clear beyond argument that same sex marriages can, by no means, be regarded as marriages valid under the law of Australia, as it is at present, s 88EA of the *Marriage Act* expressly forbids recognition of same sex marriages solemnised in other jurisdictions.

[66] Prior to the Amending Act, a same sex couple could never have qualified as a "couple … who are married" within the first limb of the definition of "couple" in the Dictionary. Neither could they have qualified as a "couple … who have a de facto relationship" because the Dictionary definition required the couple to be a man and a woman.

[67] In summary, prior to the passing of the Amending Act, a couple could only adopt if they were living together in an established heterosexual relationship, whether married or unmarried.

[68] The Amending Act did not change the words of s 23(1) Adoption Act but it changed the definition of "couple" in the Dictionary to mean:

> "… 2 persons who:
>
> (a) are married to each other, or
>
> (b) are de facto partners of each other."

[69] "De facto partner" is now defined in s 21C(1) Interpretation Act 1987 (NSW) as follows:

> "For the purposes of any Act or instrument, a person is the de facto partner of another person (whether of the same sex or a different sex) if:
>
> > (a) the person is in a registered relationship or interstate registered relationship with the other person within the meaning of the Relationships Register Act 2010, or
> >
> > (b) the person is in a de facto relationship with the other person."

"De facto relationship" is defined in s 21C(2) as follows:

> "For the purposes of any Act or instrument, a person is in a de facto relationship with another person if:

(a) they have a relationship as a couple living together, and

(b) they are not married to one another or related by family.

A de facto relationship can exist even if one of the persons is legally married to someone else or in a registered relationship or interstate registered relationship with someone else."

Section 21C(3) provides:

"**'Determination of 'relationship as a couple**'

In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

(a) the duration of the relationship,

(b) the nature and extent of their common residence,

(c) whether a sexual relationship exists,

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,

(e) the ownership, use and acquisition of property,

(f) the degree of mutual commitment to a shared life,

(g) the care and support of children,

(h) the performance of household duties,

(i) the reputation and public aspects of the relationship.

No particular finding in relation to any of those matters is necessary in determining whether 2 persons have a relationship as a couple."

[70] It will be seen that the criteria for assessing a "relationship as a couple" in s 21C(3) Interpretation Act are modelled on what used to be regarded as the normal incidence of a conventional marriage between a man and a woman, even though a "couple" can now include same sex partners.

[71] The new definition of "couple" in the Adoption Act incorporates, by reference, the definition of "de facto partner" in the Interpretation Act, which in turn provides that a couple are de facto partners if they are in a relationship registered under the Relationships Register Act 2010 (NSW) or corresponding legislation in other States. The Relationships Register Act 2010 came into effect on 1 July 2010. That Act provides only for the legal recognition of relationships, heterosexual or same sex, and does not set out the legal consequences of registration. Those consequences are to be found in other legislation such as, indirectly, the Adoption Act.

[72] The registration of relationships under the Relationships Register Act is effected by the Registrar of Births, Deaths and Marriages by registration under Pt 8 of the Births, Deaths and Marriages Registration Act 1995 (NSW). Section 5 of the Relationships Register Act specifies those eligible to apply for registration:

"(1) Two adults who are in a relationship as a couple, regardless of their sex, may apply to the Registrar for registration of their relationship.

(2) A relationship cannot be registered unless at least one of the adults resides in New South Wales.

(3) A relationship cannot be registered if:

(a) either adult is married, or

(b) either adult is registered under this Act or a corresponding law as being in a registered relationship or an interstate registered relationship, or

(c) either adult is in a relationship as a couple with another person, or

(d) the adults are related by family."

[73] Section 6 of the Relationships Register Act sets out the criteria by which the Registrar is to determine whether a relationship can be registered:

"An application for registration of a relationship is to be made in the form approved by the Registrar and must be accompanied by the following:

(a) a statutory declaration by each person in the relationship stating the following:

(i) that the person wishes to register the relationship,

(ii) that the person is in a relationship as a couple with the other person,

(iii) that the person is not married,

(iv) that the person is not registered under this Act or a corresponding law as being in a registered relationship or an interstate registered relationship,

(v) that the person is not in a relationship as a couple with a person other than the other applicant,

(vi) that the person does or does not reside in New South Wales,

(vii) that the person is not related to the other applicant by family."

[74] Section 6(a)(ii) requires evidence that the applicants for registration are "in a relationship as a couple", i.e. that they are eligible to apply for registration under s 5(1). The phrase "in a relationship as a couple" is not defined in the *Relationships Register Act* but it appears in s 21C(3) Interpretation Act, set out above. There is no reason to suppose that the phrase has a different meaning in each Act.

[75] Section 7 of the Relationships Register Act empowers the Registrar to require the applicants for registration to provide "any further information that the Registrar requires to determine the application". By this means the Registrar is empowered to investigate the truth of the assertions in the

applicants' Statutory Declarations that they are in "a relationship as a couple", ascertained by reference to the criteria set out in s 21C(3) *Interpretation Act*.

[76] While persons who are in a de facto relationship, as defined by s 21C Interpretation Act, and persons who are in a registered relationship, as defined in the *Relationships Register Act*, may be in a heterosexual or same sex relationship with each other, there are significant differences between the two legal categories of relationship. A couple in a de facto relationship may include a partner who is, at the same time, legally married to a third person in a heterosexual relationship or is in a heterosexual or same sex registered relationship with a third person: s 21C(2) *Interpretation Act*. On the other hand, a party to a registered relationship under the *Relationships Register Act* cannot be legally married to a third party or living in a registered relationship with a third party or living in a de facto relationship with a third party. While the criteria for the two categories of relationship overlap to some extent, the requirements for a registered relationship are more restrictive than those for a de facto relationship.

[77] To summarise, as the law in New South Wales presently stands, the following people are eligible to adopt a child:

– a single person of either sex, regardless of sexual orientation;

– a man and a women whose marriage to each other is recognised as valid under the Marriage Act ;

– a man and a woman who are not married to each other but who are in a registered relationship;

– a man and a woman who are in a de facto relationship with each other, even if one them is still married to a third party or is still in a registered relationship with a third party, whether heterosexual or homosexual;

– a same sex couple who are in a registered relationship;

– a same sex couple who are in a de facto relationship with each other, even if one of them is still married to a third party or is still in a registered relationship with a third party, whether heterosexual or homosexual.

[78] It hardly needs to be said that fulfilling the criteria in the legislation for eligibility as an adoptive parent is by no means the same thing as fulfilling the criteria for suitability as an adoptive parent. In considering whether an adoption order should be made in favour of a person or couple eligible to adopt, the Court applies the criteria laid down by the Adoption Act, all of which are concerned with the best interests of the child and not with vindication of the aspirations of the applicant for adoption."

55 His Honour also relevantly stated at [100]-[106]:

"[100] I cannot pretend to be oblivious to the fact that many in the community have expressed, and continue to express, a strongly-held belief that adoption by same sex couples is, in its very nature, contrary to religion, to morality and to the best interests of the child, and that it undermines the long-established concept of the nature of a family. This ideological debate is not, however, the concern of this Court in deciding adoption cases because Parliament has now resolved the issue by enacting that same sex couples are lawfully eligible to adopt children.

[101] Nevertheless, the Court must be conscious that, perhaps for some little time to come, a significant proportion of the community will continue to regard as an oddity a child who, purely as a matter of legal construction, has two mothers and no father or two fathers and no mother. Should the Court take this circumstance into consideration in determining whether adoption by a same sex couple is in the best interests of the child? Should the Court apply any special test to adoptions by same sex couples?

[102] Some would say that to apply a special test in same sex adoptions is to discriminate unlawfully against persons of a particular orientation, so that the Court should take no account at all of whether the adoptive parents are a married couple, an unmarried heterosexual couple or a same sex couple. In the context of the policy of the Anti-Discrimination Act 1977 (NSW), this view is perfectly understandable.

[103] However, the policy of the Adoption Act is not subordinated to the policy of the Anti-Discrimination Act. On the contrary, the Adoption Act requires that the interests of the child, not the rights of aspiring adoptive parents, are to be the paramount consideration. The primacy of the individual child's interests in a particular adoption case should, therefore, never be diminished by considerations of general social policy.

[104] However, in considering the best interests of the child, the Court must be aware that adoption by a same sex couple may, in certain cases, be capable of causing problems for the child in terms of the way in which he or she perceives himself or herself as fitting into the community at large. To take an extreme hypothetical example, a same sex couple may be militantly hostile to the opposite sex in general and their circle of friends and acquaintances may be confined exclusively to members of their own sex. To permit the adoption of a child by such a couple would be as inimical to the child's ability to develop normal relationships within the community at large as it would be to permit adoption of the child by a married couple with vehemently expressed homophobic beliefs.

[105] Accordingly, the Court will be concerned to see that adoptive parents, regardless of sexual orientation, have stable, supportive and balanced family and social relationships. The Court can then be assured that the adopted child will not be isolated, that the parents will be supported and that the child will be introduced successfully to social intercourse. This concern is not focussed upon adoptions by same sex couples: it [applies] equally to all adoptions.

[106] Doubtless the Court and the community will grapple for some time with the novelty of same sex couple adoptions. However, novelty does not justify the imposition of any special test for same sex couple adoption applications, nor does it warrant a specially cautious approach by the Court to such applications. That is because the *Adoption Act* prescribes only one test for all adoption applications: in the particular factual circumstances of every case, what is in the best interests of the child? The assessment procedures and the policies of the *Adoption Act* as they presently stand are perfectly adequate to ensure that, regardless of sexual orientation, only those who are able to promote the best interests of the child will be approved as adoptive parents."

**Submissions of the Parties**

56 I was helpfully provided with written opening outlines from the various parties.

*The plaintiff*

57 The plaintiff submits, which is not controversial, that all formal requirements under the Act have been met. I need not rehearse them here but they are set out in paragraphs 3 to 13 inclusive of those submissions.

58 The plaintiff also submits that I should dispense with the birth parents' consent because it is in CJD's best interest to do so. Shortly put, it is submitted that CJD has been in long term care since birth and although both birth parents have a significant role in CJD's life neither parent has been in the position of parental responsibility for CJD. Further that the proposed adoptive parents are the only family that CJD has ever known.

59 The plaintiff correctly submits that the Court must be satisfied according to section 90 of the Act which again reflects the best interests of the child. The plaintiff submits that CJD has been in the care of the Minister since she was four days old and her physical, emotional and educational needs have been consistently met. The plaintiff recites much of the history to which I refer below in greater detail. The plaintiff emphasises the fact that CJD should be seen as a special needs child, possibly as the result of being exposed to drugs in utero and possibly including some genetic factors relating to the parents respective diagnosis. Reliance is placed on the report of Ms S (CB 65).

60 Detailed references are then made to CJD's religious identity and to religious and cultural background which again I deal with in some detail below. The plaintiff points out that Ms S's recommendation in relation to CJD's religious and cultural heritage focusses on the best interests of the child and is a real and practical assessment of the most appropriate role of religion in CJD's life. Notwithstanding reservation the plaintiff submits that Ms S's view (which again is uncontroversial) is that CJD's best interest is to remain in the long term care of the proposed adoptive parents, and that adoption is the best option. Therefore, it is submitted that section 8(2)(c) is satisfied.

61 The plaintiff accepts that CJD has developed an important and positive relationship with the birth mother and the birth father through contact. The plaintiff again relies upon Ms S whose observation during a contact visit was

that neither parent represented a psychological parental figure for CJD. It is submitted that section 8(2)(f) be satisfied.

62 The plaintiff submits that the proposed adoptive parents are dutiful and capable individuals who are well able to provide for CJD's emotional, intellectual and cultural needs. Further, the plaintiff relies upon Ms S to support the proposition that the proposed adoptive parents as a same sex couple are a committed, loving and stable couple with their own strong family and professional networks. The plaintiff submits that Ms S identifies that the parenting challenges for same sex couples are similar to those for heterosexual couples but notes that same sex couples may also have to address challenges arising from prejudice in the community.

63 The plaintiff additionally points out that the *Adoption Act* prescribes only one test for all adoption applications: in the particular factual circumstances of every case the paramount concern is the best interests of the child. The plaintiff submits in this case the evidence of positive attachment to the proposed adoptive parents is compelling and that the adoption application is made in circumstances where the proposed adoptive parents are the only parents that CJD has ever known.

64 In terms of section 8(2)(k), the plaintiff submits that the only real options are adoption or maintenance of the status quo. The plaintiff submits that it is not in CJD's best interests to maintain the status quo over an adoption order. The plaintiff submits that the beneficial impact of adoption is that a child has the security of being raised in a legally recognised family rather than remaining a state ward for the duration of childhood and that a child's legal status is brought into conformity with reality. If the proposed adoptive parents merely have an order for parental responsibility the plaintiff submits this would not allow for the child's legal status to be brought into conformity with that reality.

65 The plaintiff submits that neither birth parent has sufficient capacity to parent. These matters are dealt with below in greater detail in the context of the evidence.

66 The plaintiff also submits that the maternal and paternal adoption plans (as amended at 9 November 2016) are in CJD's best interests, proper in the circumstances and should be registered.

67 In conclusion, the plaintiff submits that the making of an adoption order is in the best interests of CJD and clearly preferable to any other order that could be taken.

*The birth mother*

68 The birth mother opposes adoption and further submits that it is not in the best interests of CJD to dispense with her consent to such an order. Instead the birth mother seeks restoration of CJD to her care.

69 It is submitted on behalf of the birth mother that her plan for restoration need not be set out in complete detail. Nor is it necessary for her to include the method of transition or how to attend to any specific needs of CJD. It is submitted for the birth mother that it is sufficient to establish that there is a realistic possibility for restoration.

70 The birth mother submits that if restoration does not occur in her favour, as an alternative, she supports the birth father in his application. Otherwise she supports as I understand it, long term care with the proposed adoptive parents.

71 The birth mother submits that she has not taken any illicit drugs since at least 2012 other than marijuana on one occasion. It is submitted that she has provided urine analysis results. She has also attended parenting courses. She has had positive contact with CJD and there has been no indication that she has been affected by drugs or alcohol.

72 She attends Narcotics Anonymous ('**NA**') and Alcoholics Anonymous ('**AA**'). She has attended community restorative centres and has seen a clinical psychologist. She has a great deal of support from friends and although not in a relationship with the father, she maintains a workable friendship with him. They remain friends and speak about matters concerning CJD.

73 The birth mother submits she has a great relationship with her daughter and she is in stable accommodation although she concedes that if CJD is restored to her that will have to be changed to larger premises.

74 The birth mother submits that CJD's carers do not respect her cultural background which is that of a practising Catholic. Further she submits that if an order for adoption is made CJD would have no ability to understand or be involved in the Catholic religion. In the ultimate, the birth mother submitted that making adoption orders would fail to recognise CJD's Catholic heritage and deny CJD an ability to have a connection with Catholicism.

75 She submits mere exposure to the Christian faith or other arrangements suggested by the proposed adoptive parents do not acknowledge any distinction between the Catholic faith and different Christian faiths. She also did not appear to accept the proposed adoptive parents' suggestion of exposing CJD to Catholic bible stories and attendance at Catholic scripture classes as sufficient.

76 The birth mother raised an objection to the adoption proposal, in part, on the basis that the proposed adoptive parents are a same sex couple. This is consistent with her understanding of the teaching of her religious faith. As the carers know of that objection it is submitted that this cannot be conducive to an effective ongoing relationship between the carers and the birth mother and/or the birth father if an adoption order is made. However, it is not submitted that the carers do not have a loving and committed attitude to CJD.

77 The birth mother submitted in general terms that the attitude of the carers would make it difficult for them to commit to fostering CJD's relationship with her birth parents.

78 The birth mother conceded that if the Court did not make an adoption order CJD was likely to continue at her current placement and further that there is no evidence that her carers would refuse to care for her. She submitted that a parental responsibility order is a less permanent solution in that it did not permanently sever the legal bond between CJD and her mother and father. Such an order would enable CJD to sustain and develop her relationship with her birth parents.

79 The birth mother therefore opposes any change to CJD's name.

*The birth father*

80 The birth father appeared unrepresented throughout the hearing, although opening written submissions had been prepared by Counsel who had been earlier retained. It is unnecessary for me to repeat those in detail here as they largely mirror the submissions made by the birth mother. There are some important differences.

81 However, the birth father recognised that CJD has an attachment to each of the proposed adoptive parents and no longer holds the view that their status as a same sex couple could have a negative impact on CJD. Indeed, he accepts that the proposed adoptive parents have the capacity to care for CJD as they have done since September 2013.

82 The birth father's principal concern is that he has never been given a chance to parent CJD, who was placed in the Minister's care four days after her birth due to the birth mother being identified as a risk to CJD because of her manslaughter conviction and poly drug dependency. The birth father denies that he lacks insight into any risk posed by reason of these circumstances surrounding the death of her first child and points to the fact that he terminated their relationship on or about 16 January 2013 so that he could pursue restoration of CJD to his care. He says his position in life has improved considerably since then.

83 The birth father submits that he is managing his mental health issues adequately. He lives in a two bedroom unit. He is in regular employment and has a positive relationship with CJD which he wants to continue to develop.

84 The birth father submits that he should be the preferred choice for caring for his daughter as he will be able to meet all of her needs including her intellectual and emotional needs. He submits that it is not in CJD's best interests for the Court to make an adoption order.

85 The birth father therefore opposes any change to CJD's name.

**The Evidence before the Court**

*The birth parents*

*Birth Mother*

86 The birth mother relied upon three affidavits. One of 21 January 2016, the second of 20 May 2016 and the third of 14 June 2016.

87 Although admitting to previous drug use, in her first affidavit she asserted that she had not taken any illicit drugs since at least 2012. However, she accepted that the only time she had used drugs was in 2013 when she attended her aunt's 50th birthday party. She became "very drunk". She saw someone smoking what she believed was a cigarette and when she asked for one and was given one, it turned out to be marijuana. She asserts that she told Royal Prince Alfred Hospital and a urine test was done which detected marijuana present in her system (HR affidavit of 21 January 2016 [6]).

88 She also asserted that at one point she was sleep deprived and attended a doctor for the purposes of obtaining medication. The doctor prescribed valium. She was unable to inform her case worker of this event. She asserts that she did inform the supervisor of her case worker that she was not sleeping properly. She denies any suggestion that she was doctor shopping in order to obtain the prescription. She also denied not giving her GP a full history of her drug use when she first attended a consultation in 2010. She denied this and puts the inadequate history down to the limited time generally spent by general practitioners in consultation.

89 She said that she was not currently in a relationship with CJD's father although they remain friends. She also asserted that CJD was very confused by having three mothers. CJD calls her "Mummy HR". She also asserted that CJD indicated on one contact visit that she wanted to stay with her, by implication, indefinitely.

90 She has attended a number of courses at various places including the Royal Prince Alfred Hospital. She attends NA and AA meetings.

91 In relation to the death of her first child JR she accepted that she was found guilty of manslaughter and went to prison. She said, however, "It was alleged that I administered the methodone to my son. I still maintain that it was my then

partner and that I failed to protect my son as I was using drugs at that time. I was punished by the legal system but not a day goes by that I do not think about my child and feel sorrow", [19].

92 On the question of religion she stated that she is a practising Catholic and that she is not comfortable with placement of CJD with the proposed adoptive parents because of her upbringing and religious values. She complained about CJD not being able to wear a gold chain and cross and asserted that there was hostility between herself and the carers. She wants CJD to be christened in a Catholic Church and brought up as a Catholic. She accepts that she has some behavioural problems which led to a change in child care placement.

93 She currently takes suboxone (4mg) daily. This is a reduction on previous doses.

94 She says she would undertake any further test or course required in order to have CJD restored to her care. She acknowledges her current accommodation is only one bedroom but she is confident she would be offered a bigger place, possibly two bedrooms or possibly with a bigger bedroom if CJD is restored to her. She also asserted that if CJD were returned to her care she would seek help from a child psychologist to address CJD's behavioural issues and engage in a transitional restoration program. Her mother is supportive of the process and is going to move closer to her so that she can assist with CJD. Her aunt has also indicated she would help as well. At the time of her first affidavit, she also stated that her main income was from employment as an authorised carer.

95 In her second affidavit (20 May), the birth mother stated that she had employment with an agency called "Personally Recommended", as a mystery shopper. The job entailed her attending a retail shop to observe the customer service and performance of the staff and whether the shop was in compliance with regulatory provisions in relation to stock control. She would then make a report to her employer for review. The employment permitted her to work flexibly to suit her own requirements. She also indicated that she was proposing to do various TAFE courses which were to commence in June 2016.

96 In her third affidavit (14 June), she was still working with “Personally Recommended” and at the date of that affidavit was working for approximately 15 hours a week. As a result of that flexibility in her employment she asserted that she would be able to provide constant care for CJD if she was restored to her care.

97 During school holidays she would reduce her working hours to one day per week, but if she was required to attend work she would request the birth father to look after CJD “as he lives ten minutes away from my house”. If he was unavailable, she would take CJD to her paternal grandmother’s house in Wollongong. She also nominated a friend of hers who would be willing to look after CJD on weekends if she was required to work.

98 If restored to her care, the birth mother said she would have in mind enrolling CJD in Kindy Patch Day-Care, which is a childcare centre in Campbelltown. She said she would be able to maintain swimming lessons for CJD and has made enquiries in her area as to the availability of aquatic centres.

99 Her aim would be to enrol CJD in one of the numerous Catholic private schools in the area and she asserted that she would be prepared to provide funds for her education. She said she also aimed for CJD to attend Sunday School at St John the Evangelist Church in Campbelltown.

100 She asserts that Community Housing has indicated to her that once a restoration order was made she would be relocated to a two bedroom apartment or townhouse within her area.

101 So far as contact visits are concerned she attends with CJD’s father because she thinks it is better to see “us” as a family. If restored to her care she has asserted that she will ensure that CJD’s father sees her whenever he wants and vice versa. She has also committed to a transition whereby the carers would see CJD on a regular basis or as directed by a Court.

102 When she and CJD saw the expert psychologist Ms S, the birth mother felt that CJD was shy and was not being her normal self. For example, she became frightened when the birth mother took her to the public toilet and she started crying.

103 She felt that during the interview Ms S was focussing more on her past and only a small fraction of time was spent on the present. She felt she was being judged for the poor choices she had made in the past and not for the progress and changes that she has been constantly making.

104 The birth mother gave evidence at a preliminary hearing before Kunc J on 4 February 2016. She was questioned by his Honour and indicated that she was against the adoption because she felt that she could not have a relationship with the carers (T 4/35).

105 She also indicated that as she was a Catholic she wanted CJD brought up in the Catholic faith and that she was concerned because the carers were not religious (T 4/40).

106 She indicated that she went to mass once a fortnight and that was to fit into her employment situation (T 5/35). His Honour asked about the manslaughter charge and whether the birth mother felt that she was able to look after her daughter given what had happened in the past. She indicated that she was a different person, that she was no longer hanging around “toxic people”. She indicated that the people she was associating with were “family-orientated”. She also indicated that when she had CJD her purpose was to be a full time mother and simply wants a chance to be that and she believed that she could fulfil that role (T 7/30-45).

107 The birth mother gave sworn evidence before the Court. She gave some short evidence in chief. That was to the effect that she was still employed as a mystery shopper, she had also completed some further courses, described as a responsible service of alcohol and a responsible conduct of gambling course T 113/31-50). She had also completed a course as a food safety supervisor. Each of the courses was conducted at TAFE (T 114/10-15).

108 She also gave evidence that she had commenced employment with “Forest Cleaning Company” as a cleaner and having completed a trial, she expected to be offered numerous shifts as a cleaner within the Campbelltown and Camden areas (T 114/40-T115/7).

109 She attended NA meetings approximately fortnightly and Ms J W is her case worker (T 115/25-40). She indicated that she regularly undertook urine analysis reports and had attended "this morning" (25 October 2016), but the report is not yet to hand.

110 She was cross examined. She agreed that the proposed adoption plan would be a continuation of the current regime (T 117/45-50).

111 She also agreed that the contact locations had been the product of joint arrangements between herself, the birth father and proposed adoptive parents and to date they have worked reasonably well (T 119/10-15). She agreed that there were review meetings which occurred approximately every six months and that she and the birth father had been invited to attend those meetings and that the minutes of the meetings were sent out to herself and the birth father after the meetings concluded. She agreed that for one of the meetings she was present by telephone but could have chosen to be there in person (T 122/1-4).

112 She also agreed that she had become aware that CJD was going to see a psychologist. Indeed, she indicated that she herself raised the issue on previous occasions (T 122/45-T122/8).

113 She was asked whether she had become aware that the proposed adoptive parents were willing to take or send CJD to scripture classes. The birth mother indicated that she had only very recently become aware of that, stating "I am only aware of that as of today" (T 123/40-124/9).

114 She indicated that she wanted CJD christened as a Catholic and raised in the Catholic faith. She understood that the proposed adoptive parents were concerned that they may not be fully accepted into that community and that they held certain concerns in connection with any proposed christening (T 124/25-39). She was concerned that CJD might be excluded from scripture classes if not 'baptised' (christened) a Catholic and in effect, a way around the problem should be found (T 125/1-6).

115 She agreed that she had a history of drug use which had started in her teens. She asserted that she had not used illicit drugs for many years (T 125/25-50).

116 She agreed that prior to her first child's death she was a "poly drug user" (T 126/9-11).

117 She agreed that she had served a sentence for manslaughter and that when released she had breached her parole. She denied that the breach of parole involved drug use. She indicated that there were three breaches. First, she was not meant to be with a child under the age of 16 whilst on parole and she was with such a person. Secondly, upon urine analysis, drugs were found in her system and thirdly, she was found driving without a licence (T 127/10-15). She agreed she went back to jail and was released in 2011. She agreed that it was possible on 11 August 2011 she had tested positive to amphetamines and methamphetamine (T 127/25-30).

118 It was put to her that her evidence to the Court was that she continued to maintain that it was her ex-partner who was responsible for giving the methadone to JR (T 128/15-19). She appeared to agree that the evidence at her trial was that there was no reasonable possibility that her ex-partner could have administered the methadone (T 129/15-24). However she also appeared to continue to deny that she had in fact administered the fatal dose (T 129/40-44).

119 She denied using illicit drugs during her pregnancy with CJD but agreed that in the early stages she smoked cannabis due to morning sickness (T 130/20-25).

120 She agreed that CJD was assumed into care two weeks after she was born (T 131/15).

121 She also agreed that she was taking benzodyazapine between August and December 2012 (T 132/40-47).

122 She denied that in late 2012 she had been deceitful so far as DOCS was concerned, in relation to the extent of her drug use (T 134/1-2).

123 The birthday party of her aunt at which she mistakenly used cannabis whilst drunk was in January 2013 (T 134/30-35).

124 She was asked whether that was the last occasion upon which she used cannabis to which she answered that it was (T 134/45-46). However, it was pointed out to her that an annexure to her affidavit sworn 21 January 2016

(CB3/730) contained results of a test undertaken on 6 December 2013 (although printed out on 6 October 2015) which showed that she had tested positive for cannabis at that time in December 2013. The birth mother asserted that it was a false positive. She agreed that she had said nothing in her affidavit about any test yielding a false positive (T 135/15-20). When asked further questions about that she indicated that she had been told by someone at RPA that it was a false positive because she had raised the question with somebody suggesting that it could not be correct because she did not use cannabis at that time.

125 When asked about her attendance at AA and NA meetings she indicated that she did not attend AA meetings very frequently but she would, depending upon how she was "travelling". She had attended NA meetings once a fortnight (T 138/45-50).

126 Although she has L plates at the moment, she gets to and from the various meetings by public transport (T 139/5-15).

127 She agreed that she no longer works as a carer and that ceased in February/March 2016. She was unemployed between March and the present time but she currently has an opportunity to work as a cleaner (T 139/21-45).

128 She asserted notwithstanding her employment opportunities and history that she could still provide "constant care" for CJD. She rejected the suggestion that it would be extremely challenging for her to do that in her current circumstances (T 141/16-25).

129 She asserted that she could change her shifts around and/or rely upon her paternal grandmother or the birth father if she could not rearrange her employment demands (T 142/20-34).

130 She insisted that she was unable to make enquiries about a transition plan, at least one which involved any detail, until the matter was determined by the Court (T 144/5-15).

131 It was put to her that she had not made appropriate or adequate enquiries of proposed day care or the presence of professionals in the Campbelltown area for CJD given her behavioural issues. She rejected that suggestion (T 145).

132 She asserted that she had made enquiries of the Benevolent Society and/or was aware of its activities as well as that of Catholic Care who have indicated that they could not really assist until her situation is more certain (T 146/10-19).

133 She acknowledged that CJD would suffer psychological distress at being separated from the proposed adoptive parents but rejected the proposition that she had not properly grappled with the problem (T 146/25-35, and T147/10-30).

134 She purported to explain how the proposed adoptive parents could be proposed as godparents, for the purposes of a christening (T 148/150/24). She accepted that she attended a Catholic school for a period but her entire education was not in a Catholic school (T 150/26-34).

*Birth Father*

135 The birth father relied upon two affidavits, one of 23 November 2015 and one of 6 June 2016. In his first affidavit, the birth father admitted that he had previously been diagnosed with dyslexia and bipolar disorder and had been undergoing psychiatric treatment since 2006.

136 He asserted that he was not aware of any risk identified by the Department regarding his care or proposed care of CJD. He appreciated however that the Department was critical of his management of his mental health issues. However, he asserted that he is now managing his mental health issues with the assistance of health professionals and is living independently and working.

137 He also acknowledged that the Department was critical of his parenting capacity and his lack of insight regarding the birth mother's drug use and the impact that this may have on CJD. However, he asserted that he was not given a proper opportunity to make out his case for restoration.

138 He asserted that he separated from the birth mother in 2013 and would have wished CJD to be placed with him. He ended his relationship with the birth mother as he wanted to put CJD's best interests first and he wanted to care for her on a fulltime basis.

139 He accepted that an allegation has been made that he sexually assaulted his step sister. He asserted that allegation was untrue and denied that he sexually

assaulted that person. He has never been charged with any offence relating to such accusations. However, he accepted that an apprehended violence order was sought against him and he agreed to the order without making any admissions. He also asserted he had no criminal record.

140 He asserted that he had no issue with either of the proposed adoptive parents but was concerned that if an adoption order were made in the future the proposed adoptive parents may separate and he would be concerned about CJD's wellbeing.

141 At the date of his first affidavit he was living in Macquarie Fields, near Campbelltown in a two bedroom unit. He lived there alone. At that date he was employed one day per week as a tyre fitter. Along with his entitlement from New Start, his total income at that point was $560 per week and his total expenditure was approximately $430 per week. The unit he lives in at Macquarie Fields was provided by the Department of Housing.

142 Apart from contact visits with the birth mother and CJD he has not had other contact either with the birth mother or CJD.

143 He accepted that he has been prescribed epilim or valparoate for his bipolar disorder. He takes one 500mg tablet in the morning and two at night. He has been under the care of a Mr M J who he described in his affidavit as a psychiatrist (he is in fact a psychiatric nurse).

144 He asserted that his mental health has been stable for some time and he feels he would be able to cope with looking after CJD full time. He is aware that he can obtain assistance from organisations such as "Brighter Futures" and "Catholic Care". Either or both of those services could assist him in relation to play groups for CJD and "other support".

145 He undertook a course run by Catholic Care at Campbelltown called "My Kids and Me", which is a course about children who have been removed from their birth parents' care. He has completed this course once but would do it again and update his information and skills if it were thought necessary.

146 He also received support from a Ms J S of Schizophrenia Fellowship. That organisation assists people with many mental health issues, not just

schizophrenia. He also received continuing support from Ostara Disability Support Services.

147 In his second affidavit of 6 June he indicated that he was seeing Mr M J once a fortnight for approximately 45 minutes. He denied ever being diagnosed with schizophrenia.

148 He has set up a bedroom in his home in Macquarie Fields for CJD and annexed a number of photographs which depict a bed, shelving and soft toys.

149 At the date of his second affidavit he indicated that he was employed as a labourer with S & M Concrete, which involved him working all over Sydney doing concrete formwork, labouring and steel fixing. However, this work was weather dependent. On other days he works for IRSO Recruitment Agency based in Blacktown. This is casual work but may involve long term placements from time to time. This work involved labouring, packing, construction work and production line work.

150 He indicated that he was still obtaining a New Start benefit but that he was being assessed for a Disability Support Pension.

151 At the date of the second affidavit he estimated his total income was approximately $2,190 net per fortnight. His total expenses he estimated at approximately $670 per fortnight.

152 He asserted that he was managing well and that as a result of an increase in his income he was now paying full market rent for his premises.

153 However, he also indicated that he was made a bankrupt on 13 August 2015. That was due to a failed fencing business he began and a number of outstanding bills he had at the time. His bankruptcy will conclude on 13 August 2018.

154 He gave an example of what he regarded to be an unsatisfactory contact visit with CJD on 3 March 2016. He asserted it was made difficult by the presence of Ms S, the expert. He felt that Ms S was overly friendly to Ms KGH (one of the carers).

155 He also expressed concerns about the number of times that the carers had moved in the time that they had CJD living with them. CJD has had to change schools, he thought four times, and again he expressed concern about the prospect of the carers breaking up. However, now that CJD has moved to Wollongong, he asserted he has many family members who live in the Wollongong area and he would like CJD to be able to acknowledge his family members if she were to meet them. He also expressed concerns about the Barnardos Case Worker, Ms A because he thought she was overly friendly with the carers and thought she had been crossing professional boundaries.

156 The birth father gave evidence before Justice Kunc on 4 February 2016. During that evidence he indicated that he was trying to get a job as an apprentice landscaper, but, at the date he appeared before his Honour, he was unemployed.

157 When asked who between himself and the birth mother should have CJD he indicated that it should be him "because I've got a, some good circumstances".

158 When asked about his concern about the adoption he said:

> "I just oppose it, I just don't believe they should be adopted by – my daughter should be adopted because I have not had a chance to a father your honour – my daughter was taken off me at 3 days old."

159 When asked about whether he shared the birth mother's concerns in relation to religion he said:

> "Yes, some religious belief, I'm Catholic. I'm brought up, as in that influence, so I've been, like Ms HR has said I believe some of her beliefs are right."

160 The birth father was cross examined. He agreed he no longer dealt with Mr M J the psychiatric nurse and he is yet to be assigned to a new health professional (T 155/29-32).

161 He now works for a company called SCG. It is a five day a week job. At present he is working seven hour shifts at night time (T 156/15-25). He receives approximately $1,000 a week before tax (T 157/19-20).

162 He has been in touch with a number of organisations who provide care. He also has family support from his mother, grandmother, godparents and others (T 158/5-20).

163 He stated that if CJD is asked her name she gives it as CJD (T 159/10-20). He would like CJD restored to him because he feels he has been robbed as a father and he has not been given a chance to be one (T 159/45-50).

164 The birth father indicated that he was Catholic, that he had been christened and that he was supportive of CJD being christened but has made no enquiries about what is required by the Church in that regard (T 160/5-24). It is important to him to have CJD christened because both birth parents are Catholic, his family is Catholic and he would like the same faith passed on to her. The birth father accepted that he goes to mass only on special occasions, mainly Easter and Christmas (T 161/30-35).

165 He accepted that he had been diagnosed with a bipolar disorder but at present he does not have a treating psychiatrist. He cannot afford to pay doctors' bills and therefore has no specialist currently treating him. He does attend a Dr Mikhail who is his general practitioner (T 162/10-30). He acknowledged that a question had been raised about a possible diagnosis of Aspergers but no definite diagnosis had been made (T 162/40-50).

166 The birth father agreed that Mr M J had noted that he had suffered from irritability and impulsiveness as a result of being diagnosed with bipolar. However, he denied that he had suffered depression over the years (T 164/5-20).

167 He agreed that he had seen his general practitioner, Dr Mikhail, to obtain support for his mental health. At the time he saw Dr Mikhail he was in fact homeless and was living in other people's houses. This was as the result of a failed business venture which ultimately led to him becoming a bankrupt (T 165/5-30).

168 The birth father agreed that he had not been in consistent employment over the last 18 months (T 165/45-50). He also agreed that he has limited control over when he works shifts and basically has to work those shifts he is offered (T 166/20-25).

169 The birth father agreed that he had used illicit drugs in the past (T 167/40-49).

170 He agreed that when he saw Dr Mikhail she asked about his use of drugs. He agreed that he had in the past used cannabis and amphetamines and when in his teens he had used amphetamines intravenously but he insisted only once (T 168/5-30). He denied telling Dr Mikhail that at the time of the interview he was spending approximately $1,000 per week on drugs. He agreed that one of the notes apparently taken by Dr Mikhail was to that effect. The birth father agreed that he must have given Dr Mikhail that information when he saw her but he denied that at the time he saw the doctor he was spending money on drugs. He insisted that he would have given Dr Mikhail a history of drug use but the reference to the $1,000 a week would have been a reference to when he was in his teens and whilst he was living at home he would have been spending all of his wages on drugs (T 169/25-50). The birth father however denied he was using any illicit drugs in 2015. He did not ask Mr M J whether he should undertake any drug tests for the purposes of the proceedings and further he agreed that there was no evidence except his word that he had not used illicit drugs in 2015 (T 170/12-30).

171 He accepted that if it ever were the fact that he was using illicit drugs in conjunction with his bipolar disorder and other medication it would compromise his ability to look after CJD (T 170/40-50).

172 He could not recall whether or not he had told Ms S he has been diagnosed in the past with schizophrenia. He insisted that he had perhaps told someone, that his mother had told him, that he had schizophrenia but in fact he was diagnosed as bipolar (T 170/40-50). He agreed that the reason he would not permit Ms S access to his medical records was on legal advice (T 173/1-6). He also agreed that he was attempting to find another psychiatric nurse to consult (T 174/1-10).

173 The birth father agreed that it had been suggested of him that he lacked insight into the role played by the birth mother in her first child's death. He agreed that he had always accepted her account of what she said happened as the true version of events. He had never read any paperwork connected with the case (T 175/20-41).

174 It was put to him that he had not made any or indeed any serious attempt prior to the current proceedings to seek restoration of CJD to his care. He denied that suggestion (T 177/30-40).

175 He agreed that he believes there is a problem with CJD's behaviour and he had brought that matter up a number of times. He said he expressed his concern and thinks that she should have been diagnosed and dealt with a lot earlier (T 179/5-15).

176 Notwithstanding her behavioural problems, he asserted that he would easily manage her difficulties. He accepted she would need to see the appropriate people to get support (T 180/4-10).

177 He accepted that his dyslexia affects his ability to read sometimes (T 182/40-45). He has used support persons from time to time to assist him with documents. He also agreed that although he referred to a number of courses available to him which might assist in parenting he has not currently enrolled in any courses (T 183/15-30). He would not accept that he would face significant challenges in looking after CJD full time. He accepted that she may have problems but at the end of the day he would deal with these problems (T 183/40-50).

*The Proposed Adoptive Parents*

178 The proposed adoptive parents swore a joint affidavit of 20 August 2015. Ms KGH swore a further affidavit of 13 June 2016 and Ms JLL a further affidavit of the same date.

179 They have lived together in a de facto relationship since 18 July 2008. They have no children born of this relationship.

180 Ms KGH was born on 6 March 1979 and for most of her life has lived in New South Wales, except for a brief period between 2006 and 2008 when she lived in Queensland. She completed her secondary education in New South Wales and thereafter obtained a Bachelor of Community Welfare from the University of Western Sydney and a Graduate Diploma in Counselling awarded by the Australian College of Applied Psychology.

181 She suffers from sleep apnoea and has a low functioning thyroid but is otherwise in good health. She has in the past suffered from post-traumatic stress disorder as a result of an accident, but has recovered. She does not have any particular religious beliefs.

182 At the date of her first affidavit she was a case manager employed by a state government department. Her income was then $800 net per week and although she does not own her own home, she was then paying rental of $500 net per week (which she shared with her partner). Her liabilities otherwise were modest. She had approximately $3,000 in her bank account and superannuation to the value of approximately $73,000. Along with her partner JLL she jointly owns a motor vehicle valued at $19,800.

183 In her second affidavit Ms KGH indicated that she and her partner JLL had moved to a three bedroom home which they rented in Fairy Meadow. The home has a large combined kitchen and dining and separate lounge room. It also has a covered deck, enclosed back yard and is fitted with security screens and doors. The house is located close to beaches, parks, public transport, local shops and schools.

184 At the date of her second affidavit Ms KGH stated that she is employed as a case manager by a not for profit organisation in NSW and ACT. Her present income is $600 net per week and her rent is approximately $550 per week. She still has monies in a bank account and superannuation now valued at approximately $76,000.

185 She indicated that she and her partner had discussed how they intend to support and encourage CJD's religious background and certain recommendations made by the expert Ms S. To that end she and her partner intend to enrol CJD in Catholic scripture classes when she begins schools. She intends to be in close contact with the persons conducting the scripture classes to ensure CJD's identity as an adoptive child of a same sex family is not undermined. She has also purchased age appropriate bible stories about the Catholic faith for CJD to read.

186 On the other hand, Ms JLL has lived in New South Wales all of her life. She completed her secondary education in New South Wales and subsequently

completed a Bachelor of Arts degree awarded by the University of New England, followed by a Graduate Certificate of Communications awarded by Charles Sturt University.

187 She suffers from epilepsy which is controlled by medication and is otherwise in good health. She has no particular religious beliefs.

188 At the date of her first affidavit she was employed as a radio producer at a media organisation. Her net income was then $1,110 per week and she was sharing the rental payments with her partner.

189 Her separate assets then consisted of a bank account of approximately $10,000 together with superannuation, valued at approximately $154,500.

190 She confirmed that CJD had been placed in she and her partner's care on 9 September 2013 and has been with them ever since.

191 In her second affidavit she confirmed all of the domestic details referred to by her partner Ms KGH. She also confirmed her previous assets and liabilities. She is now employed as Chief of Staff at a media organisation.

192 Ms JLL takes the same view as her partner as far as Catholic scripture classes are concerned and in terms of how they will educate CJD into the Catholic faith she and her partner are as one.

193 Ms KGH was cross examined first.

194 She accepted that the question of 'baptism' or 'christening' was in issue, but she believed however only in the last year or so. She did not accept that it was really flagged by Barnardos as a major issue. She accepted that she and her partner were advised that CJD was from a Catholic background and she also accepted that she was informed that the birth parents wanted CJD 'baptised' into the Catholic faith. She however informed Barnardos that neither she nor her partner was Catholic. She and her partner also made it very clear throughout their assessment that they were not religious, they were not Catholic and they would not be able to agree to raising a child in any particular faith because they did not hold the faith themselves (T 84/35-40).

195 Ms KGH stated that she and her partner have thought about Catholic scripture classes for CJD. First, they did this because they have come to better understand how important a Catholic upbringing is to the birth mother. Secondly, as they could not contemplate raising CJD in a religion they did not believe in, they believed scripture classes taught by somebody who believes in the religion would be a more meaningful way for CJD to learn about Catholicism (T 85/5-10).

196 Ms KGH explained that she and her partner have decided to defer CJD starting school until 2018 on advice from her preschool and their own assessment. She accepted that she had not informed the birth mother and birth father to that effect, to which she apologised, but indicated that visits had become a little tense and she wanted to ensure that any contact which took place between CJD and the birth parents focussed on allowing that to occur rather than distracting everyone with discussions about such things as schooling (T 85/40-50).

197 She has looked at the local Public School, which if they remain in the present house, is the most likely place where CJD will go and she has checked that they do scripture classes (T 86/20-30). Beyond that however, she had made no detailed enquiries about what the scripture classes entail and whether or not CJD needs to be a Catholic to attend them.

198 A part of her and her partner's apprehension about the Catholic Church is that they do not wish the wrong messages to be given to CJD such that she may be taught there is something wrong with same sex parents and therefore something wrong with her family (T 87/10-15). So far as scripture classes are concerned they would reserve their position to ensure that their relationship and their family situation were not undermined. Were that to occur they would assess how much support they got from a teacher and whether or not there was a way of working around any issues if they arose (T 87/20-30).

199 She had not taken CJD to any Catholic services for the simple reason it is not part of her or her partner's life and she is still working through the issues (T 88/5-10).

200 She would not be opposed to the birth mother or birth father taking CJD to a Catholic service although the matter has not been raised with her (T 88/15-20).

201 She was asked whether she was opposed to CJD being baptised in the Catholic faith. She responded that it had never been put to "us" in a way that would help her or her partner understand how and what that would actually "look like"). Her understanding is that if a child is baptised in a Catholic church, the parents have to commit to raising the child as a Catholic as do any nominated godparents. It is her and her partner's understanding that they could not stand up and agree to raise CJD as a Catholic. No alternative plans have been put, nor has any dialogue occurred between them and any representative of the Catholic Church (T 88/15-45). She accepts that the decision to enrol CJD in Catholic scripture classes was only made by herself and her partner after they received Ms S's expert report (T 89/39-45). She accepted that subject to CJD's level of maturity, understanding about what she is doing and what it means to her, she would support and facilitate CJD's wishes if they included being christened (T 91/1-12).

202 Ms KGH was asked in general terms whether she would have any difficulty in providing reports and other matters from school (T 91/30-50). She would have no problem in the birth parents receiving copies of any medical report she and her partner may receive concerning CJD's health (T 94/30-35).

203 CJD calls Ms KGH "mumma", her partner JLL "mum", the birth mother "mummy H" and the birth father "daddy" or "daddy C". She calls herself CJD or CJD (T 94/45-T95-40).

204 She confirmed that it was the proposal if adoption were granted to change CJD's surname to H-L. She also accepted that if the adoption were unsuccessful it is her intention to remain a full time carer for CJD (T 96/35-44).

205 Ms KGH indicated that she and her partner had considered both changing their surname to H-L (T 97/35-40).

206 Ms KGH accepted that a change of name for CJD may be initially difficult but she thought it would be helpful with the same name for each of them going forward. That would avoid people asking questions of CJD at school and her

being constantly required to give explanations (T 98/5-15). Ms KGH indicated that if CJD felt strongly about her name she and her partner would deal with it as they did not want to force her to change against her wishes (T 98/25-30).

207 Mr CD asked Ms KGH whether she had ever used drugs in the past, to which she accepted she had over ten years ago and agreed that she had once been arrested and placed into a police car during a political rally. She denied that she suffered currently from any depression (T 99).

208 Ms JLL was then cross examined.

209 Ms JLL also confirmed that CJD gives her full name as CJD (T 101/5-10). Ms JLL was not sure whether CJD knew the birth mother's full name beyond "mummy H" (T 102/5-10).

210 Ms JLL indicated that it was important for her that all members of her family have the same surname. When asked if the Court did not make an order for CJD to have her name changed, Ms JLL indicated that she would have to "talk to KGH about that". She also accepted that if CJD's name is changed that may lead to her having some difficulty (T 103/45-47). She has sought no advice from anyone about the name change (T 104/5-7). Ms JLL confirmed that if the Court determined against the application for adoption she would still remain as a carer for CJD (T 104/32-38).

211 Ms JLL confirmed she had not made any enquiries of the local school as to whether they provided for Catholic education. She accepted that the question of CJD's religious upbringing and a baptism or christening into the Catholic faith had in varying degrees been an issue since CJD had come into her care (T 106/5-15). She made no enquiries herself, beyond attempting to search on the internet. However, she confirmed that as CJD grows older if she expressed a wish to foster her connections with the Catholic Church she would support and facilitate those wishes (T 107/5-15).

212 Ms JLL confirmed that her partner generally attended the contact visit as she works three days a week whereas Ms JLL works five days a week (T 107/45-50). Ms JLL confirmed that after conversations with her partner the contact

visits have been working well and CJD has been responding well to such visits (T 108/5-20).

213 She further indicated that she and her partner would be very inclined to keep both the birth mother and birth father well updated on how CJD was going at school and providing them with copies of relevant documentation from time to time (T 110/5-20).

*Barnardos Employees*

214 Three employees from Barnardos gave evidence and were cross examined. The first, Ms Vihtonen swore two affidavits (the first dated 20 August 2015 and the second dated 14 June 2016).

215 In addition, Ms Michelle Hatsisavvas affirmed an affidavit on 11 August 2015. The third employee, Ms Ximena Alvarez affirmed an affidavit dated 23 March 2016.

216 I will deal with each of these witnesses in turn.

217 Ms Vihtonen is currently employed as Operations Manager, Adoptions at Barnardos. She commenced that employment on 10 October 2016, after previously being Barnados' principal officer of adoptions (T 20).

218 She is a delegate of the Secretary, Family and Community Services by virtue of an order pursuant to section 206 of the *Adoption Act*. She is in fact the applicant for the orders for adoption. She was part of an Adoption Approval Panel that considered the application to proceed with CJD's adoption. She both requests and supports the orders for adoption as opposed to any other order that might be made by the Court.

219 Ms Vihtonen obtained a Bachelor of Arts degree in 1992 majoring in Psychology from the University of Wollongong. In 1996 she obtained a Graduate Diploma of Science specialising in developmental disability also from the University of Wollongong. She has completed additional training over the years to further her professional skills including courses working with abused children, attachment disorders, sexualised and offending behaviour in young people, group work with children, presentation skills advanced management and supervision and reportable conduct. She is a registered counsellor in

accordance with clause 25 of the Adoptions Regulation 2003 and she is also a registered psychologist with the Australian Health Practitioner Regulation Agency. She is a member of the New South Wales Committee on adoption and permanent care and has held the position of Chair person on the Executive Committee.

220 Much of the materials she gave evidence about were in fact a summary or distillation of various records from the Family and Community Services and/or Barnardos.

221 She indicated however that on 9 January 2013 Family and Community Services sought a long term placement option for CJD through Barnardos. On 23 August 2013 Barnardos approved CJD's placement with the proposed adoptive parents.

222 She indicated that Barnardos conducts regular review of arrangements for every child and the child's birth parents and carers are invited to attend such meetings. Meetings have regularly taken place concerning CJD through 2013, 2014 and 2015.

223 She gave some relevant history from the files relating to CJD as follows:

> She commenced walking at 12 months of age and appears to be developing appropriately and meeting her physical developmental milestones. She commenced day care on 19 June 2014 two days a week and although initially upset when her carer left her at day care she has now settled down and is happy to play with other children. In January 2015 CJD began attending day care three days a week.

224 Ms Vihtonen expressed the view that CJD had developed a close bond with the proposed adoptive parents and their family and friends. In particular one of the carers parents (JLL) moved from Newcastle to Wollongong to be closer to the proposed adoptive parents and CJD.

225 Ms Vihtonen expressed the view that the birth parents are committed to helping CJD understand about her birth family and the reasons behind her entry into care in an age appropriate manner. CJD has photographs of the birth mother and father in her bedroom and the carers speak to CJD about "mummy H" and "daddy C".

226 Ms Vihtonen noted the issue that had arisen so far as CJD's proposed baptism or christening in the Catholic Church is concerned.

227 She noted that the proposed adoptive parents between 30 October 2012 and 7 March 2013 attended nine interviews as part of the assessment process. They also attended a three day training session on 9, 16 and 22 February 2013 to determine their suitability for adoption.

228 Ms Vihtonen noted that the birth mother has consistently maintained that she does not support CJD's adoption and believes that it is not in her best interests to be adopted. The birth father takes a similar view. Ms Vihtonen supports the proposed adoption plans for both mother and father.

229 Ms Vihtonen believes that a change of surname would be in CJD's best interests. She expressed the view that CJD is too young to identify with her current surname.

230 Ms Vihtonen expressed the view that in her mind there are distinct advantages in adoption. The permanence of an adoption order in her view would create far greater stability for CJD providing her with a sense of belonging and permanence which she thinks cannot be achieved in longer term foster care or under an order for parental responsibility to be allocated to the proposed adoptive parents. Her appreciation of recent literature supports that view.

231 She also expressed the view that children in out of home care have both a social and a biological identity. Their social identity connects them with the family they live with whilst their biological identity is their link to their birth family with whom they no longer reside. Children in out of home care will retain in her opinion their biological identity through ongoing contact with their family of birth; however it is their social identity which is prominent. In her view adoption is the only order that can legally change a child's social identity. An order for care and parental responsibility during childhood is in her view not sufficient to achieve optimum outcomes. In her view a parental responsibility order cannot offer CJD the same sense of legally belonging to a family nor the security and lifelong connection that adoption would provide.

232 In her second affidavit Ms Vihtonen outlined in greater detail the attempts made by Barnardos to place CJD. She indicated that on 25 February 2013 Barnardos identified 8 families who were approved for care of a child of CJD's age. The proposed adoptive parents were not among that list of families.

233 Following orders made by the Children's Court in July 2013 and on 24 July 2014 a meeting occurred with the first family to discuss the possible match with CJD. Following the meeting the first family declined the proposed match because they were concerned that they would be unable to have a positive relationship with the birth mother because of her criminal history. On 29 July 2013 persons from Barnardos met with the birth parents. They were informed of the first family's attitude and were provided information about a second family who were a possible match for CJD.

234 On 2 August 2013 a meeting occurred with the second family. Following that meeting on 5 August 2013 the second family also declined apparently indicating that they had difficulties or concerns about working with the birth family and did not wish to face the possibility that the birth family would seek for CJD to be restored in the future.

235 As at August 2013 the other families identified initially were no longer available. Barnardos then identified the proposed adoptive parents as appropriate carers because they had indicated their willingness to work with a birth family with a criminal history and had awareness of social issues.

236 On 8 August 2013 a meeting occurred with the proposed adoptive parents and they were provided information. The proposed adoptive parents were informed of the birth parents requests for CJD to be christened however the proposed adoptive parents expressed reservations about that request due to their sexual orientation. However on 9 August 2013 the proposed adoptive parents accepted the placement of CJD. They met CJD for the first time on 21 August 2013. On 23 August 2013 the birth parents and proposed adoptive parents met for the first time. Following a transition period, on 9 September 2013 CJD was placed with the proposed adoptive parents.

237 Ms Vihtonen was cross examined. Initially, she said that when CJD was placed there was nothing indicated, she believed, of any religious needs or any specific cultural needs (T 22/20-25).

238 Although there was no information from community services Barnardos was aware through temporary family care that the birth family had indicated a preference for CJD to be 'baptised' within the Catholic Church (T 23/5-6). Some of the families identified initially were Catholic, indeed the first two families were, but there was also a range of families indicating that they would be able to work with a child within CJD's age group (T 23/25-30).

239 Ms Vihtonen indicated that at the time she did not request, as an essential element, that CJD be brought up in the Catholic faith. Her belief was that although there was a preference and although Barnardos tries to match with a preference it is not always possible (T 23/40-45). Ms Vihtonen was not personally involved at the time with the selection of the 8 families (T 24/25-29).

240 Ms Vihtonen accepted that she probably did not pay sufficiently close attention to religious preference until she had read Ms S's report (T 25/25-30).

241 Ms Vihtonen became aware at some later point that the birth parents had requested CJD be christened in the Catholic faith (T 27/30-40). She also did not regard it as unusual if a child was christened Catholic but then not brought up by a Catholic family. She gave an example of her own nephew as falling into that category (T 28/20-25).

242 Ms Vihtonen said that the decision made at the time was that it was more important to find a suitable match and a family that would be able to work positively with the birth family, rather than a family who adhered to the Catholic faith (T 29/40-44).

243 She said that a cultural care plan has always been part of Barnardos practice, but it was not done in this particular case. Barnardos has realised that it needs a similar practice for a religious care plan. That is something that she will be looking at in her new role. She understood, having discussed it with the carers that they are opposed to a christening in the Catholic Church (T 33/40-45). Ms Vihtonen's understanding is that the carers take that question very seriously.

They do not want to go to church, stand up and commit to raising CJD as a Catholic when they could not commit to doing so. She regarded their attitude as being very honest and open (T 34/15-25).

244 Ms Vihtonen agreed that there was no evidence in relation to the reports that CJD had been adversely affected by the current contact arrangements (T 37/24-34).

245 Ms Vihtonen indicated that CJD was currently being assessed by a paediatrician and a psychologist (T 38/40-50). However, no particular diagnosis has yet been made.

246 When pressed about her views about whether CJD would be too young to identify with her surname she accepted that she is now likely to be developing an awareness of her surname but she did not believe there would be any serious consequences of changing her surname at her current age. She has not spoken to CJD about this issue (T 40/35-50).

247 Ms Vihtonen indicated that if an adoption order is made Barnardos would not continue with case work and their involvement would be voluntary in the sense that they would have no legal responsibility (T 41/10-25). She stated that Barnados would still provide support "as needed" to the family (T 41/12-27). However, she explained that in reality once an adoption order is made Barnardos steps out and encourages the various persons involved, namely the birth family and the adoptive family, to negotiate contact between themselves (T 41).

*Ms Alvarez*

248 Ms Alvarez was a case manager for Barnardos Australia. She swore one affidavit in these proceedings, affirmed on 23 March 2016. Ms Alvarez attained a degree in social work from the Catholic University of Valpariso, Chile in 2001. She has been CJD's case manager since 2013. Her supervisor is Ms Hatzisavvas. She recorded that during the latter part of 2015 she had contact with the proposed adoptive parents about CJD's behavioural issues. The proposed adoptive parents had indicated that they had consulted a psychologist, a Ms Gurton, who indicated that she did not believe the behavioural issues were serious but required monitoring.

249 Ms Alvarez indicated that in early 2016 she again discussed CJD's behavioural issues with one of the proposed adoptive parents who indicated that the change of house (indicating the move to Wollongong) had led to CJD not sleeping well and she had become aggressive, spitting, biting, throwing things and kicking them. On 29 January 2016, during a home visit, Ms Alvarez discussed the prospect of locating a child psychologist in the area with the proposed adoptive parents.

250 Ms Alvarez also described a number of contact visits.

251 Ms Alvarez was cross examined. Ms Alvarez indicated that the proposed appointment with a clinical psychologist Ms BD took place but she made no enquiries as to what had happened (T 48/30-40).

252 She accepted that she did not always inform the birth mother from time to time when events had occurred. This was on the basis that she did not discuss all issues about the children with birth parents until appointments are made or a critical issue arises (T 50/1-5).

253 Ms Alvarez confirmed that when CJD is asked her name she responds "CJD" or "CJD" (T 50/45-50).

254 Ms Alvarez's view is that if CJD's surname is changed to that of the adoptive parents it will give her more security and make her feel more a part of the family (T 51/40-45).

255 Ms Alvarez was asked whether she appreciated that the question of CJD's baptism or christening was a major issue. She agreed with that proposition (T 52/40-50). Ms Alvarez agreed that she had been CJD's case manager for about three years and for the whole of that time she has appreciated that CJD's baptism or christening and the faith in which she is brought up has been an issue (T 53/10-30).

256 Although she agreed that six visits a year was in CJD's best interests she personally believed that four was better (T 54/25-40). She had no complaint about the carers or their relationship with the birth mother or birth father, and believed that CJD had had a good time during each contact visit (T 55/10-30). Ms Alvarez agreed that there had been a suggestion that CJD be taken to

church at Christmas and Easter (a Christian Church not necessarily a Catholic Church) (T 59/1-5).

*Ms Hatsisavvas*

257 Ms Hatsisavvas is the program manager for adoptions at Barnardos Australia. She commenced employment with Barnardos at the end of 2013 and has been working in her role since then. She obtained a Bachelor of Arts majoring in psychology at the University of Western Sydney in 1996 and in 1998 obtained a post graduate diploma in developmental psychology from the same university. She has also obtained a diploma in counselling from the Institute of Applied Psychology in 2000.

258 She practised as a self-employed psychologist between 2009 and 2013 working with children, adolescents and adults providing psychological services and counselling. She is a registered psychologist with the Australian Health Practitioner Regulation Agency.

259 On 5 August 2015, she prepared a report concerning the proposed adoption of CJD.

260 Ms Hatsisavvas was cross examined. She explained she had a role in contacting the birth mother and birth father to arrange contact visits with the proposed adoptive parents. She also had to organise correspondence and emails. Since July she has taken over as case manager and continues to make arrangements in relation to contact (T 67/30-50).

261 Before taking over as case manager she read the materials available which included records previously kept by Ms Alvarez (T 70/5-15).

262 Ms Hatsisavvas said that she believed that CJD was doing well at day care, but there had been some behavioural issues. She had obtained this information in a phone call with the proposed adoptive parents (T 73/5-15). The behavioural issues concerned CJD getting upset with other children and scratching one or two of them (T 73/20-21).

263 Arrangements have been made for CJD to see a psychologist, which is imminent. She had not passed this information on to the birth parents but it is not something she would normally do (T 73/35-45).

264 She agreed that once an adoption order was made Barnardos effectively 'step out' and it is up to the adoptive parents to provide information to the birth parents (T 74/15-20).

265 It is proposed that CJD will soon see a paediatrician, but again the birth parents have not been told about such an appointment (T 76/5-10).

*Miscellaneous Witnesses*

266 A number of statements from witnesses were tendered but they were not called for cross examination.

267 First there were three referee's reports tendered in support of the proposed adoptive parents: an affidavit of Ms L P (16 January 2015), an affidavit of M W (18 February 2015) and an affidavit of P S (18 March 2015).

268 Ms L P is a teacher. She is a friend of the proposed adoptive parents. Over the years, she has seen them once a month or once every two months on average. Her opinion is that the proposed adoptive parents have a very stable relationship and from her observation both are strongly committed to CJD.

269 Her impression of both is that they are intelligent, gentle and nurturing and that they plan their day to meet CJD's needs. Her observation is also to the effect that CJD is responding well to the proposed adoptive parents.

270 Ms M W is the managing director of a radio station. She is also a friend of the proposed adoptive parents. Her contact with them has been through her own daughter and from time to time the proposed adoptive parents have babysat for her.

271 Her observation is that they are very committed to each other and have a happy relationship. She describes both as caring, intelligent and generous. Her observation is that they take their role as parents very seriously and know what is in store for the future. Further, she and her family have spent a good deal of time together with the adoptive parents and CJD, and her observation is that CJD has formed a very strong bond with both.

272 Mr P S is a research fellow at the University of New South Wales. He was formerly a flat mate of one of the proposed adoptive parents and he and his partner have known the adoptive parents for some years. He is of the view that

the relationship between the proposed adoptive parents is a genuinely happy and stable one.

*Mr M J*

273 Mr M J has been a nurse practitioner in psychiatry for approximately 19 years. The birth father was a patient of his from about June 2015 until recently. He prepared a report (dated 12 April 2016).

274 In that report he indicates that when he first met the birth father he was technically homeless, sleeping each night at various friends, family and ex partners houses and on trains as he did not have a stable address at which to reside.

275 He observed that the birth father had had a difficult childhood in which he had been subjected to severe emotional and physical abuse by his step father between the ages of 7 to 15. He had been sexually abused by a neighbour between the ages of 4 and 7. He ran away from home at the age of 15. He completed limited schooling leaving part way through year 9 and has struggled with poor literacy ever since. Since leaving school he has had a number of manual jobs over the years.

276 The birth father told Mr M J during a consultation that he had used illicit drugs, including cannabis and amphetamines in the past but denied any current use of illicit substances. He was bankrupted in 2015 as the result of debts incurred in a failed business. During consultation, the birth father spoke regularly about his daughter CJD and indicated that he would do all he could to get her back including obtaining employment, stable housing, improving his conflict resolution skills and following the directions of health care professionals in relation to his regular medication and counselling.

277 Mr M J expressed the view that the birth father had not missed a single appointment and that listening to his story highlighted that the birth father had overcome a high level of adversity and trauma to get to the life he has today. He noted that the birth father had previously been diagnosed with an autistic spectrum disorder (Aspergers syndrome) and bipolar disorder. He noted that the birth father was on medication for the bipolar disorder. He also expressed the view that if the birth father continued on his medication and attended

appointments with his general practitioner and himself as directed into the future he will maintain a high level of mental and physical health. He ended his report by indicating "I hold nil acute concerns re the mental/physical health of C D at this time".

*J D*

278 Ms J D (the birth father's mother) swore an affidavit dated 15 June 2016. In that, she indicated that she supported her son's application in the current proceedings. She expressed the view that her son has not been given the opportunity he should have been given to be CJD's father. She and her family are supportive of him.

279 She indicated that she and her family have a good, solid Catholic faith and want CJD raised in the Catholic faith. She likewise wants to have a relationship with CJD. At the date of her affidavit she was living approximately 30 minutes away from her son. She is concerned that the bond between father and daughter, not to mention grandmother and granddaughter, might be further "frayed" if the adoption order was made.

**Expert Evidence**

280 There are two experts in this case, both of whom are psychologists.

*The expert report of Ms S*

281 Ms S holds a Bachelor of Science in applied psychology with Honours from the University of New South Wales and a Masters of Clinical Psychology conferred by the University of Sydney. She has been in practice for 40 years and has had a most extensive practice in the field. She has lectured and given numerous seminars in the field over many years.

282 She was retained on or about 15 February 2016 by the Crown Solicitor's Office. Pursuant to an order of the Court dated 4 February 2016 she was informed in the retainer letter that the parties had been ordered to procure a single expert.

283 She was provided with certain materials which have indeed been supplemented before me but relevantly she obtained affidavits of Ms Vhitonen, Ms Hatsisavas, Ms KGH, Ms JLL, Mr CD, Ms HR and a transcript of the

preliminary hearing which took place in the court on 4 February. She was asked a detailed set of questions covering topics such as the nature of the child's relationship with the proposed adoptive parents, the parenting capacity of the respective persons concerned, issues concerning cultural and religious identity, her views on removal of CJD from the proposed adoptive parents and restoration to either of the birth parents and her views as to whether option and/or other orders should be made. She was also asked questions about contact visits.

284 For the purposes of preparing her report she met with CJD, the proposed adoptive parents, the birth mother and the birth father. She also made observations of a contact visit between CJD and the birth parents.

285 She provided an extremely detailed report after having undertaken the interviews and considered the various matters identified in her retainer letter. As a prelude to her various observations and interviews she sets out in some considerable detail the history of how CJD came to be placed in care and in broad terms the history which is recorded and various important events in the affidavits and underlying materials she accessed.

286 On 3 March 2016, she observed the birth parents during a contact visit with CJD. One observation she made was that when both the birth mother and the birth father picked CJD up there was "no bodily accommodation by CJD" in either case (Ms S report [65]). However, she did observe that CJD ran over and cuddled Ms KGH (Ms S report [89]).

287 She conducted an interview with the birth father at her rooms on 16 March 2016. She observed that he participated in the interview willingly and showed no signs of hostility, but he did present as cognitively delayed (Ms S report [96]). She commented that his verbalisations were simple and the interview was conducted in a manner that was suitable for someone with cognitive disabilities. The birth father said he wanted to have his daughter live with him because he had never had a chance to be a father (Ms S report [97]). She got a detailed history from him, which amongst other things, he told her that he had been beaten up badly by his step-father and that he was currently seeing a psychiatrist who was helping him deal with his childhood issues (Ms S report

[103]). He informed Ms S that he had been prescribed epilim for his bipolar disorder. The birth father told Ms S that he tried marijuana when he was a teenager but not every day. He thought he used marijuana for approximately six months but he had not tried any other drugs (Ms S report [113]).

288 He also told Ms S that he would always be there for the birth mother and believed she was a good mother (S report [120]). He also recognised that although he and the birth mother had lived together initially, they "had" to separate for him to try to obtain custody of CJD (Ms S report [120]). It is certainly clear from what he told Ms S that he has issues with the carers (Ms S report [127]).

289 Ms S asked the birth father if he would give her permission to speak to his psychiatrist but he refused and said that he would need to speak with his lawyer before he could give any permission to his psychiatrist (Ms S report [131]).

290 Ms S saw the birth mother on 21 March 2016. Again, she took a very detailed history from her. The birth mother told Ms S that amongst other things she had been a state ward (Ms S report [144]) and had had 11 different foster placements between the ages of 12 and 13 (Ms S report [145]).

291 She also told Ms S that she had started using marijuana from the age of 15 and used it consistently until she was 18. Her usage was then on and off until about 2001. She had used other illicit substances such as cocaine, speed, heroin and benzodiazapene (Ms S report [150]-[151]). However, she stated that she had not touched heroin since 2010 (Ms S report [152]).

292 The birth mother told Ms S that she had had a criminal history which included convictions for shoplifting and manslaughter. She specifically denied having administered methadone and/or benzodiazapenes to her son JR. She told Ms S that she was of the opinion that it was probably his father who did this as he was the only person who purchased methadone and was in the vicinity of her son (Ms S report [164]).

293 The birth mother informed Ms S that she had always asked for CJD to be christened as a Catholic and she wanted her to have a strong religious background (Ms S report [175]).

294 With the birth mother's co-operation, Ms S made contact with Ms Reed on 30 March 2016 who had been the birth mother's case worker (Ms S report [183]-[185]). She was not able to make contact with other persons nominated by the birth mother.

295 She then observed CJD on 14 March at the then family home in Wollongong. Ms KGH was present, but Ms JLL was at work (Ms S report [189]). However, her observation was that the interaction between CJD and Ms JLL was warm and they appeared to have a close relationship (Ms S report [191]). During the visit she also observed CJD for a time on her own.

296 Ms S interviewed both Ms JLL and Ms KGH separately. She observed that Ms JLL was quite hostile and defensive during the assessment and appeared to show frustration of having to go through the process which she found stressful (Ms S report [211]-[212]).

297 Ms JLL told Ms S that she had used pot a little at university and a little bit here or there afterwards, but had not touched it for a long time, possibly 5 years. She had seen a counsellor a couple of times for work related stress (Ms S report [220]-[221]).

298 She told Ms S that she and Ms KGH (who was her first serious relationship) had been together for almost 8 years. They became a couple involved with foster care because they were keen to have a family (Ms S report [223], [225]).

299 Ms S brought up the question of CJD's baptism or christening as a Catholic. Ms JLL told Ms S that she and Ms KGH were not church people and that religion was not a part of their life (Ms S report [238]-[239]).

300 Ms S interviewed Ms KGH who observed that she did not exhibit any hostility towards Ms S (Ms S report [244]). She likewise had tried marijuana when she was 16 or 17 and had been arrested a couple of times for being involved in political protests but was never charged (Ms S report [263]-[264]).

301 She confirmed that she and Ms JLL had been together for about 8 years and expressed the view that together with CJD they were a family (Ms S report [270]).

302 Again on the issue of religion, during the interview, Ms JLL was of the view that CJD should not be baptised and that she did not want to engage in making representations that were untrue (Ms S report [278]).

303 As the result of her interviews and having considered the various materials, Ms S expressed the view that CJD had formed a close and loving relationship with her long time carers and at the same time has maintained knowledge of her birth parents through contact visits. She thought the situation had been destabilised to some extent by the current legal issues around the application for CJD to be adopted (Ms S report [187]).

304 She also expressed the view that CJD perceived Ms JLL and Ms KGH as her psychological parent figures and as her safe base "for exploring the world". She further expressed the view that CJD will need a secure base when trying to adjust to the changes and expectations that attending primary school will entail for her in a couple of years. She expected that life will continue to be difficult for CJD so the level of security and stability will be essential for her to reach her full potential (Ms S report [289]).

305 As she has never resided with either her birth mother or birth father, Ms S was of the view that CJD did not perceive either birth parents as psychological parents (Ms S report [290]-[291]). She also expressed the view that she did not demonstrate a close psychological attachment, as far as she observed, to her birth mother or birth father in their various interactions.

306 Ms S observed that CJD was quite comfortable with calling her birth parents, "mummy H" and "daddy C". She observed her using this nomenclature and she just appeared to accept it (Ms S report [295]).

307 She described Ms JLL and Ms KGH as intelligent women who were very capable of caring for CJD on a day to day basis. Given their history and background and given what she described as "CJD's special needs" she believed that Ms KGH and Ms JLL had demonstrated that they are able to

provide CJD with good quality physical care. She also expressed the view that they are emotionally intelligent and they are attuned to CJD's emotional needs. She also explained that the interactions with CJD provided for appropriate intellectual and language stimulation and assisted her intellectual and educational development. She also expressed the view that they had developed a good attachment relationship with CJD and that they will be able to meet her need for psychological nurturance (Ms S report [301]).

308 In Ms S's opinion, both her experience and research suggest that there would be no significant impact on a child's wellbeing from being raised by same sex parents. Her belief was that children in such families do as well emotionally, socially and educationally as their peers from heterosexual families (Ms S report [303], [308]).

309 Ms S accepted that the birth mother had not had an opportunity to become CJD's psychological parent. She indicated that the birth mother felt she was being punished for something that happened before CJD was born. Ms S did not agree that her observation of the birth mother's interactions with CJD at contact demonstrated some positive parenting skills, although her observation further was that the birth mother did not appear to be confident in her management of CJD (Ms S report [310], [312]).

310 Ms S observed that CJD and her birth mother have not had an opportunity to develop a significant reciprocal psychological attachment. Ms S accepted that the birth mother loved CJD but she thought the reality was that CJD hardly knew her birth mother and in the circumstances of the limited contact visits it had simply not been possible for CJD to develop a significant psychological attachment to her birth mother (Ms S report [313]).

311 Ms S expressed the view that 4 years in care is "too long a period" for a child taken at birth to be able to be restored to the care of the birth parents simply because it means that the child has already formed an attachment away from the birth parents. In all the circumstances, she expressed the view that because CJD has certain special needs, caring for her will be a challenge for anyone. Ms S was not convinced that the birth mother would be up to this challenge, although she was quite sure that the birth mother would try very

hard to manage. In her opinion, restoration was not a realistic possibility (Ms S report [315]).

312 Ms S observed that the birth father is precisely the same position as the birth mother in the sense that he has not ever had full time care of CJD. She was of the view that the birth father clearly loves his daughter and was committed to regular contact (Ms S report [316]).

313 She described the birth father as a mild mannered and respectful man. However, she did observe from the history that the birth mother had previously called police because the birth father would not leave her home when she asked him to and that without his medication he could be a difficult person. Ms S was also concerned given some of the behaviour reported by the birth mother in the past that the birth father may not be able to cope with CJD particularly if she were to have tantrums or exhibit other challenging behaviour (Ms S report [318]).

314 Ms S's view is that the birth father had obvious cognitive difficulties and a long term mental disorder. She thought his bipolar disorder and mood swings could make it difficult for him to manage the care of a child with challenging behaviour and concluded that in her view he would not have sufficient parenting capacity to have sole care of CJD (Ms S report [319]).

315 On the question of cultural and religious identity Ms S thought that the birth parents' wish for CJD to have a Catholic identity was not handled well by Barnardos during the matching process. However, Ms S thought that CJD could be exposed to her parents' Catholic religious and cultural beliefs and need not look to the carers for that instruction. She suggested CJD attending Catholic scripture classes at school and being provided with age appropriate children's books and bible stories specifically directed to the Catholic faith (Ms S report [322]). Ms S was of the opinion that it was simply not possible to go backwards and redo the matching process or the commitment or the cultural and religious expectations in the placement, largely due to the fact that CJD was in a stable and loving placement with two women who love her very much. She recognised the difficulty faced by all concerned but especially as the proposed adoptive parents are in a same sex relationship and the attitude of

the Catholic faith towards such a relationship (Ms S report [323]). She noted that the proposed adoptive parents have stated that they would allow CJD to be involved in a religion if she chose to do so in the future. However, she thought that this was not a solution to the dilemma because it may be many years before CJD was able to make such a choice (Ms S report [324]).

316 Ms S expressed the view that baptism is a form of initiation into a religion and that it would be futile to baptise a child into a religion that no one had responsibility for teaching her about. While she thought the issue should have been dealt with at an earlier point in time in a pragmatic sense, she thought little could now be done to address the issue in a way which would satisfy the birth parents (Ms S report [325]). However, she felt that CJD could be introduced into the beliefs of the Catholic faith with bible stories in a simplified form with the assistance of the extended adoptive parents and through attendance at Catholic scripture classes (Ms S report [327]).

317 Ms S was of the view that CJD's psychological parents are Ms JLL and Ms KGH and to separate her from them at this point in time would be psychologically harmful to her (Ms S report [330]). She believed that Ms JLL and Ms KGH provide a secure base for CJD and removing her from their care would mean that her path towards psychological health would be interrupted. In her opinion, as CJD is a challenging child, she would not take the separation from her psychological parents easily (Ms S report [331]-[332]). She believed that CJD would struggle with being placed with her birth mother. Part of this is because the birth mother herself would have difficulties, because she has not shown a strong capacity for dealing with major stress in her life and, notwithstanding her having completed various parenting courses, Ms S was of the opinion that the birth mother would struggle with managing the situation (Ms S report [334]).

318 Her views were exactly the same in relation to the birth father, namely that to separate CJD from Ms JLL and Ms KGH and for her to be placed with the birth father would cause CJD psychological harm (Ms S report [338]). Further, she thought it unlikely that the birth father would be able to manage her full time care because of his cognitive and mental health issues (Ms S report [338]).

319 Ms S expressed the view that research has shown that the best outcomes in terms of psychological adjustment and emotional wellbeing for children in and out of home care is achieved in homes where the child has been adopted. She thought that CJD could not be removed from the care of the proposed adoptive parents without experiencing both short and long term psychological harm. If she is to remain in long term out of home care, in her view, adoption is the optimum choice as it provides a level of stability and security for the child and for the carers which cannot be afforded by any other option available to the Court (Ms S report [344]). Adoption would make CJD a legal and real part of the adoptive family and mean that she has a family for life. It would remove a risk of further applications to the Court for restoration to the birth parents. Adoption would remove uncertainty and would make both CJD and the proposed adoptive parents secure in the knowledge that she is a permanent part of the family. Being taken away she thought, is often a concern held by children in foster care and can lead to high levels of anxiety or insecurity (Ms S report [344]).

320 While Ms S accepted that being placed with either birth parent would in fact mean CJD being with one or other of her biological parents and which in turn would ensure her cultural and religious heritage, there were however, disadvantages of such a placement. Psychological damage would be caused to her by the separation from her psychological parents and the fact that neither of the parents, in her mind, have sufficient independent parenting capacity to manage CJD's needs (Ms S report [346]).

321 So far as contact is concerned, she believed that the current contact arrangements did not require formal supervision and the presence of the carers somewhat peripheral. Nonetheless, she thought it would be in CJD's best interests for the proposed adoptive parents to be present for contact and to participate at a low level so that the get togethers are more natural. She thought rigid adherence to contact plans was never a good thing and that there needed to be some flexibility on the part of the proposed adoptive parents if either parent became sick or something happened which required a change of contact arrangement (Ms S report [358]-[359]).

*The expert report of Ms RN*

322 The birth mother's then solicitor, a Ms Rutkowska, retained a Ms RN, clinical psychologist to prepare a report on the birth mother and answer certain questions on the birth mother's capacity to provide adequate parenting in the light of CJD's emotional, intellectual, physical and psychological needs.

323 Ms RN has degrees in psychology from the University of New South Wales and the Australian National University and has been in private practice as a clinical psychologist since 1996. She was provided with numerous materials which were also provided to Ms S, together with Ms S's report. She also conducted an interview with the birth mother. She did not see the birth father or CJD.

324 Ms RN observed the birth mother as a person able to express herself clearly in a reasonable amount of detail and in a manner which was entirely appropriate. She observed her interaction as reasonably un-defensive, warm and unguarded, however she cried periodically during the interview (Ms RN report [66]).

325 Ms RN did not perceive any indications of perceptual disturbances such as hallucinations or dissociation and no disturbance in thought processes. The birth mother's thinking appeared to be fairly coherent, logical and sequential (Ms RN report [67]). She took a lengthy history from the birth mother who amongst other things described her being assaulted physically by her step father (Ms RN report [69]). She also told Ms RN that she had been assessed as having ADHD and her food was severely restricted (Ms RN report [70]). She also told Ms RN that her mother had been diagnosed with Munchausen syndrome by proxy (Ms RN report [74]).

326 The birth mother told Ms RN about her use of cannabis, ecstasy and amphetamines and her progression to heroin which she was on and off until she was 30 (Ms RN report [75]).

327 She told Ms RN that an important part of her self identity and perception was dominated by her food allergies and she spoke about how that affected her. She told Ms RN that she had uncritically accepted the blame for her poor behaviour as a child however she had not properly considered at the time her mother's diagnosis of Munchausen syndrome by proxy (Ms RN report [77]).

328 However, she felt that her acceptance of her past assisted her to develop a healthier self esteem (Ms RN report [79]). Ms RN subjected the birth mother to some psychometric testing. The results led Ms RN to express the view that the birth mother did not deny normal faults and failings admitted by most adults, nor did she attempt to exaggerate her current problems. Ms RN felt that the birth mother had appeared to answer the tests honestly (Ms RN report [82]). However, she felt the birth mother's responses were suggestive of an individual in some distress and that she had indicated pathology on a number of scales, most prominently her tests indicated borderline features. Her pattern of responding suggested difficulties with emotional instability, volatile interpersonal relationships underlying anger and identity issues. Ms RN felt that she experienced uncertainty about major life issues and a lack of direction or purpose in life and that she was likely to have a history of involvement in intense, needy and short lived relationships. Ms RN also felt she was likely to be preoccupied with fears of being abandoned or rejected (Ms RN report [83]). The birth mother's score on what Ms RN described as the 'post traumatic scale' suggests that she had experienced a disturbing traumatic event that is the overwhelming focus of her life and that she has been severely damaged by this experience (Ms RN report [75]). She has also indicated high levels of anti-social behaviours (Ms RN report [86]).

329 Ms RN observed that in relation to the manslaughter charge, the birth mother was sentenced on the basis that despite her constant protestations to the contrary, she was the only person who could have administered the drug to her son JR. Ms RN expressed the view that her intention was not to harm JR but rather to quieten him and that she was assessed as responding to a period of stress and being unable to cope with the stressors (Ms RN report [106]).

330 Ms RN described the birth mother as having a complex background with her own child protection history raised by a family of declining fortunes ridden with violence and emotional instability (Ms RN report [114]). Ms RN expressed the view that the birth mother appeared to have been "scapegoated" by her family as she was identified as the "patient" of the family (Ms RN report [114]).

331 Ms RN expressed the view that the birth mother's psychometric testing was entirely consistent with her interview material. She stated that the birth mother was self aware, had intense and unstable relationships, had poor self identity, poor self esteem and unruly emotions. However, she had developed a life of purposeful activity and self development and as a result of attending a number of parenting programs she has shown "some insights" into her adult function ( Ms RN report [117]).

332 Ms RN expressed the view that if the Children's Court assessment had taken place now, restoration would likely be recommended with a number of additional recommendations including ongoing work on her understanding of the trauma of her own childhood and drug monitoring (Ms RN report [121]).

333 However, Ms RN made it abundantly plain that the assessment of the birth mother did not take into account the 'real' four year old CJD and her current needs. She expressed the view that an assessment of her attachments must be paramount in any recommendations and that was beyond the remit of her assessment. Additionally, her assessment did not take into account what she described as the very real problem of cultural mismatch between the birth family and the proposed adoptive family. Again, that was also in her view beyond the remit of her report (Ms RN report [122]).

*The joint expert report*

334 I directed that the experts confer and provide a joint report and attend for cross examination. They provided a joint report dated 28 October 2016.

335 As a result of their meeting, the experts did not identify any areas of disagreement between them. On the birth mother's history of drug and alcohol use and criminal history, both experts agreed that she had a long history of alcohol and drug abuse and a criminal history. While these issues were significant at the time of CJD's removal and the failed restoration plan, the experts agreed that she had worked hard to overcome her problems.

336 The clinical impression of the birth mother formed by both experts was that she had started to develop some insight into and had made significant improvements in her mental health functioning. Both experts agreed that she had made a good start on this but still needed more work so as to continue to

improve. The results of Ms RN's testing expressed that there was still significant personality issues, but that for the last two years they did not appear to impinge upon the stability of her mental health.

337 On the psychometric testing undertaken by Ms RN, although Ms S did not conduct any such personality tests, she did not disagree with Ms RN's interpretation of her results which disclosed self awareness but "intense and unstable relationships with poor self identity, poor self esteem and unruly emotions".

338 On the birth mother's capacity to have insight into the emotional, intellectual, physical and psychological needs of CJD, Ms S expressed concerns about her capacity to cope. Ms RN acknowledged that she did not see CJD or observe her with her birth mother but from her assessment of the birth mother her view was that there would need to be considerable support provided to her in relation to her own history of trauma and the impact that this would have on parenting CJD. Ms RN thought that the intervention required would have to be intensive so as to enable the mother to understand CJD's needs.

339 In relation to the mother's request that the child should be restored to her care both experts agreed that CJD's attachment needs to be paramount and should be the primary concern to be considered in relation to a decision concerning restoration versus adoption. The experts further agreed that it would not be in CJD's best interests for her current attachments to be broken.

340 On CJD's religious and cultural identity and the birth mother's request that CJD be christened, both experts were of the view that the issue should have been resolved at the time of the initial long term placement. At the current time, they regarded attachment issues as more significant for CJD's psychological health than the issue of maintaining her birth parents' cultural and religious backgrounds. The experts agreed that from a child focussed perspective attachment overrode cultural concerns.

341 The experts also agreed that the amount of contact should not be reduced to post-adoption and should remain at a minimum of 6 times a year. They also thought that it should be possible for additional, informal contact around CJD's birthday and other special events.

342 During the course of the hearing, a further issue arose in respect of which the experts conferred. The application before the Court seeks to have CJD given the combined surname of the adoptive parents. As a result, a number of assumptions were put to the experts concerning the proposed name change and the importance of it to CJD as well as any additional issues that the experts might see as arising.

343 I permitted a short adjournment of the proceedings so that these assumptions could be drawn up and the experts given an opportunity to confer. When the matter resumed, Ms S, who was already being cross examined was asked specifically what she and Ms RN's views were in relation to the various questions posed.

344 On the question of the importance of CJD having the same surname as the proposed adoptive parents, Ms S noted that in keeping with the principles of stability and psychological identity, it was important for CJD to see herself as an integral part of the adoptive family. Although it was not essential to have a change of surname, in their view it was preferable for that to occur.

345 The next question was the importance of CJD retaining D as her surname. Ms S indicated that the experts view was that although retention of her current surname would help her maintain her identity with the biological family, this was of less value for CJD going forward than her identifying with the adoptive couple. The experts concluded that retaining the current surname would meet the needs of the birth parents more than it would CJD going forward.

346 The third question related to whether there were any perceived issues arising from the use of a double barrelled surname in the circumstances. Neither experts saw any problems from a psychological point of view with a double barrelled surname.

347 The final question posed was whether in the circumstances it was in CJD's best interests for her surname to be changed. The experts were of the view that although it was not essential they believed it would be in CJD's best interests in the context of adoption to have the surname as proposed in the application.

*Cross examination of the experts*

348 In cross-examination, Ms S was asked her view about CJD's needs and she expressed an opinion that an assessment should be made of CJD as soon as possible by an occupational therapist and a paediatrician (T 195/15-20).

349 Ms S's view was that regardless of the birth mother's capacity and given CJD's age there was no realistic possibility of restoration to her care. Ms S adhered to the view that it was too long a period to enable her to be cared for by the birth mother as she has never been in her care and she had a psychological attachment to the proposed adoptive parents (T 196/8-33).

350 Ms S confirmed her view that Barnardos consideration of cultural and religious issues were not addressed appropriately although she was unaware that Barndardos had identified two Catholic families neither of whom in the end were prepared to take CJD (T 201/4-35).

351 Ms S reaffirmed that CJD going to Catholic scripture classes would help to address in part the cultural or religious issues. She believed it would not be a requirement for CJD to be christened in order to go to Catholic scripture classes (T 203/5-34).

352 Ms S also confirmed that she supported adoption because she believed it would provide a level of stability for CJD as she would legally be part of a family and because it would remove the risk of any further applications. She also felt it would remove the stigma potentially attached to the carers and it would remove the need for supervision by an outside agency (T 205/5-21). Further, she felt that in the absence of an adoption, even if CJD remained with the proposed adoptive parents it was none the less an insecure environment because a section 90 application could be made at any time before the Children's Court. It was put to her that in relation to such an application the chances of it occurring would be minimal (T 2015/40-44). The witness thought the chance of leave being given to proceed might be minimal but she was unable to indicate any view on the chance of such an application being made (T 206/10-15).

353 It was put to Ms S that it would be important for CJD to continue to retain her father's surname. She did not agree with that proposition. She did not agree

that a name change would unsettle CJD. She said that children often change names when they are adopted and most children celebrate that change because they understand that as being part of the adoption process and being part of a family (T 216/4-45).

354 Ms S confirmed that she thought that a change of name in accordance with that which was requested, although not essential, would be in CJD's best interests because it would strengthen her identification with the adoptive family (T 2175/20).

355 Ms RN was also cross examined. Before this occurred, Ms RN confirmed that she shared Ms S's opinion as to the various questions concerning the proposed changes to CJD's surname (T 222/224-30).

356 A number of assumptions were put to Ms RN about the mother's use of cannabis and in particular her denial of having done so in December 2013. Upon those various assumptions, Ms RN agreed that it would indicate a lack of insight on the part of the birth mother into the link between drug use and parenting capacity. However, Ms RN thought the link would be more tenuous if the child was not in fact in her custody at the time. Further, she indicated that she would be concerned when assessing parenting capacity upon those assumptions (T 226/40-50). She would also be concerned about the birth mother's commitment to recovery if in fact she had falsely denied such activity (T 227/1-5).

**Final submissions of the parties**

*The plaintiff*

357 In short, the plaintiff submits adoption is clearly preferable in CJD's best interests. It is submitted CJD knows no other family and the proposed adoptive parents have and will continue to provide a stable and loving environment for CJD, restoration is unrealistic and an adoption order will provide a sense of security to CJD and her proposed adoptive parents (T 243).

358 The plaintiff also submitted that Barnados did all it could have done to place CJD with a Catholic family however eventually CJD was placed with a family that will best care for the totality of her needs (T 233). The plaintiff asserted

that the proposed adoptive parents were, and continue to be, the "most appropriate match" for CJD (T 233).

359 The plaintiff submitted that it was not in CJD's best interests to be christened if she was adopted, especially because the proposed adoptive parents would not be able to facilitate her involvement and development with Catholicism due to their sexual orientation (T 237). However, the plaintiff argued that the proposed adoptive parents "take seriously the religious and cultural heritage of CJD" (T 235) and that evidence of their willingness to 'facilitate' CJD's involvement with the Christian faith should be accepted (T 235). The plaintiff highlighted the birth mother's "lack of insight" (T 237) into the proposed adoptive parents' situation and the immense difficulty they would face in even attempting to raise CJD as a Catholic (T 237).

360 In relation to the restoration orders sought by the birth parents, the plaintiff submits that neither has the capacity to care for CJD. The plaintiff submitted that the birth mother was an unreliable witness, who refused to accept responsibility for her past criminality and had a long history of drug use, even during CJD's pregnancy (T 239-240). Further, that the birth mother had no viable restoration plan, and the fact that CJD had not yet been restored to her care was no excuse for this (T 241). On this basis, the plaintiff argued that restoration was not in CJD's best interests. Similarly, the plaintiff asserted that restoration to the birth father was not in CJD's best interests because he had limited parenting capacity due to his work commitments and personal mental health issues that were not yet adequately managed (T 242).

361 In relation to the proposed amended parental plans, the plaintiff argued they should be accepted because they were supported by both experts and provided an appropriate minimum level of contact with the birth parents (T 233).

362 The plaintiff also submitted that the name change should be ordered because the experts verified that it was in CJD's best interests and it accords with the name of the proposed legal parents which authority suggests should be preferred (T 233-234).

*The birth mother*

363 The birth mother continued to seek that CJD be restored to her sole care (T 245). She submitted that whatever problems she has had in the past have been resolved (T 245-248). In particular, that she is free of the use of illicit drugs, although she takes daily medication (T 245).

364 In the event that she is unsuccessful in having CJD restored to her, the birth mother supports restoration to the birth father (T 249). She opposes any order for adoption or the orders sought as a consequence of any adoption if made (T 249-250). She likewise opposed the name change because the proposed adoptive parents had not yet changed their own surnames to 'H-L' and that 'D' was the only surname CJD presently knew (T 250).

365 The birth mother did not oppose long term care by the proposed adoptive parents.

*The birth father*

366 The birth father's primary position was to support the mother's application for restoration to her sole care. In the alternative, the birth father sought restoration to his sole care. He submitted that he is gainfully employed, with a regular income and has a large enough house to support CJD if she were to live with him (CD written submissions 1). He also asserted that he wanted the chance to care for her because he was deprived of the opportunity to be a father (CD written submissions 1, 2). He also believed he would be able to obtain outside professional and familial support, which will assist him in caring for CJD on a full-time basis.

367 Like the birth mother, the birth father opposes the proposed adoption and again any consequential orders sought by the plaintiff (CD written submissions 1). He sought to have his daughter raised a Catholic, as he believed the "church…will help her later in life" (CD written submissions 1). As an alternative, the birth father does not oppose long term care by the proposed adoptive parents.

**Consideration**

368 For the reasons which follow I am of the view that adoption is clearly the preferred course, along with the proposed name change. It would follow that I

reject the applications for restoration by both the birth mother and the birth father. It follows I also reject any long term care plan.

369 In passing I note the experts, in substance, do not support restoration or long term care and instead favour adoption. Although they believe it is not essential, they also support a name change for CJD.

370 Strictly speaking I am not bound to accept the expert evidence. However, I am in entire agreement with them. They were both informed and highly experienced and each has, from somewhat different vantage points, thoroughly examined the issues and come to similar conclusions. I accept their opinions.

371 Unaided by them I would not have come to a different view upon all the evidence having had the opportunity of seeing each of the relevant major participants.

372 It is important that I deal with the various participants but one thing is clear, each of the birth parents and proposed adoptive parents love CJD very much. I am satisfied each has a genuine desire to parent her. Upon all of the materials and having considered the available evidence carefully in my mind there can only be one result, as I have already indicated.

*The birth mother*

373 The birth mother has a long history of illicit drug use. On one view of the evidence, the last time she used cannabis was by accident in January 2013. However, materials which she herself put before the court (without any explanation or qualification) disclosed cannabis being detected in her system in December 2013. When confronted with this situation, she asserted that she had been told by a person at Royal Prince Alfred Hospital that the result was a false positive. I find that difficult to accept. She must have been acutely aware of the importance of being able to show a significant period during which she had not used drugs. She or the person who assisted her to prepare the affidavit must have been alive to that issue. To put such materials before the Court without qualification or explanation is in effect tantamount to a concession that she had tested positive in December 2013 and had no explanation for it. Her position when challenged was highly questionable. If this was however the only matter, clearly it could not be regarded as determinative in the circumstances.

374 I regard the birth mother's proposed plan for CJD's restoration as vague and entirely unsatisfactory. Her employment situation is by no means secure. When she gave evidence before me she was about to start employment as a cleaner. As I understood her evidence, although she could make specific requests, she would have little if any control over the shifts that she would be offered. She asserts she had recently completed courses which would enable her to obtain employment in the hospitality industry. The wisdom of pursuing employment either in a hotel or casino environment could in my opinion place a good deal of pressure upon her to revert to old habits, especially in relation to alcohol or drug use.

375 In any event, although she has made consistent and genuine steps towards rehabilitating herself, there are clearly unresolved issues. In addition, both experts have doubts about her ability effectively to parent and agree that she would need considerable ongoing support.

376 To my mind, of considerable significance is her unwillingness or inability to face the harsh reality of her role in the death of her son, JR. She denied her involvement at her criminal trial. On the evidence available the trial judge had no reasonable doubt about her responsibility for her son's death. However, she has simply never faced up to this reality. She has persisted over the years, even when giving evidence before me, in blaming her then partner as the person responsible for the administration of the relevant substances to her son. She made the same assertion to Ms S and Ms RN when they interviewed her. Her resistance to facing up to this reality, whatever its true cause, poses a real risk in my mind to any child for whom she might be given sole care. It seems to me that she has suffered a deep trauma which she has simply been unable or unwilling to confront.

377 CJD has exhibited some behavioural problems which may or may not lead to any diagnosis. Many young children can be difficult to handle. Notwithstanding her significant advances, the stress ahead for what at least for now would be a working single parent with many unresolved issues would be on its own a risky venture for CJD but equally for the birth mother.

378 However, equally important is CJD's psychological attachment to her proposed adoptive parents. In substance, the experts agreed that she has been with them for a significant period. Ms S's view is that it is too late to change the situation now without considerable trauma to CJD. Ms RN is in effect of the same opinion. Again I accept that evidence.

*The birth father*

379 I have no doubt that the birth father loves and cares greatly for his daughter. He conducted his case with courtesy. However, he in my mind is equally incapable of caring for CJD. Again his plan for restoration lacks reality and is equally inadequate. He clearly needs ongoing monitoring of his mental health issues, although he has been stable for some little time. He is not currently under the care of a psychiatrist nor does it appear a psychologist, which raises concerns about the stability and monitoring of his mental health in the future. Mr M J is no longer available to him and apart from a GP there is no one objectively to monitor his condition should it be required.

380 His employment history has been rather haphazard, and it seems that even now, the unpredictability and extent of his work commitments would clearly prevent him from providing adequate, full time care for CJD. These issues are compounded by the fact he is an undischarged bankrupt because of an unsuccessful business venture. That to one side, the capacity of a man in his position with his issues would make it difficult if not impossible for him adequately to parent a small girl on his own, especially if her behavioural issues require attention and monitoring.

381 In addition but importantly, in siding with the birth mother in her stance that she was not responsible for her son's death, in my mind very much calls into question his judgment and his independence. In one sense his ongoing support for the birth mother in relation to her claim for restoration is laudable but it raises in my mind a very real question of whether he could or would be able to intervene if things go awry with the birth mother. To place CJD in his care would in my view likewise pose a risk for CJD which I regard as unacceptable.

*The adoptive parents*

382 Both women are intelligent, caring and are in a stable relationship. They have been together since 2008. I believe the most significant feature of their relationship is that both share a deep love for and understanding of CJD. Ms S observed that this is reciprocated by CJD, who has a psychological attachment to both women. They are financially secure and it seems they are secure in themselves.

383 The expert evidence is that neither birth parent has adequate or sufficient parenting capacity solely to care for CJD, whereas there is simply no doubt on the evidence before me as to the parenting capacity of the proposed adoptive parents. That assessment clearly comes from various Barnardos case workers but most importantly from Ms S. Indeed both experts it seems to me favour adoption over any other alternative and each recognises the paramount importance of CJD's psychological attachment to the proposed adoptive parents.

384 The proposed adoptive parents are in my view realistic women of undoubted integrity. They have been frank from the very outset about their attitude to religion and especially their concern about the Catholic Church's attitude to same sex couples. That candour has exposed them to added stress but speaks volumes about their strength of character.

385 The Court's paramount concern is for the best interests of CJD in all the circumstances. The Act requires cultural and religious ties to be preserved "as far as possible". That clearly does not mean they can be ignored but it also means that they should not predominate if in some way they cannot be accommodated alongside what might otherwise be the best interests of the child. Religion of course is only one of a multitude of factors the Court is to consider in determining CJD's best interests. I accept the proposed adoptive parents will facilitate CJD becoming familiar with and potentially involved in the Catholic religion if she desires. I also accept the proposed adoptive parents will in good faith continue to actively explore CJD attending Catholic scripture classes.

386 In my view, in all the circumstances, it would be unthinkable to break the strong psychological attachments CJD has formed with the proposed adoptive parents simply to accommodate the birth parents' religious preferences. That would not be in her best interests. In my mind, it is vital that these attachments be preserved not only for her current stability but also for her ongoing wellbeing.

387 There is nothing stopping either birth parent from appropriately and in good faith introducing Catholic concepts to CJD and for that matter, Catholic ceremonies. While the birth parents' religious beliefs must be respected, the proposed adoptive parents' attitude to the Catholic faith requires equal respect.

388 In the course of proceedings, much was made about whether or not the joint names of the proposed adoptive parents should be the new surname for CJD. The expert evidence is that a change of name, although not essential, would not be harmful. More to the point, the experts effectively concluded that a name change was desirable. It would reinforce the new legal compact between the proposed adoptive parents and their daughter. I consider it appropriate again in CJD's best interests.

389 The birth parents will always be that. Although they will not have what each has sought, they will have continuing contact with CJD pursuant to the parental plans. Those parental plans can be changed by mutual agreement. In the event of some impasse being reached the plans can always be reviewed by this Court. As loving birth parents, I would expect notwithstanding the obvious limitations, they will do their level best to put CJD's interest first at all times and their own views and/or prejudices very much second. The quality of the relationship each birth parent enjoys with CJD in the future is entirely within their respective hands. How she comes to know them and her attitude towards them will be a direct reflection of the honesty and integrity they display towards her and more importantly themselves in the forthcoming years. At the appropriate time she will, and will want to, make her own choices whether they are religious, political or otherwise. Each of the participants concerned, including the proposed adoptive parents, will play a role in her evolution so as to ensure she makes appropriate and informed life decisions.

390 I conclude by observing that there has been some criticism of Barnardos (some of it from the agency itself) about the lack of a clear cultural or religious plan. While such action is highly desirable in every case I am satisfied here that Barnardos did set out to match CJD with an appropriate Catholic family. In the end that choice was, to some extent, taken out of their hands. I think there is a real question in practical terms as to how long an agency keeps a child in an interim position as it were hoping that an ideal situation will arise. Ultimately, in the real world practical choices have to be made.

391 In all the circumstances, in my view, I should make each of the orders in the Further Amended Summons.

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