RAW & Anor v Minister for Health, Family and Children's Services & Ors
[1999] NTSC 106

PARTIES:	R.A.W. and C.A.W. and Minister for Health Family and Children's Services and J.A.S.C. and R.N.F. and D.A.W.
TITLE OF COURT:	THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING FEDERAL JURISDICTION IN FAMILY LAW
FILE NO:	111 of 1999 (9917207)
DELIVERED:	8 October 1999
HEARING DATES:	6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21 and 22 September 1999
JUDGMENT OF:	Mildren J

CATCHWORDS:

Family Law – Family Matters Court – child in need of care – Court unable make orders in relation to a child until Minister's order revoked – Court exercising jurisdiction may make such parenting order as thinks fit.

Family Law – *locus standi* – person concerned with the care, welfare or development of the child – non-biological applicants – persons of significance – best interests child paramount consideration

Family Law – pre-parenting order conference – urgency of order – conference unlikely to be successful – significant issues not amenable to solution by counsellor or welfare officer

Family Law – allegations sexual interference – no corroboration – complaint without substance – court should refrain from making positive findings unless compelled by circumstances of case

Family Law – age of child, beyond babyhood and capable forming relations to give good start in life to be regarded by court which is obliged to attempt longer term predictions – status quo

Family Law – expert evidence – attachment disorder – advantages for child to grow up with half sibling and grand-parents – scaffolding

Legislation:

1. *Community Welfare Act* (NT) – s43(4)(a); s52(2), (3)
2. *Family Law Act* – s69ZK; s69K; s69H(3); s69ZG; s65D(1); s65C(c); s68E; s65F(2)(b); s68F(2)(d); s68F(2)(b), (c), (d), (e), (f), (g) (h); s68F(1); s68F(2)(j); s60B; s40B(1), (2)(a).
3. *Family Law Rules* – O.30B, r.9(2)

Texts:

1. *Cross on Evidence* (Australian looseleaf edition)
2. Luntz *Assessment of Damages for Personal Injury and Death,* 3rd Edition
3. E James Anthony, *Risk, Vulnerability and Resilience: An Overview*

Cases:

1. *KAM v MJR; JIG (Intervener),* (1999) FLC 92-847
2. *Re C and D* (1998) FLC 92-815, discussed
3. *B and B: Family Law Reform Act 1995* (1997) FLC 92-755, followed
4. *Mooney v James* (1949) VLR 22, applied
5. *M v M* (1988) 166 CLR 69, followed
6. *Briginshaw v Briginshaw* (1938) 60 CLR 336, mentioned

7. *In the marriage of Brown LF and Brown WJ* (1980) FLC 90-875, discussed.
8. *In the marriage of Raby RAM and Raby DM* (1976) FLC 90-104, followed.
9. *In the marriage of Burton G and Burton M* (1979) FLC 90-622, discussed

REPRESENTATION:

Counsel:

Applicants:	B. Cassells
First Respondent:	S. Gearin
Second Respondents:	C. Black
Third Respondent:	In Person
Child's Representative:	S. Barr

Solicitors:

Applicants:	Terrill and Associates
First Respondent:	M.C. Orwin and Associates
Second Respondents:	C. Black
Child's Representative:	Northern Territory Legal Aid Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
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RAW & Anor v Minister for Health, Family and Children's Services & Ors
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No. 111 of 1999 (9917207)

BETWEEN:

R.A.W. AND C.A.W.
Applicants

AND:

MINISTER FOR HEALTH FAMILY AND CHILDREN'S SERVICES
First Respondent

AND

J.A.S.C. AND R.N.F.
Second Respondents

AND

D.A.W.
Third Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 8 October 1999)

Mildren J

[1] The applicants are the parents by adoption of the third respondent, the mother of a child, Samantha born on 27 May 1997. On 26 November 1998, the Northern Territory Family Matters Court made an order declaring the

child to be in need of care pursuant to s43(4)(a) of the *Community Welfare Act* (NT). The Court also ordered that sole rights in relation to the guardianship of the child be transferred to the first respondent for a period of six months. That order was extended for a further six months by order dated 19 May 1999. The Court also ordered that the child was to remain in the present foster placement with Ms S.C., one of the second respondents. This part of the order is clearly invalid, there being no jurisdiction in the Court to make such an order: see also ss52(2) and (3) of the *Community Welfare Act.* Pursuant to s69ZK of the *Family Law Act* (the Act), this Court must not make an order in relation to the child unless the orders are expressed to come into effect when the child ceases to be under the care of the Minister. Counsel for the Minister, Miss Gearin, has advised the Court that if a parenting order is made in relation to the child, the Minister will take steps to cause the in-need-of-care order to be revoked and will do whatever is necessary to be done in order for this Court's orders to take effect.

[2] The foster-mother of the child and one of the second respondents, has had the care of the child since 29 July 1998. She and her de-facto husband, Mr F., also seek a residency order in relation to the child.

[3] The child's mother, the third respondent, does not seek any residency order herself. Until the very last moment of these proceedings, she supported the application by the second respondents; but in the end she remained neutral between the applicants and the second respondents.

[4] The identity of the father is not known.

Jurisdiction

[5] Subject to section 69K of the *Family Law Act* jurisdiction is conferred on this Court in relation to matters arising under Part VII of the Act, pursuant to s69H(3) of the Act. S69 prevents the Court from hearing or determining proceedings under this Part unless at least one of the parties to the proceedings is ordinarily resident in the Territory when the proceedings are instituted or are transferred to the Court.

[6] In this case the second respondents were ordinarily so resident in the Northern Territory and that is sufficient to found jurisdiction in this Court.

[7] Part VII of the *Family Law Act* applies to the Northern Territory by virtue of s69ZG of the Act. Subject to Division 6 of Part VII, a court exercising jurisdiction under the Act may make such parenting order as it thinks proper; see s65D(1).

A Preliminary Point

[8] Counsel for the second respondents, Mr Black, submitted that the applicants lacked standing under s65C of the Act to apply for a parenting order. Mr Black's submission was based upon the fact that the child has been living with the foster-mother since she was fifteen months old; that the applicants, who lived in Canberra, had not seen the child until May 1998; that the applicants were not the biological grandparents of the child; that since the

third respondent was thirteen years of age the relationship between the applicants and the third respondent was "severed" and had never been repaired. The evidence certainly shows that the relationship between the applicants and the third respondent has been under great strain over the last eight years and apart from telephone calls and occasional meetings, the applicants have had little direct contact with the third respondent; but Samantha is not the third respondent's first child. On 5 November 1995 she gave birth to a child Nicolla. By an order made by the Family Court of Australia on 15 July 1997, the residence of that child was granted to the applicants who thereafter assumed responsibility for the day to day, long term care and welfare of Nicolla. The evidence appears to be that the third respondent is either unwilling or unable to identify the father of Nicolla, but in any event Samantha and Nicolla are not full sisters.

[9] The evidence is also clear that Samantha and Nicolla did not meet until May 1999, although there has been on-going contact between Samantha, Nicolla and the applicants on a regular and frequent basis thereafter.

[10] I am satisfied that when the applicants were first advised by the third respondent that the first respondent was taking proceedings for a care order in the Family Matters Court in relation to Samantha, the attitude of the mother was that she wanted the applicants to take care of Samantha. Accordingly the applicants engaged solicitors who, on 22 October 1998, wrote to the Child Protection Unit in the Northern Territory seeking the written consent of an appropriate Child Welfare Officer pursuant to s69ZK

of the *Family Law Act* so as to enable an order for residency to be made in favour of the applicants. I will not delve into the way in which the Department handled that correspondence, which does it little credit, but it is plain that the applicants did their best through their solicitors in Canberra to pursue their stated purpose. Eventually, the applicants instructed solicitors in Darwin and came to Darwin in May 1999 to seek leave to be made parties to the proceedings in the Family Matters Court and to seek variations of the orders therein made. The orders made on 19 May 1999 appear to have been made by consent. At about this time, the mother changed her mind and decided to no longer support the applicants' application. It is not necessary to go into the reasons for this at this stage. Notwithstanding the lack of support from the mother, the present application was commenced in this Court on 27 July 1999.

[11] S65C of the *Family Law Act* provides as follows:

> A parenting order in relation to a child may be applied for by:
>
> (a) either or both of the child's parents; or
>
> (b) the child; or
>
> (c) any other person concerned with the care, welfare or development of the child.

[12] S65C(c) was considered by Burr J in *KAM v MJR; JIG (Intervener)* (1999) FLC 92-847. In that case Burr J considered as a preliminary matter whether

or not a person who was not a blood relative of a child was entitled to seek a parenting order in circumstances where the applicant, a female friend of the child's mother, had been involved in the care of the child firstly during a period when the applicant had had a sexual relationship with the child's mother and later when the child's mother began to co-habit with the child's father. His Honour concluded that an application may be made for a parenting order by any person, but that in order for the application to succeed the applicant had to first establish as a threshold matter that the applicant was "a person concerned with the care, welfare or development of the child". His Honour considered that it was necessary only for the applicant to show concern with only one of the issues of care, welfare or development. In particular, his Honour held that the fact that the applicant had no previous physical connection with the child did not necessarily preclude a finding that the applicant was a person concerned with the care, welfare or development of the child. His Honour said at paragraph 5.1.4:

> That the degree or strength of the nexus or concern with the care, welfare or development of the child is again an issue for determination in each case, depending upon the facts and circumstances of each case. For example, as mentioned earlier in my reasons, it may be appropriate for a complete stranger, say in the form of an aunt who resides overseas, to be granted a parenting order by this Court in the event of the death or incapacitation of the child's parents. The nature and degree of her concern with the care, welfare or development of the child in that case, would be defined and determined by entirely different circumstances than those which exist in this matter.

However, as Mr Black pointed out in his submissions, that case is factually distinguishable from the present case because the applicant in that case had

significant contact with the child prior to the bringing of the application, whereas in the present case the only contact which the applicants have had with the child prior to the bringing of the application is that which has been arranged by the Minister. Further, as Mr Black pointed out, the observation of Burr J relating to the position of the aunt who resides overseas in the example that his Honour gives, is a reference to a biological relative, and in the present case the applicants are not biologically related to Samantha.

[13] The only other authority to which my attention has been drawn is the case of *Re C and D* (1998) FLC 92-815 where the Full Court dealt with an appeal relating to a parenting order made in favour of the husband, who for many years had raised the child as his own in the belief that he was the biological father of the child. Subsequently it was discovered that he was not and orders for residency were made in favour of the wife and the biological father of the child with whom the wife had taken up residence. At paragraph 4.3 of the judgment of Nicholson CJ and Baker J their Honours say:

> After making findings as to the credit of the parties' evidence, to which we shall return, Hannon J held on the evidence, to which we shall also return, that the husband and his family are persons significant to the care, welfare and development of the child, correctly observing that:-
>
> > Persons significant to the life of the child are not confined to those who are biologically related to the child, in the same way that the existence of a family is not determined by biological considerations.

[14] In this respect it is to be noted that s60B(2)(b) of the Act provides that except when it is or would be contrary to a child's best interests, "children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development...".

[15] In my opinion, no distinction ought to be made between persons who are biological grandparents and persons who are in the position of grandparents by adoption. On the facts of this case, Samantha's biological grandparents are unlikely to show any interest in the mother in the future having regard to the unsuccessful attempt which she made to establish and maintain contact with her biological mother. Apart from a brief period when the mother lived with her biological mother, the applicants have been the only parents that she has known and although the relationship she has with them has been strained, I am unable to find that the relationship between the mother and the applicants is non-existent. On the contrary, there appears to have been continued telephone contact, particularly with Mrs W., whose advice and assistance the mother has sought in the recent past, for example, on matters relating to her pregnancies; and it is to the applicants that the mother has turned when she has sought to place her daughters in the care of someone else. Further, the child's biological half-sister is living with the applicants. As the mother is herself unable to care for the children and there is no other biological relative of Samantha available, it is clear that the applicants are the nearest living relatives of Samantha. As the Full Court observed in *Re C*

and D, supra, the existence of a family is not determined by biological considerations any more than are persons of significance.

[16] Mr Black submitted that there is a difference between persons who are *concerned with* the care, welfare and development of a child and persons who may be *concerned in* the care, welfare and development of a child. Mr Black in effect adopted the argument of Miss Vanstone QC in *KAM v MJR; JIG (Intervener), supra*; in other words, that there had to be shown, in order for a person to be concerned with the care, welfare or development of the child, some evidence of a parenting role or some sort of decision making in relation to the upbringing of the child. Whilst I have no doubt that the existence of such a connection is a relevant consideration, I do not consider that the absence of such factors necessarily precludes a finding that a person is concerned with the care, welfare or development of a child. In this case the relevant concern is shown by the applicants by virtue of their status as the adoptive parents of Samantha's mother; by virtue of their having the day to day parenting of Nicolla and by virtue of the request by the mother, albeit later withdrawn, for them to seek parenting orders for Samantha. As to the latter point, there is some evidence before me that the mother has been treated by a psychiatrist and suffers from a personality disorder which was diagnosed in about September 1998. She claims to be suffering from a borderline personality disorder, but whether that is so or not, I find, having seen and heard her give evidence, that she is unable to care for the child herself. S68E of the *Family Law Act* provides that in deciding whether to

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

[17] In those circumstances, I find that the applicants do have standing to apply for a parenting order pursuant to s65C(c) of the Act.

The Best Interests of the Child

[18] Counsel for the child's representative, Mr Barr, in his very helpful submissions which I have largely adopted, submitted that the best interests of the child are to be determined by applying s60B and ss68F (2) of the *Family Law Act* in a commonsense way and by attaching to the individual components of those sections such weight as is appropriate in the individual circumstances of the case; see *B and B: Family Law Reform Act* 1995 (1997) FLC 92-755 at 84,220. I note in particular the following passages in the joint judgment of the Full Court at pages 84,220 to 84,221:

> 9.58 As a matter of proper practice and to ensure that this essential task is performed, a judge in the adjudication of such a case would be expected in the judgment to clearly identify s65E as the paramount consideration, and then identify and go through each of the paragraphs in s68F(2) which appear to be relevant and discuss their significance and weight, and perform the same task in relation to the matters in s60B which appear relevant or which may guide that exercise. The trial judge will then evaluate all the relevant issues in order to reach a conclusion which is in that child's best interests.
>
> 9.59 In this approach no question of a presumption or onus arises. The analysis of McLachlin J in *Gordon v Goertz, supra*¸ is compelling. The Act contemplates individual justice. Any question of presumption or onus has the potential to impair the

inquiry as to what is in the best interests of the particular children. It may render the case more technical and adversarial, and may divert the inquiry from the facts relating to the children's best interests to legal issues relating to burdens of proof. The task is not "to be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary". See the judgement of Brennan J (as he then was) in *Brown and Pederson, supra.*

9.60 In cases where there are no countervailing factors the s60B principles may be decisive, not only because they are contained in s60B but because they accord with what is in the best interests of the particular children.

No Conference with a Counsellor

[19] Before turning to these considerations, I should first deal with s65F(2) which provides that the Court must not make a parenting order in relation to a child unless certain conditions are fulfilled. S65F generally requires that before a parenting order is made, the parties to the proceedings attend a conference with a family and child counsellor, or a welfare officer, to discuss the matter to which the proceedings relate. I am satisfied in this case that there is an urgent need for a parenting order (see s65F(2)(b)). As I previously stated, the child is presently in the care of the Minister as a result of being declared to be a child in need of care. The Minister's position is that that order should be revoked as soon as possible and that a parenting order should be made in favour of either the applicants or the second respondents. The applicants have made special efforts to come to the Northern Territory in order to get to know their grand-daughter and in order to contest these proceedings. Mr W. has taken six months leave without pay and Mrs W. has resigned from her employment. Together they are meeting their own costs of this litigation

without any legal assistance. If their application is successful they intend, as soon as they are able to do so, to return to Canberra with Samantha. Mrs W. does not plan to return to work and will devote her time to being the principal carer for both Nicolla and Samantha. The financial considerations of the applicants, therefore, make it imperative from their point of view that this matter be determined urgently. There is also the consideration that the longer the child remains with the second respondents the more difficult it may become for the Court to be satisfied that the risk of any harm of detachment flowing from an order in favour of the applicants would outweigh any benefits which might flow to Samantha should she be required to reside with the applicants. On the other hand, if the second respondents are successful, their position should be clarified as soon as possible so as to relieve them from the anxiety of this litigation which is likely to impinge upon the welfare and well being of the child.

[20] Furthermore, these proceedings are somewhat unusual, if not unique, in that residence orders are being sought by the adoptive grandparents on the one hand and the foster-parents on the other. It is not the sort of case where a conference with a family and child counsellor, or a welfare officer, is likely to be productive as both protagonists have strong claims that the child's best interests would be best served by a residency order in their favour. There are also some significant issues raised by the second and third respondents relating to the competency of the applicants with which I will have to deal and which are not easily amenable to solution by a counsellor or welfare

officer. Further, the expert evidence is in conflict. In those circumstances, I am further satisfied that there are other special circumstances which make it appropriate to make an order even though the parties have not attended a conference: see s65F(2)(b) of the *Family Law Act*.

Background Facts

[21] Before dealing with the various provisions of s68F of the Act, there are a number of facts which need to be found.

[22] Mrs W. is 48 years of age having been born on 15 December 1951 in Adelaide, South Australia. She married her husband, the other applicant Mr W., on 10 February 1973. They have two adopted children. Apart from the third respondent, the elder child D who was born on 10 February 1970 and who is Mrs W's biological child, was adopted by both the applicants in 1973. The elder adopted child presently lives in Wollongong where he works as a public servant for the Taxation Office. This elder child, who gave evidence in these proceedings, clearly has a close relationship with his parents.

[23] Mr and Mrs W. moved to Canberra in 1984. They own their own four-bedroom home and if Samantha went to live with them, she would have her own room. They are secure financially. The house is paid for; they own their own motor vehicle and have about $50,000 in savings. Both appear to be in good health. Mr W., who is 47 years of age having been born in Adelaide on 7 February 1952, is employed as a chef at British Aerospace at the Tidbinbilla Tracking Station where he has been employed for the last

four and a half years. There is evidence from the mother that Mr W. abuses alcohol. Mr W.'s evidence, supported by Mrs W., is that he drinks light beer, but is not a heavy drinker. There are some discrepancies in the evidence about the regularity of his consumption, but I am satisfied that whatever drinking problems Mr W. may have had in the past, they were not of a serious nature so as to affect either his health or his ability to parent a child. I note that Mr W.'s income is approximately $1,000 net per fortnight.

[24] Some indication of the applicants' ability to care for Samantha is indicated by the manner in which they are presently caring for Nicolla. Without going into the evidence in detail, suffice it to say that the evidence of Ms Schneider, a home based Family Care Worker who has been caring for Nicolla during week days since July 1997, is that Nicolla is a happy and carefree child who has developed good social skills and is no different than any other child of her age. According to Ms Schneider's evidence, she has had the opportunity to observe the applicants' interaction with Nicolla and she considers that Nicolla has developed a very loving and trusting relationship with the applicants. Her evidence was that she has not once seen any signs of neglect or maltreatment of any type. I should point out that this was in stark contrast to the situation which existed when Ms Schneider first began to care for Nicolla who at that time was very shy, unable to walk well, could not pick things up with her fingers, was incapable of feeding herself finger food, displayed a lot of rocking, appeared to be terrified of anybody that she did not know, lacked confidence and was not

comfortable in trying to seek attention. There is evidence of a notification to the appropriate authorities in Canberra relating to Nicolla by an unknown person. However, the result of the Department's inquiries were such that they did not even bother to speak to the applicants about the notification and it was not until these proceedings commenced that the applicants were even aware that a notification had been made. The Court appointed psychologist, Ms McKenna, considered that Nicolla was firmly bonded with the applicants and secure in her relationship with them. Another psychologist, Ms De Ionno, agreed that there had been a successful transition from Nicolla's previous care-giver, Ms Deanne Lodge, to the applicants. She considered that there were some matters she observed in Nicolla's behaviour which may require further investigation, but I do not consider these concerns to be of any moment at present. I prefer the evidence of Ms McKenna who considered that the reported behaviour was normal for a child of this age. I am satisfied that the applicants are doing a splendid job of looking after Nicolla and providing for her.

[25] A number of allegations of a serious nature were made by the third respondent against the applicants in an attempt to show that the applicants had ill treated the third respondent as a child and were unfit to have a parenting order made in their favour. The substance of the allegations is set out in the affidavit of the mother (Exhibit C1).

[26] Shortly after the commencement of these proceedings, the mother was represented by a local solicitor, Ms Elliott. Orders were made for the filing

of affidavits by the parties and on two occasions extensions of time were sought by Ms Elliott, and granted by the Court. At that time the Court was informed that the third respondent was living in Cairns. Shortly before the trial, a document purporting to be a notice of discontinuance against the third respondent and signed by the solicitors for the applicants and by the solicitor for the third respondent was filed. The third respondent was brought to Darwin at the behest of the second respondents, and at their expense, and the third respondent's affidavit was prepared by the second respondents' solicitor and counsel, Mr Black. It is patently obvious that the third respondent was in the second respondents' "camp". On the morning of the hearing, the third respondent was present in court and wished to represent herself as a party to the proceedings. The applicants' counsel, Mr Cassells, was unaware of the notice of discontinuance, but after taking instructions conceded that the notice of discontinuance was invalid. No opposition was raised to the third respondent appearing in her own right. However Mr Cassells subsequently submitted that as she was clearly in the "camp" of the second respondents, counsel for the second respondents should not be permitted to use leading questions in cross-examination of the third respondent. In my opinion, Mr Black had no absolute right to put leading questions in cross-examination to the third respondent, and I have a discretion to forbid leading questions where I am satisfied that she would show partisanship towards the second respondents: see *Mooney v James* (1949) VLR 22 and *Cross on Evidence* (Australian looseleaf edition) para 17,165. Mr Black did not seriously

contest the matter and accordingly, as it seemed to me plain that the third respondent was in the second respondents' "camp", I directed Mr Black that he was to refrain from using leading questions.

[27] Both the applicants were cross-examined at considerable length about the allegations which were denied.

[28] In *M v M* (1988) 166 CLR 69 the High Court held that there are strong practical family reasons why the court should refrain from making positive findings that abuse has taken place unless compelled to do so by the particular circumstances of the case. After observing that allegations of this nature should not be made the subject of positive findings unless the court is satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362, their Honours observed (at p77):

> No doubt there will be some cases in which the court is able to come to a positive finding that the allegation is well founded. In all but the most extraordinary cases, that finding will have a decisive impact on the order to be made respecting custody and access. There will be cases also in which the court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be very many cases, such as the present case, in which the court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.
>
> In resolving the wider issue, the court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assess the magnitude of that risk. After all, in deciding what is in the best interests of the child, the Family Court is

> frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of the child, is a fundamental matter to be taken into account in deciding issues of custody and access.

[29] Although that case was specifically concerned with sexual abuse, the same principles apply in respect of other forms of abuse: see *B and B: Family Law Reform Act 1995*, *supra*, at para 9.15.

[30] So far as the alleged sexual interference is concerned, there is no corroboration of it whatsoever, nor is there any other evidence to support it. Apart from the third respondent's evidence, the allegations are detailed in Exhibit A1 (p9 of attachment B thereto) which is a Foster Care Assessment Report prepared by a social worker of the Substitute Care Services, Family Services, Australian Capital Territory Education and Community Services. The report notes that as to these allegations, the records indicate that the third respondent later told the applicants that the allegations were lies and that she never thought anything would come of them. Further, the source documents in relation to the allegations, Exhibit A5, indicate at p145 that on the third respondent's version given to social workers at the time (she was then fifteen years of age) there was no "sexual intent" behind Mr W's actions. I infer from this, and from the lack of any action by the Department, that the Department at least was satisfied that this complaint was without substance.

[31] So far as the creditability of the witnesses is concerned, I have no hesitation in preferring the evidence of Mr and Mrs W to that of the third respondent whenever their evidence differs from that of the third respondent, with the exception of one issue to which I will come. The third respondent, by her own admissions, is receiving psychiatric care for long-standing mental problems. Her history, both in the very recent past and for some time, has been erratic and irrational. If her allegations were true, it is difficult to understand why she would want Nicolla to be placed in the care of her parents even though she claimed in an affidavit (Exhibit A7) that the carer of the child, Deanne Lodge, was attempting to prevent her from seeing the child. Further, her initial reaction in relation to Samantha was to call upon her parents' help and she claimed that it was not until she saw the Foster Care Assessment Report of Miss Fuller that she changed her mind, apparently on the basis of the unsubstantiated notification in relation to Nicolla. Throughout these proceedings she maintained a degree of hostility towards the applicants until the very end of the trial. In her final submissions, she submitted that she believed that it would be detrimental to remove Samantha from the foster-mother's care and that Samantha had a good future with the second respondents; that she believed that the second respondents would be amenable to granting her access to Samantha; and she said that she had a genuine concern that Nicolla had not been properly cared for at all times in the past. She said that Samantha had requirements for a range of services including counselling and paediatricians and other

professionals and she felt that those support structures would be provided by the second respondents who had demonstrated a genuine commitment towards Samantha and she believed that that commitment would not likely be matched by the applicants. After she had read her submission to the Court, I invited her to hand it up if she so desired, as counsel for the other parties had handed up written submissions. I briefly adjourned the Court to enable her to photocopy what she had written. When the Court resumed, she indicated that she wished to retract her statement. She said that she just wanted her daughter to be happy and healthy and to be somewhere where she is loved, cared for and with people who will not stop her from seeing Samantha no matter:

> ...whether we get into an argument or we don't. Samantha and Nicolla are the best things in my life and without them I don't know where I would be. I'm sorry, but I have come to a stage where I just can't keep doing this and I just want her to be happy.

[32] This was a somewhat remarkable turn around as she seemed to be indicating to the Court that she would leave it to the Court to decide and expressed no preference of her own. She did not go so far as to support the applicants' application, but on the other hand she withdrew her support in favour of the second respondents. Nevertheless, her change in position was inconsistent with the allegations which she had maintained against the applicants (although Ms McKenna predicted this kind of behaviour could occur if she had a borderline personality disorder (Tr. p846)).

[33] Indicative of the third respondent's unreliability as a witness was her statement that she had been prepared to hand over her daughter Nicolla to her parents because she did not believe that they would harm her, but that she "was proven wrong". The proof that she relied upon was what she had read in the Foster Care Assessment Report prepared by Ms Fuller which, so far as Nicolla was concerned, was investigated and not substantiated. In particular, the report concluded:

> After consultation with a Family Day Care Co-ordinator, it appeared that the child was a healthy and happy child. No bruises had ever been sighted on the child by the Day Care worker. No further action was implemented by Family Services.

Further, the report noted at page 11:

> Nicolla attends Family Day Care from Monday to Friday between 8am and 4pm and is visited in her care environment by a Family Day Care field worker a couple of times a month. Nicolla's field worker describes Nicolla as a "changed child" since she first began attending Day Care 18 months ago. The worker reported Nicolla had been withdrawn, and unsure of herself and her surroundings. The Family Day Care field worker considers Nicolla is now a different child. She is affectionate, and is happy and "chatty" in her care and environment. The field worker stated that Nicolla's carer has also noticed a significant improvement in her ability to relate to others and in her general attitude and development.

The carer, Ms Schneider gave evidence to the same general effect. In fact there was no evidence to show that the applicants had in any way mistreated Nicolla.

[34] The third respondent was prone to gross exaggeration whilst giving her evidence (if not outright untruths). An example of this was her claim that

she was not allowed to ring her mother at her home, but was told to ring her at her work. She claimed that she had phone bills that showed that she had telephoned about 90% of the time to her mother's work and not to her home, because her father did not like her ringing her mother at home. The phone bills were produced and ultimately tendered into evidence as Exhibit P7. An examination of them revealed that by far the majority of the phone calls were made to the home telephone number. Further, all of the long calls were made to the home number, with most of the calls to the mother's work number being of very short duration.

[35] On the other hand, I was very impressed with the applicants' demeanor when giving their evidence, particularly during cross-examination, especially by the third respondent. They were clearly hurt by the allegations but responded with great dignity and stoicism throughout the whole trial. Except in one respect to which I will come, I have no hesitation in accepting their evidence as truthful and accurate. The matter about which I express a reservation is their denial that Mr W. had used a strap on the third respondent when she was ten years of age. The circumstances of that event are set out in the details of the first notification in Exhibit A1 at annexure B at page 7. The Department regarded this complaint as substantiated, the departmental record saying that "Mrs W. admitted that the bruise on D's bottom was caused by a beating with a belt by Mr W.". The source notes, Exhibit A5, indicates at folio 15 that Mr W. "felt that he was pushed to this action", i.e., using a belt on D. Exhibit A5 was tendered by consent

absolutely and so it forms part of the evidence before this Court. The evidence is in direct contradiction to the sworn evidence of Mr W. Mrs W. claimed to have no memory of her alleged admission. I do not feel that I am able to accept their evidence on this point. I formed the view that Mrs W. was uncomfortable about this issue when giving her evidence and I obtained the impression that she was trying to protect her husband from any criticism. However, the fact that I do not accept the applicants' evidence on this issue does not mean that I am bound to accept the admissions as contained in Exhibit A5. In the end, whilst I do not consider that the allegation is proven, I am not prepared to make a finding to the effect that this did not occur. Nevertheless, in the context of this case and given all the circumstances, if it did occur, it is, to my way of thinking, at worst an isolated incident many years ago. My impression also of Mr W. is that as he has grown older he has significantly matured. I accept his evidence concerning the level of his drinking which I do not consider to be of any real significance or concern. I accept also the evidence of Ms Schneider and I have no concerns what-so-ever that Samantha would be at risk of abuse of either a physical or sexual nature by either of the applicants.

[36] Mr Black, counsel for the second respondents, submitted that the evidence supports the conclusion that the third respondent was a difficult child; that the applicants did not know how to deal with her; that they failed to obtain appropriate assistance and advice and that whilst they may have had the skills to raise a child without special needs, they did not have the skill and capacity

to raise D. The consequence of that submission as I understood Mr Black, was that as the proposed removal of Samantha from the second respondents was likely to cause difficulties for Samantha, the applicants' past record in the upbringing of D. indicates that they would not be capable of dealing with the kind of difficulties which were anticipated might well occur in that eventuality. Even if I accept both of Mr Black's premises, I do not accept his conclusion. I think, if anything, that the applicants' experiences with D. have taught them the need to seek early professional assistance when problems of a serious nature begin to emerge and also have taught them what signs and symptoms to look out for. Further, their experiences with D. have familarised them with the relevant service providers in the Australian Capital Territory where they live. They have, in fact, sought professional assistance in the past concerning D. on a number of occasions and I therefore have no hesitation in accepting that they would do so in the future. Further, their commitment to these proceedings, both financially and by the significant personal sacrifices which they have made in order to contest these proceedings by giving up their employment and coming to live in the Northern Territory for an extended period, have convinced me not only of their sincerity but of their commitment to Samantha and to her future. That commitment was demonstrated all the more by their having to experience the attacks made upon them by the third respondent during the course of these proceedings. I think many lesser people would have walked away from these proceedings rather than accept the humiliation, expense and personal inconvenience which they have had to

endure. I noted also that Mr W. accepted, notwithstanding the enormous difficulties which they had with D., that in hindsight there was more they could have done (transcript at pages 379-380).

[37] So far as the second respondents are concerned, I am satisfied that both of them would provide an excellent home and the necessary love, care and attention to Samantha which she needs. I am also satisfied that they have so far done everything reasonably possible for them to have done in Samantha's upbringing to date.

[38] Ms S.C.was born on 1 June 1941. She is now 58. Her partner, Mr F., was born on 15 March 1959 and is now 40 years of age. They have been living together for approximately five years. Ms S.C. has been previously married on two occasions. It appears that the current relationship is stable and happy. One matter of some concern is Ms S.C.'s age. There is evidence from Doctor Tilakaratne who has been treating her over the last five years, that she is a fit and healthy person without any blood pressure or heart conditions and much fitter than most other persons her age. Dr Tilakaratne expresses the view that there is no reason why Ms S.C. could not adequately look after Samantha. My own observations of Ms S.C. is that she is very much younger looking than her stated years. She appears to me to look fit and healthy. I consider that I am able to take judicial notice of the Australian Life Tables for females set out in Table 8 to the Appendix of *Luntz, Assessment of Damages for Personal Injury and Death, 3rd Edition.* These tables indicate that the life expectancy for a female aged 58 is 23.70

years. I consider that Ms S.C.'s age should not be a negative factor in considering her application. She appears to be financially secure; she has been a business woman for many years and she has a house property, in which she lives with her partner, which has a separate room for Samantha. There appears to be not much in the way of direct evidence as to Ms S.C.'s financial position (the only information available being hearsay contained in the Family Report, Evidence D1, at para 9.1.2), but it was not suggested that she is not financially secure. She presently does not work as she devotes herself full time to Samantha's care. Her partner, Mr F., is employed as a truck driver which from time to time means he is unable to see Samantha. He proposes to change the hours of his employment so that he will, in effect, be able to work a nine to five job.

[39] Ms S.C. has adult children whom she has successfully raised. Mr F. has also had previous experience in caring for children, albeit older children. His former de-facto had three boys aged ten, twelve and fourteen and it appears that Mr F. has also developed a close and loving relationship with Samantha. There is no reason to doubt whatsoever that the second respondents would be very capable of providing adequately for Samantha's intellectual and material needs in the future. However, in her report, Ms McKenna suggested that Ms S.C.'s personality and strong protective instinct may have a negative inpact on the child's future emotional needs. I will return to this later. Subject to that, I accept the evidence of Ms McKenna (Tr. p793) which happens to coincide with my own views, that the applicants and the second respondents

are of equal capacity in terms of the physical and psychological environment they are able to provide for the child.

The ability of the child to maintain contact with her mother

[40] Samantha is presently two years, four months old and has lived with the second respondents since she was fourteen months old. I do not think it is necessary to traverse the circumstances under which that came about. Suffice it to say that I am satisfied that Ms S.C.'s intention has at all times been, to adopt Samantha in due course. I note that the second respondents have developed a relationship with the third respondent. So far as the second respondents are concerned, it would appear that they are willing to ensure that the child maintains reasonable contact with the third respondent. However, it is also equally clear in my view that the second respondents do not plan to surrender residency to the third respondent at any time in the foreseeable future. The orders that the second respondents seek, are orders that they have sole responsibility for making decisions about the long term and day to day care, welfare and development of the child, with provisions for reasonable contact with the applicants and reasonable supervised contact with the third respondent. In cross-examination it was put to Ms S.C. that she had sworn an affidavit in the Family Matters Court in which she said that she would resist the child going back into the third respondent's care "with all her might". Ms S.C. accepted that she did say that, but said that her intention was only to have the care and control of the child until the mother was capable of looking after the child herself, after having had appropriate

therapy and medical attention. There is no evidence before me of any difficulties between the third respondent and the second respondents in the third respondent having access to the child at any time that she has desired to do so. According to Ms S.C. she has also referred to the third respondent as "mummy" when talking to Samantha. Ms S.C. has also said in evidence that she would envisage Samantha maintaining contact with Nicolla in the future and that if at any future time Samantha wanted to go and live with Nicolla she would support that decision, providing Samantha was of an appropriate age to make an appropriate decision. Whilst I am prepared to accept that these are Ms S.C.'s present intentions, I consider that it is unlikely that she would ever agree to returning Samantha to the third respondent. My impression of Ms S.C. is that she is, deep down, not committed emotionally to this course, because she wants to adopt Samantha, and would have difficulty in breaking the attachment she has developed for the child. I have no doubt that she is caring and compassionate; but as appears in some of the affidavits tendered on her behalf, she is the sort of person who follows things through to the end, and I think, perhaps to an obsessive degree. As Ms McKenna observed in her report (para 4.1.2), her strong need to protect, results in her being enmeshed in the lives of those she feels she is protecting, and causes her to loose objectivity. This is further supported by her behaviour in continuing to put information by both telephone and facsimile to Ms De Ionno despite the latter's rejection of that information (Tr. pps547 and 568-9). Ms S.C. is clearly the dominant partner in her relationship with

Mr F., who I believe would be likely to support whatever course she took. To some extent, my conclusions may appear to differ from the report of Mr Milliken (Exhibit B5), but to some extent they are also supported by that report. Mr Milliken concludes that Ms S.C. is unlikely to be restrictive or controlling of other people; but, my conclusion, is that whilst this may be so, her underlying need to adopt Samantha (whether or not this is legally possible), indicates not merely her enhanced capacity to nurture others in need, but presents, perhaps not unnaturally in the circumstances, an obstacle to her ever giving up her role as the principal care-giver to the third respondent in the future (no matter what the circumstances), and is likely to inhibit the full development of such access as may be possible and beneficial to the child in the future.

[41] I have already referred to the applicants' plans in relation to maintaining Samantha's relationship with the third respondent. The applicants regard themselves as grandparents and see their role as such. They hope to reconcile with the third respondent and to work with her towards the day when she will be able to take over the full care and responsibility of raising her own children.

[42] I consider it more likely that the applicants will be supportive of the child having access to the third respondent, and promoting the third respondent as the child's mother, than the second respondents. This is an important consideration (see s68F(2)(d) of the *Family Law Act*). The third respondent presently lives in Cairns and it is my view that she will only have spasmodic

personal contact with Samantha in the near future, regardless of whether Samantha is placed with the applicants or the second respondents. It is likely that the third respondent would maintain telephone contact; but nevertheless I consider that both parties are genuine in wanting to do whatever they can (including financing the third respondent's travel and accommodation) from time to time to enable this contact to occur. The third respondent told the Court about her plans to join the navy in due course and has said that should Samantha reside with her parents she would move closer to Canberra to live. She explained that she did not wish to live in Canberra for personal reasons which I accept are understandable. However I consider that her plans are somewhat naive and are most unlikely to occur in the manner in which she envisages them. Given her psychological state I think it is extremely doubtful that she would be accepted into the navy, which requires psychological testing as part of its normal recruitment process. In the past the third respondent has, from time to time, placed herself in a position of lost contact with the applicants and the second respondents, both of whom have sometimes had difficulty in locating her. I think the third respondent is interested in her children and their welfare and would make some efforts in the future to maintain contact with them regardless of whether Samantha was placed with the applicants or the second respondents but I am extremely doubtful that she would live in or near either Darwin or Canberra for any length of time in the foreseeable future. In the long term, because of the love which the applicants and the third respondent still have

for each other, despite their differences, and of the fact that the applicants already have residency of Nicolla, I think it is more likely that as time goes by, the applicants will be better placed than the second respondents to encourage access between the child and her mother. This view is supported by the evidence of Ms McKenna (Tr. p801).

Short Term and Long Term Considerations

[43] In the end result the principal consideration is whether or not the advantages both in the short term and the long term of Samantha living with the applicants outweigh the advantages of her living with the second respondents.

[44] In *In the marriage of Brown LF & Brown WJ* (1980) FLC 90-875, Hogan J, with whom Evatt CJ and Baker J agreed, said at p75,543:

> His Honour was confronted with the making of a decision which would stand until it should be altered by order of the court or the effluxion of time. In those circumstances in my view his Honour should have had regard to the overall welfare of the child and not limit himself to the consideration of the short term view. In some custody cases, of which type I am of the view this was one, it is necessary for the Judge in the exercise of his discretion to have regard to the guiding rule that if of two decisions available to the court one would expose the child to risk or more risk than another decision, then that course should usually be adopted which is the least likely to expose such child to such risk.

[45] I note that in that particular case, the child was approximately two and a half years old. I note also the remarks of the Full Court in *In the marriage of Raby R.A.M. and Raby D.M.* (1976) FLC 90-104 at 75,483 to 75,484 where the court observed that where a child is beyond the stage of babyhood and is

capable of forming those relations which will give it a "good start in life" the court is obliged to attempt predictions in the longer term.

[46] In that case, the Full Court said at p75,484:

> Predicting the future is an inexact science. Predicting the outcome of human relationships is fraught with uncertainty. Neither legal nor psychological skills and insights are as yet sufficiently developed to enable predictions to be made with reasonable certainty.
>
> The Judge in a custody suit brings his own innate skills and personality to the task. As custody guidelines are few he will be necessarily subjective. Attempts in the past to deny such subjectivity or to surround it with question begging guidelines have failed.

[47] In *In the marriage of Burton, G. and Burton, M.* (1979) FLC 90-622, the Full Court said at p78,218:

> "...no legal onus rests upon a party with whom a child is residing to show that a change would be detrimental to the child and no legal onus rests upon a party seeking a change to justify the change either by establishing that a change would be positively advantageous to the child or in any other way. An existing status quo is but one factor to be weighed with all other relevant factors in determining a particular case. When weighing that factor, the quality of the status quo would require examination and if a longstanding status quo is disturbed, the factors which influence the court to come to that conclusion should be clearly identified.

[48] In this case, there is a great body of material placed before the Court in relation to these issues. It is necessary to observe in passing that the first respondent has arranged for the applicants to have access to the child, including overnight access, and that observations have been made by social workers concerning these periods of access which are relevant to these issues. In addition, the Court has heard evidence from three psychologists,

Mr Edward Milliken, Ms Maria De Ionno and Ms Louise McKenna (the author of the Family Report prepared pursuant to the Court's order). I record that no particular weight is to be given to Ms McKenna's evidence simply because she is the Court's witness. I have also revealed to the parties before the case commenced that Ms De Ionno is a personal friend of mine and that I have undertaken to the parties to treat her expert evidence with the same detachment as I would any other witness. I invited the parties to make any application they thought fit to make should they require me to disqualify myself. No such application was made.

[49] An analysis of the psychologists' reports was made pursuant to Order 30B, rule 9(2) of the *Family Law Rules* and was subsequently tendered as Exhibit A3. Each of the experts agree that the child has "attached" to Mrs S.C., who may be regarded as the child's primary attachment figure. Further, each of the experts accept that there is a risk of psychological injury, present and future, if the child is removed from the foster-mother. A principal area of disagreement is whether that risk is such as to outweigh any possible benefits which may flow from granting residency to the grandparents. Mr Milliken and Ms De Ionno considered that these risks were too great, and further, that any potential benefits (particularly benefits of the kind which might flow from the child being brought up with her sibling) were of much less importance than maintaining the status quo. Ms McKenna's opinion was that, given the child's temperament, there was a high degree of probability that she would re-attach to the grandparents, so long as the transfer was

properly handled; that the potential advantages of being raised by her grandparents and growing up with her sibling outweighed the disadvantages, and that there were risks of the later development of feelings of rejection if she were to be brought up by her foster-parents. Ms De Ionno and Mr Milliken considered that these competing advantages and disadvantages could be off-set by strategies involving regular contact of the child with the grandparents and her sibling, and they considered re-attachment to the grandparents to be unlikely.

[50] In the end result, I prefer the opinion of Ms McKenna to that of Mr Milliken or Ms De Ionno wherever they disagree for the following reasons. All three have similar academic qualifications, and are well qualified to express the opinions they hold. However, I consider that Ms McKenna was better prepared than the others in her research of the current professional literature relevant to the issues in this case. Further, I formed the opinion that she was more experienced in this area. She gave evidence that after obtaining a post-graduate diploma in counselling psychology, she spent ten years working for the Northern Territory's Health Services, during which time she gained significant experience in undertaking adoptive assessments, as well as a range of other matters relating to the protection of children. Between 1990-1997 she was employed with Carpentaria Disability Services as the Director and psychologist working with children up to six years of age considered to be at high risk. She said that her specialty was in paediatrics as a child development psychologist. Mr Milliken's experience was more general. He

has fifteen years experience in clinical, forensic, family and remedial development psychology. He has also taught psychology, including developmental and personality, to under-graduate students, and psychological testing and assessment to post-graduate students. However, Mr Milliken was engaged by the foster-parents on a more limited basis than Ms McKenna, in that his opinion was sought on the strength of the attachment of the child to the foster-parents, and the risks involved in the program developed by Child and Family Protective Services to introduce the child to her grandparents. He did not interview the grandparents, nor did he see the child with them. He said that he directed his attention fairly narrowly to the question of attachment because, as a base for future effective adjustment, attachment is the most important thing; that there was no reason to consider a sibling who was not present and unknown to the child; and the true sense of a sister could not be known to the child, given her age at the time (Tr. p483). I consider that this concentrates too much on the short term and does not take into account adequately the long term possibilities for the welfare and development of the child. Nevertheless, he proffered the view that overall the benefits of a secure and undisturbed attachment would outweigh any possible benefits open to the child if living with the grandparents, because there was no reason why there ought not be sufficient contact with the sibling and the grandparents living apart; yet he claimed there was no research on this type of situation to guide his making an assessment. I noted, too, that his opinion seemed firmer in giving his

evidence than appears from the statement in his report, "that I cannot say what the consequences might be for [the child] if that separation period is lengthened into a loss". This was in contrast to the view he expressed in evidence that in those circumstances there was a real chance of developing some of the serious problems referred to in the article *What is attachment disorder,* (Evergreen Consultants), quoted at pps3-4 of Attachment 1 to this report. Ms McKenna's evidence was that there was research on this topic to show that not all children separated from primary attachment figures have poor psychological well-being or adjustment difficulties (Tr. p768). She identified a work by E. James Anthony, *Risk, Vulnerability, and Resilience: An Overview,* part of which was tendered as Exhibit P22, in support. The general thrust of the work suggests that children who are "ego resilient", for example, are better able to adjust than those who are not (although this is not the only factor).

[51] Ms De Ionno's experience in this area is far less than Ms McKenna's. She has had other careers since her initial qualifications, and has practised in this area only in the last five years (Tr. p545) and only in the last year, has her work in this area equalled half of her workload. She seemed to be less familiar with the general literature on the topic than Ms McKenna, although she was acquainted with the familiar works. Her investigation was broader than that of Mr Milliken's, in that she had the opportunity to interview the grandparents as well as the foster-parents, and to see the child relating to both. Her conclusions regarding the question of the degree of attachment to

the foster-parents was accepted by Ms McKenna as valid and consistent with her own observations, except that Ms De Ionno saw signs of attachment disorder in the child, a view the other experts rejected. I prefer the view of Ms McKenna on this subject, i.e., that there is no clinical evidence of this. Ms De Ionno herself expressed limitations in her ability to adequately prepare her report due to time constraints. I note also that her last contact with the child was on 4 August, before overnight access had been established with the grandparents. By contrast, Ms McKenna's report was prepared at a later time. She was able to carry out observations of the child as late as 19 August, after an overnight access had been arranged. I feel that in this case that gave her an advantage over the other experts, in that she was seeing what the others may not have seen, viz., the beginnings of the development of a real bond by this child with her grandparents.

[52] The foster-mother's evidence, which was supported by a number of other witnesses, was that after contact had been established between the child and the grandparents, Samantha developed behaviour problems, such as sleeping difficulties and vomiting, which was sought to be relied upon to show that removal of the child from the foster-parents was a significant risk to the child's psychological welfare. I am not satisfied that this is the true explanation. There is evidence, which I accept, that the foster-mother has become anxious and depressed at the possibility of losing the child, and has real concerns about the quality of care Samantha would be likely to receive from the grandparents, based on the Fuller report. In those circumstances, it

is possible that the symptoms which are relied upon are, at least in part, a reaction by the child to her foster-mother's reactions. Another possible contributing factor, is that the child had not been returned by the grandparents to the foster-mother personally, but rather through the agency of one of the first respondent's social workers. There is some, but not very much, evidence that initially the child was tearful when taken from the foster-mother and showed other signs of insecure behaviour, but the overall impressions were that these occasional experiences dissipated rapidly and became less frequent as the visits increased and the child became familiar and comfortable with the applicants. To the extent that these factors were relied upon by the second respondents and their witnesses, I am not satisfied that they display the significant risk contended for.

[53] Finally, I was more impressed by Ms McKenna as a witness. That is not to say that the other experts were not impressive; but I believe she considered all of the relevant factors to a much greater degree than the other experts. In particular, she not only focussed attention on attachment to the foster-parents (and to the grandparents), but considered in detail the advantages to be gained by Samantha being brought up by her foster-parents, and her grandparents, as well as the advantages of developing a relationship or bond with her sister. I have already noted that Mr Milliken did not consider the sibling bond for the reasons he gave; Ms De Ionno similarly did not concentrate on this issue because she did not regard Samantha and Nicolla as siblings (Tr. p579) and, as she said, she "hadn't researched massive amounts

of it" (Tr. p581). Neither of these experts seem to have considered the advantages of creating a significant bond with the grandparents, and both in my view under-estimated the potential advantages to the child of growing up with her sister. I consider that both Mr Milliken and Ms De Ionno concentrated too heavily on immediate factors rather than looking at the long term view, as Ms McKenna has done.

[54] I note also that Ms McKenna considers the child to be "robust", and in arriving at that conclusion I note that she had access to the Allied Health Paediatric Team's assessment of the child (Exhibit P20) which the other experts apparently did not have the benefit of considering. I accept this evidence. It supports Ms McKenna's conclusion and opinion that if the child is transferred to the grandparents, the risk is diminished. I accept her evidence that attachment can still be transferred to the grandparents, although ideally the handover should be controlled over a period of about three months, to further minimise the risks. Nevertheless, the risk remains; but there are risks, too, in preferring the status quo. Whichever course is ultimately taken, it is clear that the primary care-giver will need to obtain professional support. It is clear on the evidence that this is likely in either case. I accept the evidence that professional support is available (in particular to the grandparents) and I consider it likely to be appropriately utilised if and when the need arises. I accept Ms McKenna's evidence that there are significant advantages to the child if she is to live with her grandparents. These were described on a number of occasions, but the

explanation given to a question asked by the mother perhaps best sums it up (Tr. pps 835-6):

> While neither parties are your biological families, the W's are the family that raised you and the W's are the only family that you have that have an idea of your history, who you are, how you grew up, your experiences with them, your experiences living with them and your experiences living with your brother. They have the stories of your development that's maintained by them and by your brother too. In order for Samantha to have access to that information and to the whole family history, I'm sure that they're – even with your family – with the W's even though they're not your biological family, and there is stories that all of you hold important in regards to things that may have happened with your grandmother, or with you know, uncles and aunties that are you able to talk some of those. Those are parts of your sense – or where you have an incomplete sense of identity in terms of your adoption, those – that is the shared history that you have with the W's. That is a shared history that your daughter, by being placed with the W's, would also have. She will be exposed to the language that is common among – all families have their own language that they use, the terms of endearment that they use to be affectionate towards other – each other, they have the family story or the family history that is passed from one generation to the next and that people are privy to – privy to as a matter of growing up within the context of that family – that is what the W's are able to offer your daughter. What we know about the development of identity and the words *(sic)* that we've done with Erikson is that in order for somebody to have a firm sense of identity they need to be able to link past concepts and ideas with present ones. What that means is being able to take their family history, their family knowledge and apply it to who they and where they are at this point in time and to have those links.
>
> But you couldn't you still do that if Samantha was staying with Ms S.C. If S.C./F. family kept taking her down to see my family?—That doesn't give her access to the quality that is normally there nor to the quantity of the history and the story. That doesn't happen through visits. That happens through ongoing daily contact, through people's interactions and exchanges with one another. That happens while people are sharing activities that these histories get recalled and passed on.

[55] I accept also the opinion of Ms McKenna that the establishment of a bond with her sibling is more likely than not to be fully realised and beneficial if the child is brought up with her sibling, even at this stage. As to the first point, her evidence was that in order to develop this relationship what was needed was continual access:

> Access is spending lengths of time; considerable lengths of time. Being raised in the same home, in the same environment, experiencing the same degree of care giving, being exposed to the same morals, values and you know, standards that are being provided by a family. (Tr. p747)

As to the second point, the evidence was, in summary (Tr. pps 746-7), that the strongest sibling bond is between sisters; the benefits to the younger child include language stimulation, semantic language development, and what is described as "scaffolding", i.e.;

> ...the ability to actually provide salient examples or rich information surrounding that concept to enable a person then to fully grasp the concept...The research has also demonstrated that as siblings get – sibling relationships also go through fluctuations and changes throughout the life span, but as one becomes older, the quality of sibling relationships tends to also improve quite significantly. And that towards old age, siblings tend to turn to each other a lot more for comfort and nurturing etcetera. Siblings are also likely to turn to each other in times of crisis as opposed to people from outside the family. They share a similar family perspective, they're able to discuss things that have happened in the family without giving massive amounts of details, because they share that same – what would you call it? I'm just trying to – affectation and understanding of the culture of the family that they grew up in. There's always been works that have been done to demonstrate encouragement, particularly in the disability area; there's been quite significant work on – between siblings and children that have disabilities. And the positive aspects ---

> When you talk of disabilities, are we talking physical or emotional? ---We're talking about children, for instance, that have Cerebral Palsy or Down Syndrome etcetera. For siblings to be a good medium in terms of actually promoting motor skill development; playing chasey, children throwing balls, children tending to have – siblings tending to have the time to play and to interact that often adults or parents don't have.
>
> So it is your view that there are very real potential benefits which are attached to growing up in a sibling relationship?---There are.

[56] Of course, there are no guarantees that the child will reap the advantages of growing up with a sibling. Sometimes siblings reject each other completely; sometimes there is intense sibling rivalry – but in that event remedial measures are available with professional help if the rivalry becomes problematical. I accept that it is impossible to predict in any given case whether a child will be better off raised with a sibling, as there are exceptions and these are unpredictable. Nevertheless, the indicators so far, I find, are positive, in that there is no unhealthy rivalry so far between the children, both seem to enjoy each other's company, and the grandparents are in a position to attend to both their needs and demands. I do not accept Mr Milliken's view that Samantha is not a very psychologically tough child. Nor do I accept that it is proven that she will inherit, through her genes, aspects of emotional instability. There is no evidence to support Mr Milliken's views on this topic. However, as Ms McKenna puts it, the sibling relationship is the next most important relationship, apart from the parent/child relationship (Tr. p833), although I expect that she would accept that it is not more important than the relationship between a principal care-

giver and a child in view of the statement in Exhibit A3, page 2 that "it is as important for [the child's] current and future psychological well-being for her to be reared with her half-sister as it is for her to remain with her primary care-giver". I accept also, that in many cases, children reared without siblings are no worse off than many who have siblings. I consider that the child's best interests are supported by giving her the opportunity to develop this relationship to the full.

[57] I accept also the evidence of Ms McKenna (Tr p846) that there is a risk of a sense of loss to the child if she is to remain with the foster-parents:

> And what are the consequences from a psychological point of view for Samantha if she felt that?---It's almost like a re-enactment of the original rejection, the breaking of the original bond. So that's what people describe it as being, that rejection as being, (1) I've been rejected by my birth mother; I've been raised in a family that's outside of my own family connectedness; and my sister – I have a sister that has been raised by my family, why is it that I'm not? What is it about me? And this – individuals tend to internalise this stuff rather than externalise it – 'what is it about me that is so deficient that I am not able to have been raised within my own family context?'.
>
> And if that situation developed with Samantha with Mrs S.C., is there any way that Mrs S.C. could deal with that and assist Samantha with it?---As I stated earlier today, I think the adoption research shows that irrespective of the level and degree of support that is provided to adoptees by their adopted family, the quality of care that's provided to them, that is the feelings – those feelings of rejection come up and it's only the individual themselves that can actually overcome that and to deal – and to go through the whole psychological process themselves.
>
> His Honour: Do you mean by that that the – even explaining to Sam, "Look, there wasn't any rejection of you by the W's at all; in fact, the

> W's went to court and fought for you, and the court ---?---That's – see, these---
>
> ---and a court decided that you were going to stay with ---?---Yes. No, I mean, these issues---
>
> Do you think that kind of explanation would make her feel any less rejected?---No and the evidence doesn't demonstrate that. What we're doing is we're dealing – what we're attempting to do is to deal on a cognitive level, rationally, with feelings and emotions that don't fit into rational contexts necessarily, and can't be negated through rationalisations. These are very real feelings that adoptees have and they have a very core basis. So too with all of the amount of information that she may have at her disposal as to numerous adoptees, those feelings are still evident.

Conclusions

[58] I have considered each of the factors referred to in s68F(2)(b), (c), (d), (e), (f), (g), (h) and (l) of the Act. The child is too young to express her wishes (s68F(2)(a). There are no family violence orders (s68F(2)(j)). There is a possibility of future litigation regarding Nicolla, but probably not Samantha if the foster-parents were successful. I discount this possibility as slim, and in any event, irrelevant. So far as s60B is concerned, my conclusions in para [42] are relevant to the purposes of s40B(1) and (2)(a), in that I consider that the mother is more likely to be encouraged to meet her responsibilities as a mother, and that the child is likely to better know her mother, if the child is raised by the grandparents.

[59] Bearing in mind all of these factors, I consider that the best interests of the child require a residency order in favour of the grandparents. I will hear

counsel as to the form of the orders bearing in mind s69ZK of the Act. I also consider that there ought to be a gradual handover of residency from the foster-parents to the grandparents, and that contact orders ought to be made in favour of the foster-parents and the mother. I understand that the parties wish to see if agreement can be reached on those issues. Accordingly, those issues are also reserved, as is the question of costs.
