Children's Court

New South Wales

Case Name:	The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer
Medium Neutral Citation:	[2019] NSWChC 5
Hearing Date(s):	15 & 16 April 2019
Date of Orders:	26 August 2019
Decision Date:	26 August 2019
Jurisdiction:	Care and protection
Before:	Judge Peter Johnstone, President of the Children's Court of NSW
Decision:	There is a realistic possibility of restoration of the child to the father within a reasonable period Secretary to prepare a different permanency plan, one that involves restoration
Catchwords:	CHILDREN - Care and Protection - realistic possibility of restoration
Legislation Cited:	Children and Young Persons (Care and Protection) Act 1998
Cases Cited:	Briginshaw v Briginshaw [1938] HCA 34 DFaCS re Day [2012] NSWChC 14 DFaCS and the Steward Children [2019] NSWChC 1 DFaCS Re Nicole [2018] NSWChC 3 Department of Human Services & K Siblings [2013]VChC 1 Director General of Department of Community Services; Re "Sophie" [2008] NSWCA 250 DFaCS and the Steward Children [2019] NSWChC 1 In the matter of Campbell [2011] NSWSC 761 Johnson v Page [2007] Fam CA 1235 M v M [1988] HCA 68

	Re Alistair [2006] NSWSC 411 Re Henry; JL v Secretary Department of Family and Community Services [2015] NSWCA 89 Re Mary [2014] NSWChC 7 Re Saunders and Morgan v Department of Community Services, NSWDC unreported, per Johnstone J. Re Jayden [2007] NSWCCA 35 Re Timothy [2010] NSWSC 524 Re Tanya [2016} NSWSC 794 Re Saunders and Morgan [2008] CLN Sudath v Health Care Commission [2012] NSWCA 171 VV v District Court of New South Wales [2013] NSWCA 469
Category:	Principal judgment
Parties:	The Secretary The father The mother The child
Representation:	Ms J Wong, solicitor, for the Secretary Mr T Mara, solicitor, for the father The mother did not appear Ms E Canning, solicitor, for the child, as the Independent Legal Representative
File Number(s):	2017/346944
Publication Restriction:	Pseudonyms have been used in order to anonymise the child and the parties

JUDGMENT

Introduction and issues for determination

1 Fiona Farmer is now 21 months old.

2 Fiona was assumed into care on 10 November 2017 pursuant to the *Children and Young Persons (Care and Protection) Act 1998* (the *Care Act*), and placed into interim care with her older sister, Mary, in an authorised foster care placement.

3 The child's father is Jim Farmer. Her mother is Kayla Banks.

4 The father seeks restoration of Fiona to his care. Originally, the Secretary of the Department of Communities and Justice (DCJ), previously known as the Department of Family and Community Services (DFaCS), supported restoration, but subsequently changed his position and is now opposed to the restoration of Fiona to her father, preferring that she remain in foster care with her sister, Mary, until the age of 18.

5 The mother has not been engaged in these proceedings and until recently has been unrepresented. On 8 January 2019 there was a finding made by the Children's Court of NSW that there is no realistic possibility of restoration of Fiona to her mother. The mother accepts that position and does not seek restoration to her, but she supports restoration of Fiona to her father.

6 The principal issue for determination is, therefore, whether there is a realistic possibility of restoration of Fiona to her father within a reasonable period: s 83(4) of the *Care Act*.

7 There were other, consequential issues for determination, including contact for Fiona with the members of her family.

A brief history of the proceedings

8 Following the assumption of Fiona into care, the Secretary commenced these proceedings by filing an Application on 16 November 2017: s 60 of the *Care Act*.

9 On 21 November 2017 the Children's Court made an order allocating parental responsibility for Fiona to the Minister until further order: s 69 of the *Care Act*.

10 On 13 February 2018 the Children's Court made a finding that Fiona was in need of care and protection: s 71 of the *Care Act*, and the matter was established: *DFaCS Re Nicole* [2018] NSWChC 3 at [23] - [25].

11 On 10 April 2018 the Children's Court made an order pursuant to an Application made by the Secretary for the assessment of the parenting capacity of the parents by the Children's Court Clinic (the Clinic): s 53 and s 54 of the *Care Act*.

12 An Assessment Report dated 4 May 2018 was provided to the Court prepared by an independent Clinician appointed by the Clinic, Dr Lizabeth Tong, a

clinical and forensic psychologist. Dr Tong recommended that Fiona be restored to the parental care of her parents, contingent upon certain provisos.

13 The Secretary filed a Care Plan on 6 July 2018 in which he made the assessment that there was at that time no realistic possibility of restoration of Fiona to the parents. The plan proposed that Fiona remain in the sibling placement long term.

14 On 10 July 2018 the Children's Court made an order referring the proceedings for alternative dispute resolution: s 65(1) of the *Care Act*. A Dispute Resolution Conference was conducted by a Children's Registrar on 8 August 2018: s 65(2A), following which the Children's Court made an order on 14 August 2018 for a supplementary assessment by the Clinician of the father: s 53 and s 54.

15 An Addendum Report dated 29 August 2018 prepared by Dr Tong was provided to the Court, which recommended that Fiona be restored to the sole parental care of her father, contingent upon certain provisos, noting that the parents had separated.

16 The Secretary filed an Amended Care Plan on 1 November 2018 in which he made the assessment that there was a realistic possibility of restoration of Fiona to the sole parental care of her father, contingent upon various provisos. The plan set out a staged process for the restoration over a 6 month period, following which there was to be a further period of supervision by the Secretary for an 18 month period.

17 A second Dispute Resolution Conference was conducted by a Children's Registrar on 11 December 2018, following which it was proposed that the father undergo a psychiatric assessment.

18 When the matter returned to court on 8 January 2019, the mother, who remained separated from the father, had disengaged from the proceedings and the Court made a finding that there was no realistic possibility of restoration to her. So far as the father was concerned, the Secretary sought an order for the independent assessment of the father. However, the Independent Legal representative opposed restoration to him, indicating that her position on that issue would not change regardless of any assessment. The father continued to

press for restoration to him. Accordingly, the Court directed that the matter be listed for hearing.

19 The Secretary filed a Further Amended Care Plan on 22 January 2019 in which he changed his assessment, now contending that there was no realistic possibility of restoration of Fiona to the sole parental care of her father, expressly rejecting the recommendations of the Clinician. It appears that this new plan was prepared by Ms G, who assumed the role of Acting Manager Casework at the CSC on 26 November 2018.

20 Following her appointment, Ms G reviewed the file, formed the view that restoration was not the best option for Fiona, and prepared and filed the Further Amended Care Plan opposing restoration to the father. In cross-examination she told the Court she did this notwithstanding there had been no change in any of the surrounding circumstances since the Amended Care Plan which supported restoration, and without consulting anyone, including her predecessor in the role, or the father.

21 When the matter returned to court on 5 February 2019 it was fixed for hearing over 3 days: 15, 16 and 17 April 2019.

22 The matter came before me for hearing commencing on Monday 16 April 2019 and continued into Tuesday 17 April 2019. The Secretary was represented by Ms J Wong, solicitor. The father was represented by Mr T Mara, solicitor. The mother did not appear. The child was represented by Ms E Canning as the Independent Legal Representative, appointed by the Court: s 99 of the *Care Act*.

23 The parties relied upon various documents including affidavits filed, the Application, Summary of Proposed Plan, and various Assessment Reports and Care Plans. Several witnesses attended for cross-examination, namely Dr Tong, the father and Ms G.

24 At the conclusion of the evidence the matter was stood over for written submissions and a transcript was ordered.

25 The transcript became available on 20 May 2019, and the parties then agreed on a timetable for the provision of written submissions.

26 Written submissions were filed on behalf of the Secretary dated 11 June 2019. Written submissions were filed on behalf of the father dated 18 June 2019. Written submissions were filed by the Independent Legal Representative dated 21 June 2019. Judgment was then formally reserved.

Background

27 In her written submissions Ms Wong, on behalf of the Secretary, set out a helpful summary of the historical background to this dispute, which I am happy to adopt (excluding the footnotes):

> 5. The proceedings concern the child Fiona, born 10 November 2017, who is one year and 7 months old. The child has an older sister Mary Farmer who is 3 years old. Mary is also the daughter of the mother and the father.
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> 6. On 6 September 2016, Mary was assumed into the care of the Minister. Mary was assumed because of concerns of the mother's mental health and Mary's failure to thrive and nutritional neglect.
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> 7. The Secretary accepts that on or around 14 September 2016 Mary had day surgery at Hospital to correct a tongue tie. The Secretary concedes that Mary's failure to thrive at nearly five months had an organic basis and not as a result of either the mother or father neglecting to feed her.
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> 8. In February 2017, the parents commence the Circle of Security Program through a Catholic organisation.
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> 9. On 3 March 2017, Children's Court Clinician Jessica Pratley, Forensic Psychologist, prepared a report noting the mother lacks insight into her significant and unmanaged mental health, therefore reducing the likelihood of future medication compliance; the mother's attachment to Mary is inconsistent and the mother does not have the skills or capacity to offer Mary a secure base and attachment; the father demonstrates limited insight into the mother's mental illness and how this impairs her parenting capacity; both parents failed to recognise child protection concerns and therefore do not have capacity to address same; and both parents, during the assessment, minimised the areas of concern, stating they were resolved despite no evidence that they had.
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> 10. On 17 October 2017, final orders were made in the Children's Court of New South Wales at Parramatta for Mary to remain in the parental responsibility of the Minister until she attains 18 years of age. Since 6 November 2017, Mary has resided with Wesley Dalmar authorised carers.
>
> 11. In November 2017, Fiona was born and assumed into the care of the Minister. The basis of the assumption was the child protection concerns in regard to Mary in accordance with s. 106A of the Care Act; and ongoing concerns in regard to the mother's mental health and disengaging with services. Fiona was placed in the same placement with her sister upon her discharge from hospital.
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> 12. On 16 November 2017, an Application Initiating Care Proceedings was filed on behalf of the Secretary.

13. On 21 November 2017, her Honour Magistrate Haskett of the Children's Court of New South Wales at Parramatta made an order that Fiona be placed in the parental responsibility of the Minister until further order.

14. On 22 November 2017, Fiona was placed with her mother in the residential program Mum's and Kids Matter ("MaKM program"). The father's filed evidence was that he saw the mother and Fiona at MaKM program three to four days per week. Although when cross examined the father was unsure whether the mother and Fiona entered the MaKM program in 2018 or 2019.

15. On 22 January 2018, the Secretary filed a Summary of Proposed Plan supporting restoration of Fiona to her parents care.

16. The father's evidence filed on 25 January 2018 stated:

> (a) He has maintained stable accommodation and will shortly be setting up baby furniture in Fiona's room.
>
> (b) Agreed to participate in a cognitive assessment.
>
> (c) He has a better understanding of the mother's mental health and how this can impact on her ability to parent Fiona.
>
> (d) Learnt the signs of when the mother is having mental health issues, i.e. unfocussed, dizzy or emotional.
>
> (e) Knows he can contact the mother's caseworker if he has concerns about the mother's mental health and has a list of services he can contact if the mother has any further mental health issues.

17. On 23 January 2018, the father completes the Circle of Security program at MaKM.

18. On 13 February 2018, his Honour Magistrate Sbrizzi of the Children's Court of New South Wales at Parramatta made a finding that Fiona was need of care and protection at the time of her assumption in accordance with s. 71(1)(d) of the Care Act.

19. On 14 February 2018, the mother and Fiona were discharged from the MaKM program. The Department arranged for the in-home service Zest Personalised Care to assist and support both the mother and father on a daily basis.

20. On 14 March 2018, a Community Health Nurse recorded that Fiona had been recorded losing weight each week for the previous three weeks.

21. On 14 March 2018, following referral by Ms Fear, the mother and father attended Hospital with Fiona. Fiona was diagnosed with mild gastroesophageal reflux and discharged.

22. On 21 March 2018, the Community Health Nurse was required to telephone the parents as they missed their scheduled appointment. The mother had advised Zest Personalised Care worker that Fiona had been discharged and no longer needed to attend the Community Health Centre to be weighed. On attending the Community Health Centre, the parents did not appear to be in a good mood and the father presented with poor hygiene.

23. The father's evidence filed on 23 March 2018 states he has a good working relationship with the Department and always tries to be upfront and honest with them about how Fiona is going.

24. On 4 April 2018, caseworker Grace North received a telephone call from the Community Health Nurse Carly Hanson ("Ms Hanson"). Ms Hanson observed Fiona had put on weight and the parents appeared in a poor mood and quite angry. The father accused Ms Fear of lying to the Department about Fiona's weight discrepancies. Ms Hanson observed that the father appeared fixated on Fiona's recent weight loss and continued to state his belief that the Community Health Centre was being dishonest. The father advised that the discrepancies in recording Fiona's weight is the reason the matter was before Court.

25. On 11 April 2018, caseworker Grace North received a telephone call from the Community Health Nurse Ms Hanson. Ms Hanson observed Fiona had put on weight and the parents appeared more pleasant and in a better mood; the mother engaged well with Fiona; and the father took photographs of the scales to compare.

26. On 18 April 2018, caseworker Grace North received a telephone call from the Community Health Nurse Ms Hanson. Ms Hanson observed Fiona had put on weight and the father appeared friendly and had an open conversation. Ms Hanson observed that the mother appeared agitated with the conversing between herself and the father.

27. On 20 April 2019, caseworker Grace North received an email from the Wesley Dalmar Case Manager advising the father had spoken with Ms Neal's team leader Jacki Machado advising that the mother does not leave the household and her mental health was deteriorating.

28. On 20 April 2019, caseworker Grace North also received a telephone call from MaKM program coordinator Sarah Lee ("Ms Lee") reporting concerns of the mother's deteriorating mental health and MaKM Mental Health Nurse Eric Okunzuwa would be conducting a mental health assessment.

29. During an unannounced home visit on 20 April 2019, caseworker Grace North had a conversation with the mother reporting her frustration in regard to her relationship with the father. The mother does not advise that the father had moved out.

30. On 20 April 2018, caseworker Grace North received an email from MaKM program coordinator Ms Lee, in regard to Eric Okunzuwa's home visit on the mother. The mother expressed concerns about the father not working within the routine she had implemented for Fiona and he often stays at this parent's home.

31. On 22 April 2018, During a Zest Personalised Care Home Visit, the mother was observed to be upset. The mother had asked the father to leave the home a number of times and had called the Police. The father refused to leave. The Mother reported concerns about losing Fiona and that the father would blame her if Fiona does not remain in their care. The mother reported that the father was photographing the mother's medication as he believed she was not taking it.

32. On 24 April 2018, caseworker Grace North received an email from the Community Health Centre Registered Mental Health Nurse in regard to a home visit she conducted on the parents. The mother and Fiona appeared distressed; the mother had asked the father to leave the home until 8pm; Fiona was visibly distressed and did not settle; Fiona's heart rate was elevated; the mother could not communicate with the father to ask him to come home and Ms Patel had to call the father herself; the father returned

home and reported the mother would not allow him to do anything and that she had contacted the Police when he refused to leave; the father reported the mother had been unwell for among a week; the mother reported that she had not taken her medication for three days and was guarded and did not provide information; and an urgent psychiatric review was booked for 1 May 2019.

33. On 24 April 2018, the mother and father were interviewed by Children's Court Clinician Dr Lizabeth Tong.

34. On 27 April 2018, caseworker Grace North attempted to conduct an unannounced home visit of the mother and father. The mother did not answer her telephone. The father returned Ms North's call and advised he had been staying with his father all week and the mother was at home. Ms North arranged a meeting at Community Services Centre for later that day.

35. Later on 27 April 2018, caseworker Grace North received a telephone call from the father. The father advised he had not attended CSC as agreed as he wanted to go home first and get the mother to attend. The father disclosed concerns about the mother's mental health and that he had contacted Relationships Australia in an attempt to initiate counselling. Following this conversation a text message was received from the father: "*Hi grace I have managed to speak with Kayla and we have sorted everything out. Whenever Kayla needs timeout I will provide it*".

36. On 30 April 2018, caseworker Grace North received a telephone call from MaKM Mental Health Nurse Eric Okunzuwa in regard to his home visit earlier that day. Mr Okunzuwa reported his concerns that the mother appeared to have no insight into what was occurring with the father and how this was impacting on Fiona. The mother appeared preoccupied with her relationship with the father and this was overshadowing Fiona's needs.

37. On 3 May 2018, caseworker Grace North received a telephone call from MaKM Mental Health Nurse Eric Okunzuwa in regard to a meeting he had with the father. The father had reported that the mother would not let him stay in the home; that the parents would benefit from Functional Family Therapy in the home; concern that nobody was monitoring the mother' medication; referral to a long term intervention service was appropriate; and confirmed the mother's prescribed medication, noting the mother had not advised Ms North of the correct dosage.

38. On 8 May 2018, Dr Lizabeth Tong's Children's Court Clinic Assessment report released to the parties. Dr Tong recommended restoration of Fiona to the parent's care.

39. On 15 May 2018, during an interagency service meeting it was agreed to refer the parents to Functional Family Therapy.

40. On 18 May 2018, caseworker Grace North conducted a home visit on the parents. The father confirmed that Fiona had attended playgroup earlier that day; the father confirmed he was spending some nights in the apartment and some nights with his father; the caseworker stressed the importance of the parents sharing the care of Fiona; and the parents refused to allow the Department to purchase a pram, the father advising he should be able to meet the costs.

41. On 29 May 2018, caseworker Grace North received an email from MaKM Mental Health Nurse Eric Okunzuwa advising that the father was not in the home and wanting the parents to attend relationship counselling.

42. On 4 June 2018, caseworker Grace North conducted a home visit on the mother and father with Family Therapists from Functional Family Therapy.

43. On 6 June 2018, caseworker Grace North received a telephone call from MaKM Mental Health Nurse Eric Okunzuwa in regard to attempts to contact the father. Mr Okunzuwa advised that the father continues not to reside in the home and MaKM program would be ceasing to work with the family at the end of June 2018.

44. On 15 June 2018, caseworker Grace North received a telephone call from Community Health Nurse Ms Fear. Ms Fear advised Fiona had put on weight. Ms Fear expressed concerns that MaKM program would be retrieving Fiona's pram. Ms North confirmed that the Department had offered on multiple occasions to purchase a pram and this had been declined by the mother and father.

45. On 22 June 2018, caseworker Grace North had a telephone conversation with the father in regard to extended family contact. The father advised that his relationship with the mother was 'okay' and that they had commenced counselling with Relationships Australia; the father was advised to take a more proactive role in parenting Fiona and that it was positive for Fiona to have paternal family contact; the father advised that every time he tries to take Fiona out of the home the mother threatens to call the Police; the father was reminded that the Minister had parental responsibility, he understood this and was willing to take Fiona to see his family, however concerned about the mother's reaction.

46. On 25 June 2018, the father attended the CSC and enquired about what supports the Department could provide if he were to leave the mother and apply for Fiona to be restored to his care alone. The father was not certain at that stage as he wanted to continue repairing the relationship through counselling, but needed to consider other options.

47. On 27 June 2018, caseworker Grace North conducted a home visit. The father was outside on the telephone. The apartment was observed to have an offensive smell. The father stated that the home visit was because he was not in the home; the father clarified and admitted that he had not been living in the apartment since mid-March; the father advised that the mother wouldn't let him live in the home; the mother would threaten to call the Police if the father did not leave; the father said it was not because he didn't want to be in the home, the mother wouldn't allow it. A safety plan was developed and signed by both the mother and father.

48. On 28 June 2018, caseworker Grace North had a telephone conversation with the father. The father advised that he had moved back in the home and things had dramatically improved overnight and that he and the mother had attended Relationships Australia overnight.

49. Later, on 28 June 2018, caseworker Grace North conducted a home visit, Fiona was assumed into care and returned to her previous placement with her sister Mary. The basis of the assumption was that the mother and father could not meet Fiona's immediate needs; persistent nutritional concerns in regard to feeding Fiona; the mother's deteriorating mental health and medication non-compliance; neglect; and tensions between the mother and father.

50. On 6 July 2018, a care plan was filed for Fiona. The Secretary recommended a finding of no realistic possibility of restoration to either parent

and recommended parental responsibility to the Minister until Fiona attains eighteen years of age.

51. The father's evidence filed on 19 July 2018, states that the father commenced counselling with psychologist Sue Benney on 12 July 2018.

52. On 17 September 2018, Dr Lizabeth Tong's second Children's Court Clinic Assessment report released to the parties. Dr Tong recommended restoration of Fiona to the father's sole care.

53. On 18 October 2018, the father attended a case plan meeting with caseworkers. The father stated he is unable to manage non-controlled contact between Fiona and the mother. Concerns were raised about the father's ability to identify risks associated with the mother's mental stability and evidence the father has not demonstrated the ability to accurately assess the mother's treatment compliance.

54. On 1 November 2018, an amended Care Plan for Fiona was filed. The Secretary recommended a finding of no realistic possibility of restoration to the mother, but realistic possibility of restoration to the father.

55. On 21 November 2018, caseworkers attended a Permanency Consultation with Kim Downie, Permanency Coordinator for the Department, and Wesley Dalmar casework team. Ms Downie was concerned with the sister's small age gap that there was different permanency outcomes for Mary and Fiona; final orders for Mary were obtained only three months prior to birth of Fiona; separation of siblings would not be in their best interests; recommended an independent restoration assessment in relation to separation of siblings; and Children's Court Clinic assessment should have included addressing the issue of separating siblings.

56. On 26 November 2018, Ms G commenced her role as Manager Casework for Fiona.

57. On 11 December 2018, following a Dispute Resolution Conference, orders made by a Children's Court Registrar for the Secretary to circulate terms of a further Assessment Application by 14 December 2018; and matter adjourned for further mention on 8 January 2019 in regard to the supplementary Children's Court Clinic Assessment application.

58. On 8 January 2019, the Children's Court of New South Wales at Parramatta made a finding of no realistic possibility of restoration of Fiona to the mother's care. The proposed supplementary Children's Court Clinic Assessment application was refused.

59. On 8 January 2019, the father and Fiona attended Newpin's Fathers Centre between 10am and noon.

60. On 11 January 2019, caseworker Grace North received an email from Mary and Fiona's carer in relation to discussions with the contact worker observing the father's contact. The father had confused Mary with comments around Mary refusing to give the father a kiss.

61. On 16 January 2019, caseworker Grace North had a conversation with Wesley Dalmar Case Manager Ms Creamer. The father requested contact with Fiona and Mary to occur at the same time as their contact with his family.

62. On 16 January 2019, caseworkers had concerns about the father's transparency with services. The father advised Newpin that he cannot attend

the service two days per week due to his commitments to see Fiona twice week, this being incorrect as he sees Fiona once a week.

63. On 22 January 2019, a further amended care plan for Fiona was filed. The Secretary recommended a finding of no realistic possibility of restoration to the father and recommends parental responsibility to the Minister until Fiona attains eighteen years of age.

64. On 13 March 2019, the casework team attended a meeting with Newpin. Newpin confirmed:

(a) They have met Fiona once.

(b) The father attends Newpin twice a week – 1 parenting group and 1 support group.

(c) The father attended "Keeping Children Safe" program and been very reflective on the course content.

(d) Engagement with Newpin Restoration Service – 4 goals:

1. Father to advise the Department/Wesley Dalmar/Newpin if he resumes contact or resumes a relationship with the mother.

2. The father to assist Fiona maintaining a relationship with the maternal grandparents.

3. The father to take responsibility of historic and current child protection concerns in regard to Fiona.

4. The father to participate in supervised contact and demonstrate an ability to talk about what he could do differently.

Given the Department does not support restoration, 2 and 4 have been unable to be assessed.

65. Newpin workers expressed concern in regard to the father's level of insight into historic and current child protection concerns; and have observed the father having some difficulty taking responsibility of his own actions that increased the level of risk for Fiona.

66. On 14 March 2019, a case review meeting with Wesley Dalmar was attended by the father. The father was uncertain why the Department were not supporting restoration. The father was advised restoration was not supported based on ongoing concerns relating to his parenting capacity and his lack of insight into the child protection concerns leading to Fiona's entry into care.

67. On 19 March 2019, caseworker Leila Pehlic conducted an unannounced home visit on the father. The father stated he has been attending Newpin consistently since 2017 in regard to Mary; the father was unsure of the Department's expectations and what he could do to demonstrate increased capacity to care for Fiona; the father couldn't understand why the Department had changed their mind in relation to restoration as he felt *"nothing had changed"* in his circumstances; the father couldn't understand what he did wrong except leaving Fiona with the mother; the father was unable to identify risks posed to Fiona's safety and well-being when left with the mother; the father became upset when it was advised he had been prioritising his needs over Fiona's immediate safety; the father was unable to explore nor articulate the Departments concerns; the father disclosed he was a victim of domestic

violence by the mother, however could not articulated the dangers and impact of domestic violence to Fiona's immediate safety and well-being; the father advised he has no issue caring for Fiona and Mary. The father expressed being unaware of his progress during contact visits as he had not received any reports; concerns were raised by the Department in regard to the father's inability to reflect on his own parenting, particularly within a controlled environment; the father acknowledged challenges in regard to his contact with Fiona and Mary, referring to their "indifferent ages" and one of the reasons he has contact in a controlled environment; caseworker Ms Pehlic acknowledged that multiple family members attending the father's contact with Mary and Fiona has been detrimental to assessing the father's parenting capacity and the father was agreeable to have individual visits with Fiona and Mary alone; concerns in regard to the father being unable to articulate the concerns leading up to the removal of Fiona nor the ability to articulate the impacts of child protection concerns on Fiona's well-being and longer term development.

68. On 27 March 2019, the father completes the program Keeping Children Safe and for the third time Circle of Security.

69. The father's evidence filed on 5 April 2019, states that he has decided to undertake Circle of Security for the fourth time.

70. The father's evidence filed on 5 April 2019, states that on 5 April 2019 he attended the mother's contact with Fiona as a support person for the mother.

28 I accept the history as outlined is accurate.

The Secretary's Submissions

29 Ms Wong, on behalf of the Secretary submits that there is no realistic possibility of restoration of Fiona to her father.

30 Firstly, because she has formed an attachment to her carers, to which a restoration would cause traumatic disruption. She refers to evidence from the carers and the Department's Permanency Coordinator, Kim Downie.

31 Secondly, it is submitted, there are a number of factors that counter a finding of restoration to the father. The submissions then proceed to detail the safety concerns articulated in the Summary of Proposed Plan, and the various matters it was considered the father needed to address. It was submitted that the father had not addressed a number of the concerns articulated.

32 As to the concern that the father had not demonstrated insight into the child protection concerns for Fiona, or accepted responsibility, the submissions set out and relied on a passage from the Assessment Report dated 2 March 2017 of the first Children's Court Clinician, Jessica Pratley, whose report was prepared in respect of the removal of the older sister, Mary:

> "Mr Farmer presented as a naïve man and a concrete thinker who demonstrated limited insight into his relationship with others and a poor understanding of the mental health concerns present for his wife. Furthermore, he presented as reluctant to receive further information in this regard. This presents a significant barrier to him offering adequate support to his wife and raises concerns about his protective capacity towards Mary should Mrs Farmer become significantly unwell in the future."

33 It was submitted that this prediction in fact eventuated when the father later failed to protect Fiona from the mother; that the father has an inadequate level of insight into the child protection concerns for Fiona; has failed to take responsibility for his actions that increased the risks to Fiona; and was inappropriately subservient to the views and demands of the mother.

34 It was next submitted that the father has shown a limited commitment to Fiona's safety, has not been upfront and honest with the Department, and has had limited engagement with the Department, and that has placed Fiona at risk of harm. The submissions summarise various pieces of evidence to support these propositions.

35 In particular, the Secretary contends that the father has been unable to demonstrate an understanding of the impact of the mother's mental health on her capacity to parent Fiona, that he abandoned Fiona at a time when the mother's mental health "decompensated", and failed to engage with caseworkers and service providers notwithstanding the identified concerns in respect of the mother. The Secretary is critical of the father's inadequate engagement with the Newpin service, suggesting it has been superficial and tokenistic.

36 Finally, the submissions cast doubt upon the father's parenting capacity to meet Fiona's needs on a long term ongoing basis. The Secretary points to his inadequate engagement with services, his failure to follow through on referrals for Fiona to professionals to assist with her psychological development, and her emotional and learning needs. The submissions refer to evidence suggesting he does not understand Fiona's individual needs, an inability to manage day-to-day tasks, and poor capacity for nurturing and supporting Fiona.

37 The Secretary's submissions conclude:

> "In accordance with s. 83(3) it is submitted that the Secretary's further amended care plan filed 22 January 2019 evidences a suitable long term placement for Fiona… an order allocating parental responsibility to the Minister until Fiona attains eighteen years will provide Fiona with a safe, nurturing, stable and secure environment by ensuring she remains in the current sibling placement where her physical, emotional, psychological, medical and educational needs will be met."

The Independent Legal Representative's submissions

38 Ms Canning, the Independent Legal Representative (ILR) for the child, supported the Secretary on the issue of restoration to the father. In her written submissions on behalf of the child, she submitted that it is not in the interests of Fiona to be removed from the family home in which she has spent most of her life, cared for by a foster mother and father who seek to adopt or care permanently for her, that it is not in Fiona's interests to be separated from her sister Mary, only a year and a half older than she is, and it is not in Fiona's best interests to be restored to the care of her father.

39 The ILR submits that the father has made several statements that have later been proven to be untrue, false, or a misrepresentation by omission. These statements are set out in his affidavit made on 23 March 2018:

> "I have noticed Kayla's parenting ability to be greatly increased by her being given the chance to parent Fiona and she is leaning new strategies all the time as to how to look after Fiona."
>
> "I continue to live with Kayla and Fiona in a two bedroom unit at Kingswood."
>
> "I believe I have a good working relationship with FACS and we always try to be upfront and honest with them about how Fiona is going."
>
> "I take a role in ensuring that Kayla's mental health continues to be managed. She takes her medication twice per day and I always ensure she is taking her medication. I realise how important it is, given her mental health diagnosis, that she takes her medication."

40 The father "*worked to hide his concerns from DFaCS and from the Court by swearing or affirming affidavits that were demonstrably false*." His attempts to suggest that he articulated his concerns to Mr Eric Okunzuwa have also been shown to have been misleading. He was less than candid in his presentation to the Children's Court Clinician, Dr Tong, especially in relation to his moving out, and the mother's medication.

41 The ILR next submitted that little or no weight should be placed on the opinions expressed by the Children's Court Clinician, due to "a number of serious

failings in process, procedure and methodology of Dr Tong, combined with the false and misleading information reported by the parents".

42 On the other hand, the ILR placed great weight on the earlier clinical report of Ms Jessica Pratley:

> "Ms Pratley has accurately identified the risk the mother presents to her child if she becomes psychotic or delusional and also the inability of the father to understand or appreciate this risk. She also accurately predicted that the father would be either unable or unwilling to act protectively for his daughter if his wife's mental health declined. This is exactly the situation that arose when the parents were caring for Fiona."

43 In particular, it was submitted, Ms Pratley's assessment of the father was more thorough, and better observed, assessed and articulated:

> "The mother's diagnosis means that when she is unmedicated she may experience delusions that significantly impact her capacity to parent Mary."
>
> "Mr Farmer has limited understanding of Mrs Farmer's mental health. He does not understand the risks it poses to her capacity to parent Mary and presented as reluctant to gain such insight. As such, he does not present as able to effectively protect Mary from the potential harms that Mrs Farmer, when actively psychotic or developing delusions, may pose to Mary."
>
> "Mr Farmer's lack of insight also means that he is unlikely to protect Mary should Mrs Farmer experience relapse and become neglectful, harsh or otherwise inappropriate in her care of Mary."

44 The ILR submits that the suggestion that with support from DFaCS and services restoration is viable is belied by the degree of service provision to the family prior to removal but which failed to protect Fiona.

45 The submissions list an extensive array of services provided to and interactions with the family:

> "Given this extensive list of multi-disciplinary support and services provided to both parents, it is difficult to see what further level of service provision could be provided to ensure that Fiona was safely restored to her father."

46 By way of conclusion, the ILR summarises the reasons for her view that Fiona should not be restored to her father, as follows:

> "Mr Farmer has failed to adequately care for two daughters, both who required medical care to remedy the effects of neglect suffered while in his care. He has demonstrated twice, that he does not understand how a child is to be fed and nourished, what clothing a child needs in cool weather or how a child needs to be protected from risk."
>
> "Mr Farmer has failed twice to protect his daughters from their mother, who at best is loving and attentive and at her worst is psychotic and delusional."

> "Mr Farmer has failed to be honest to this Court around his conduct. He has lied and misrepresented the truth in his affidavit evidence, oral evidence and to the Clinician. He has minimised his culpability in the sequence of events leading to Fiona's removal."
>
> "Mr Farmer has demonstrated he is incapable of putting Fiona's needs ahead of his own. When the relationship with Ms Banks deteriorated he retreated and left his vulnerable baby daughter at extreme risk. He then lied to caseworkers and service providers and this court, placing Fiona at an even greater risk of harm from her unwell mother."
>
> "Mr Farmer was equally responsible for the care of his daughter. He abrogated that responsibility by leaving the home and leaving his vulnerable baby with the mother, whom he knew to be unwell, un-medicated and potentially psychotic."

The Father's submissions

47 Mr Mara, on behalf of the father, submits that Fiona should be placed with her father, and that her best interests would be served by her having the opportunity of growing up with a parent, not in a foster care placement.

48 The main thrust of the submissions made on behalf of the father is that he has done everything asked of him, particularly since his separation from the mother, and he "only requires help and oversight to look after his child":

> "Since the parents' separation, the father has established himself in his own accommodation and has done everything required of him as part of the Summary of Proposed Plan and, in fact, has been willing to do more."

49 Whatever the flaws or shortcomings in his conduct or attitude may have existed historically, the present reality is that he is open, honest and determined in his desire to have Fiona in his care:

> "… both the Department and the ILR chose to focus on issues that were historic regarding the father's issues. These were issues in regards to Mary from a number of years prior and also issues that lead to the removal of Fiona from both his and the mother's care in the middle of 2018.
>
> No questions asked of him as to what he had been learning from his involvement in programs such as Newpin or his engagement with his counsellor. It appeared that neither representative chose to test his ability to parent as a single parent. We note his ability to parent as a single parent has not been tested (other than by the clinician) given the only time the children have been living with the parents was when they were parenting jointly."

50 The father explains his failures to protect Fiona whilst he was still in a relationship with the mother was a desire to avoid conflict in the home, and "took the view that it was important that those disagreements did not occur around the child".

51 The father rejects the criticism of his having stepped away from the home to avoid altercations:

> "The father, in his lengthy oral evidence, spoke to the fact he thought that this would be better for the child to reduce the potential for conflict. The evidence shows it would appear the mother felt strongly that it was her responsibility to look after Fiona alone and as her mental health got worse she would not accept help from the father or any services. Throughout the whole period of this deterioration the Department had Parental Responsibility for the child and could have stepped in at any time on the basis of the reports they were receiving regarding the mothers mental health."

52 The solicitor for the father is critical of the Department's casework as regards the father:

> "We note the father's solicitor, throughout the proceedings, has repeatedly written to the Department seeking clarification as to whether there is anything further that is required of the father to undertake. The Department have acknowledged there is no request or requirement for the father to do anything further, they simply do not support restoration to him despite having previously supported it on two separate Care Plans."
>
> "We also note that the Summary of Proposed Plan, which supported restoration, set out the requirements for the father, which have all been achieved by him and there have been no further requests to add to that list of tasks that the father has not done."

53 In particular, the solicitor for the father is critical of the circumstances under which the Secretary's position on restoration was changed in the Further Amended Care Plan filed on 22 January 2019:

> "… nothing has occurred in order for the Department to change their position, other than a change in staff at the head of the case."

54 It was pointed out that the change in position was made by the Manager Casework alone and despite the following:

- She had not met with the father nor tested his ability to achieve a restoration,
- She had not identified anything the father had not done that he had been requested to do by the Department,
- She had not identified anything further he could have done in order to gain restoration,
- She did not meet with him to say these are our concerns and we think you should do this course for example to address them.

55 Nor had there been any change in circumstances:

> "It is essential to note at this time that there was a change in case manager within a few weeks of the change in law, and despite the change in law, the Department did, in fact, go the other way from a position of supporting

> restoration to no longer supporting restoration. There were not any factual circumstances, other than the change in case manager, that led to this decision that, in the writer's submissions, would have warranted such a change."

56 It was submitted on behalf of the father that the Court should accept the recommendations of the Clinician, Dr Tong, in particular because there was no direct evidence that contradicted her view on restoration:

> "The clinician was emphatic that a restoration to the father is what is in Fiona's best interests and the clinician, at no stage, varied from this position under cross-examination over many hours… We respectfully submit to the Court that there is no cogent reason to vary from the recommendation of Dr Tong in her second report which supports restoration solely to the father. Dr Tong was the only expert to give evidence in these proceedings and her evidence was based upon having the benefit of not only all the material filed in the proceeding but also two meetings with the father."

57 The father's submissions set out a summary of reasons as to why the Court should "order restoration":

- the father has done everything in the Summary of Proposed Plan that has been required of him by the Department;
- the father has maintained a stable life away from the mother with no recommencement of their relationship.
- the father has accommodation that is suitable for Fiona to enter into and he has the support of a number of services including his counsellor as well as Newpin;
- the father has the family support of both his mother and father who, both live close to him and would be able to provide assistance to him at home at any stage if required;
- the Court has the ability to make an Order to make sure that the restoration is working and is being monitored over a period of two or even more years under the legislation and any concerns that the Department or the Court may have in regard to the restoration can be monitored during this period. Therefore the least intrusive option can easily be taken by the Court with appropriate scaffolding;
- there is no evidence that the father has any issues in regards to his own mental health;
- there is no evidence that the father has any issues, nor ever has, in regard to drugs or alcohol;
- there is no evidence that the father had an issue in regards to domestic violence. It is clear he has never been charged in regard to any offences,
- nor has there been any credible police reports in regard to domestic violence. It is clear that the only thing that ever occurred was some arguments between himself and the mother during periods when the mother's mental health was

not stable. The father, it is clear, would step away from these situations and would exit the home so the father was someone who actually worked to diffuse any violent situations. The Court should place no weight on the father in this regard. Indeed had the Department really thought this was an issue would they not have asked him to do domestic violence programs or course in their Summary of Proposed Plan or at a later date;

- the father has a clear commitment to his child. He has attended all the contacts over a lengthy period of time that have been provided to him with regard to the children;
- the only expert to have read all the documents, being the Children's Court Clinician's evidence, has gone through relatively unchallenged even after a day of cross examination by the parties. No headway was made by either legal representative for the Department or the child that challenged the father's ability to care for Fiona.

The relevant legal framework

58 Proceedings relating to the care and protection of children and young persons in NSW, including first instance matters before the Children's Court, and appeals from its decisions, are public law proceedings, governed, both substantively and procedurally, by the *Care Act*.

59 Care proceedings involve discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection: s 60 of the *Care Act*.

60 The rules of evidence do not apply, the proceedings are non-adversarial and they are required to be conducted with as little formality and legal technicality and form as the circumstances permit.

61 Decisions in Care proceedings are to be made consistently with the objects, provisions and principles provided for in the *Care Act*, and where appropriate, the *United Nations Convention on the Rights of the Child 1989* (CROC).

62 The *Care Act* contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department's powers and responsibilities begin and end as opposed to those of the Court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the Court: Report of the Special Commission of Inquiry

into Child Protection Services in NSW, November 2008 (the "Wood Report") at 11.2.

63 The objects of the *Care Act*, are to provide: s 8

> (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and
>
> (b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and
>
> (c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

64 The *Care Act* sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear in other parts of the Act.

65 First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

66 This principle, therefore, is the underpinning philosophy by which all relevant decisions are to be made. It operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

67 It is now well settled law that the proper test to be applied in care proceedings in respect of final orders is that of "unacceptable risk to the child": *M v M* [1988] HCA 68 at [25]. That case dealt with past sexual abuse of a child but the principles there set out apply to other forms of harm, such as physical and emotional harm. A positive finding of an allegation of harm having been caused to a child should only be made where the Court is so satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw*. Nevertheless, an unexcluded possibility of past harm to a child is capable of

supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned: at [26].

68 The Secretary, will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable: *Secretary of Department of Community Services; Re "Sophie"* [2008] NSWCA 250 at [67] - [68], per Sackville AJA.

69 Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] Fam CA 1235. This is an exercise in foresight.

70 The Court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated, for example, the nature and extent of parental contact, including any need for supervision: from a paper by Justice Stewart Austin delivered at the 2015 Hunter Valley Family Law Conference.

71 Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

72 Secondary to the paramount concern, the *Care Act* sets out other, particular principles to be applied in the administration of the Act. These are set out in ss 9(2) and 10 and include the following:

- Wherever a child is able to form their own view, they are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child's developmental capacity, and the circumstances: s 9(2)(a). See also s 10.
- Account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child or young person: s 9(2)(b).
- Any action to be taken to protect the children from harm must be the least intrusive intervention in the life of the children and their family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c).

- If children are temporarily or permanently deprived of their family environment, or cannot be allowed to remain in that environment in their own best interests, they are entitled to special protection and assistance from the State, and their name, identity, language, cultural and religious ties should, as far as possible, be preserved.
- Any out-of-home care arrangements are to be made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and, the younger the age of the child, the greater the need for early decisions to be made s 9(2)(e).
- If placed in out-of-home care, a child is entitled to a safe, nurturing, stable, and secure environment. Unless contrary to the child's best interests, and taking into account the wishes of the child, this will include the retention of relationships with people significant to the children: s 9(2)(f).

73 There are also special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11, 12 and 13. Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible: s 11(1).

- Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.
- Where possible, any out-of-home placement of an Aboriginal or Torres Strait Islander child is to be with a member of the extended family or kinship group.
- If that is not possible, the Act provides for a descending process of placement with an appropriate Aboriginal and Torres Straits Islander carer before, as a last resort, placement with a non-Aboriginal and Torres Straits Islander carer, after consultation: s 13(1).
- In determining where a child is to be placed, account is to be taken of whether the child identifies as an Aboriginal or Torres Strait Islander and the expressed wishes of the child: s 13(2).
- A permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13: s 78A(3).

74 If the Secretary forms the opinion that a child is in need of care and protection, he or she may take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child: s 34(1).

75 Removal of a child into state care may be sought by seeking orders from the Court: s 34(2)(d), by the obtaining of a warrant: s 233, or, where appropriate, by effecting an emergency removal: s 34(2)(c); see also s 43 and s 44.

76 Where a child is removed, or the care responsibility of a child is assumed, by the Secretary, he or she is then required to make a Care application to the Children's Court within 3 working days and explain why the child was removed: s 45.

77 The Court may then make interim Care orders: s 69. An 'interim order' is an order of a temporary or provisional nature pending the final resolution of the proceedings in which an applicant "generally speaking, does not have to satisfy the Court of the merits of its claim". It may be made if it is not in the best interests of the safety, welfare and well-being of the child that he or she remain with the parent or parents, or that it is appropriate for the safety (s 69(2)), welfare and well-being of the child (s 70), or that an interim order is necessary, and is preferable to an order dismissing the proceedings (s 70A): *Re Jayden* [2007] NSWCA 35 per Ipp J at [70]

78 The usual interim order is for the allocation of parental responsibility to the Minister until further order: *Re Mary* [2014] NSWChC 7.

79 Such an order enables appropriate investigation and planning to be undertaken by Departmental caseworkers while the child is in a protected environment. The making of an interim order in effect puts the position of the parties in a holding pattern, without prejudice, and without any admissions.

80 The *Care Act*, as recently amended, makes it clear that parties may apply to vary an interim order without the need to follow the formal process that applies to the rescission or variation of final Care orders.

81 This overcomes a problem thought to be posed by the Supreme Court decision in *Re Timothy*, to the effect that an application to vary an interim order needed to be brought under s 90 of the *Care Act*, such that a formal application was required seeking leave to apply, and evidence adduced to satisfy the Court that there had been a significant change in circumstances. The Children's Court may now vary interim orders at any time if considered appropriate, including on

oral application in matters currently before the Court: *Re Timothy* [2010] NSWSC 524 at [59] - [60].

82 After removal or assumption of a child into care, and the making of an interim order allocating parental responsibility to the Minister, the proceedings then focus on the past and current circumstances of the child. This first phase of care proceedings is generally referred to as the establishment phase.

83 Thus, before the Court moves to the second phase of the proceedings, in which the focus is on the child's future, the proceedings are required to be "established": *Re Alistair* [2006] NSWSC 411 at [69].

84 The establishment precondition is satisfied if there has been a finding that there is an existing need of care and protection pursuant to s 71 of the *Care Act*: *VV v District Court of New South Wales* [2013] NSWCA 469 at [20]. It does not matter whether the conduct constituting a reason or part thereof for the purposes of s 71 occurred wholly or partly outside New South Wales: s 71A.

85 The rationale for the requirement that protective proceedings be established has been described as a safeguard against arbitrary intervention by the State into the lives of children and their families: *Re Alistair* [2006] NSWSC 411 at [64]-[65] per Kirby J.

86 The establishment issue is a threshold issue. It is a statutory precondition to the making of final Care orders in the second, welfare phase of protective proceedings. Establishment, or a finding, is not concerned with the issue of restoration, nor is it concerned with considerations of unacceptable risk of harm, nor with the amelioration of risk. These are properly matters for the second, welfare stage of protection proceedings: *Re Nicole* [2018] NSWChC 3.

87 For care proceedings to be "established" a finding is required that the child is in need of care and protection for any reason or was in need of care and protection at the time the Application was made.

88 Section 71(1) of the *Care Act* relevantly provides:

> **"Grounds for Care orders:**

> 1. The Children's Court may make a Care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any reason including without limitation any of the following:
>
> (a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,
>
> (b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,
>
> (c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,
>
> (d) subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents,
>
> (e) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,
>
> (f) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service,
>
> (g) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with,
>
> (h) section 171(1) Applies in respect of the child or young person."
>
> (Section 171(1) deals with a child or young person residing in unauthorised statutory or supported out-of-home care.)

89 Thus, the need for "care and protection" is not conclusively defined, and the concept is at large; a finding may be made for "any reason". The *Care Act* does, however, specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.

90 The Court is not bound by the rules of evidence unless it so determines: s 93(3). Nevertheless the Court must draw its conclusions from material that is satisfactory in a probative sense so as to avoid decision-making that might appear capricious, arbitrary or without foundational material: *JL v Secretary Department of Family and Community Services* [2015] NSWCA 88 at [148].

91 The significance of a finding that a child is in need of care and protection is that it forms the basis for the making of final Care orders under the *Care Act:*s 71(1) and s 72(1).

92 Once proceedings are established, they enter the so-called second phase, sometimes referred to as the "welfare phase" during which planning for the

child is undertaken, and following which final Care orders may be made. Establishment is a statutory precondition to the making of final Care orders in the welfare phase: *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [36] - [37].

93 My preference is to describe this second phase as the "placement" phase given the important threshold construct that the Secretary must first address after establishment as to whether there is a realistic possibility of restoration. Only if there is no realistic possibility of restoration will alternative placements be required to be considered as part of the permanency planning, in the welfare or placement of proceedings, in a Care Plan that the Secretary is required to prepare pursuant to s 78 of the *Care Act*.

94 Once a child has been found to be in need of care and protection under s 71 of the *Care Act* the Secretary is required to undertake planning for the child's future. In most cases the Secretary will prepare a formal Care Plan that addresses the needs of the child.

95 The Secretary is required to consider what permanent placement is required to provide a safe, nurturing, stable and secure environment for the child: s 10A of the *Care Act*.

96 Permanent placement is to be made in accordance with the permanent placement principles prescribed: s 10A(3) of the *Care Act*. The 'placement hierarchy' established might be summarised as follows:

- If it is practicable and in the best interests of the child, the first preference for permanent placement is for the child to be restored to the parent(s).
- The second preference for permanent placement is guardianship of a relative, kin or other suitable person.
- The next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted.
- The last preference is for the child to be placed under the parental responsibility of the Minister.
- In the case of an Aboriginal or Torres Strait Islander child, if restoration, guardianship or the allocation of parental responsibility to the Minister is not practicable or in the child's best interests, the child is to be adopted.

97 Thus the Secretary must first assess whether there is a realistic possibility of restoration of the child to the parent(s) within a reasonable period, having regard firstly to the circumstances of the child; and secondly, to the evidence, if any, that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child: s 83(1).

98 The Court must then decide whether to accept the assessment of the Secretary: s 83(5).

99 If the Court does not accept the assessment of the Secretary, it may direct the Secretary to prepare a different permanency plan: s 83(6).

100 The phrase “realistic possibility of restoration”, therefore, involves an important threshold construct, which informs the planning that is to be undertaken in respect of any child that has been removed from parents or assumed into care and found to be in need of care and protection.

101 There is no definition of the phrase “realistic possibility of restoration” in the *Care Act*. However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the Supreme Court by Justice Slattery in 2011: *In the matter of Campbell* [2011] NSWSC 761.

102 This decision was cited with approval by the Court of Appeal: *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [44], and was most recently applied by Justice Rein in the Supreme Court: *Re Tanya* [2016] NSWSC 794 at [50] - [51].

103 Importantly, Justice Slattery held that it is at the time of the determination that the Court must make the assessment. It must be a realistic possibility at that time, not merely a future possibility. This restriction has been removed by recent amendments to the *Care Act*.

104 The amendments inserted the additional words “within a reasonable time” into the relevant sub-sections of s 83. It is necessary, therefore, to look more closely at the significance of the addition of those words.

105 In my view, the effect of those words has been to remove the restriction formulated by Justice Slattery in *Re Campbell*, when he said:

> "It is going too far to read into the expression a requirement that a parent must always at the time of hearing have demonstrated participation in a program with some significant "runs on the board": at [56].

106 Instead, now, the Court may take into account the formulation originally articulated by Senior Magistrate Mitchell in a submission to the the Special Commission of Enquiry into child protection services in NSW:

> "The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant 'runs on the board'. The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted."

107 I dealt with the effect of the amendments to s 83 of the *Care Act* more fully in *DFaCS and the Steward Children* [2019] NSWChC 1.

108 The principles relating to the phrase "a realistic possibility of restoration" may now be summarised therefore, by reference to *Re Campbell* and *Re Tanya,* a decision by Justice Rein in the Supreme Court, as follows:

- A possibility is something less than a probability; that is, something that is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible.
- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve.
- The possibility must be 'realistic', that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'. It needs to be 'sensible' and 'commonsensical'.
- A realistic possibility may be evidenced at the time of hearing by a coherent program already commenced and with some significant 'runs on the board'.
- The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.
- There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.
- The determination must be undertaken in the context of the totality of the *Care Act*, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm.

109 Where the Secretary assesses that there is a realistic possibility of restoration to a parent, and the Court accepts that assessment, the Secretary is to prepare a permanency plan that includes a description of the minimum outcomes that need to be achieved before the child is returned to the parent, services to be provided to facilitate restoration, and a statement of the length of time during which restoration should be actively pursued: s 83(2) and s 84.

110 If the Secretary assesses that there is no realistic possibility of restoration to a parent, the Secretary is to prepare a permanency plan for another suitable long term placement in accordance with the permanent placement principles discussed above, as set out in s 10A of the *Care Act.*

111 Permanency planning means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs: s 78A(1).

112 The Court must not make a final Care order unless it expressly finds that permanency planning has been appropriately and adequately addressed: s 83(7).

113 The permanency plan must have regard to the principle of the need for timely arrangements, the younger the child, the greater the need for early decisions, and must avoid the instability and uncertainty that can occur through a succession of different placements or temporary care arrangements.

114 The planning must also make provision for the allocation of parental responsibility, the kind of placement proposed, the arrangements for contact, and the services that need to be provided: s 78.

115 A permanency plan does not need to provide details as to the exact placement in the long-term, but must be sufficiently clear and particularised so as to provide the Court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future: s 78A(2A).

116 If the child is an Aboriginal or Torres Straits Islander there are particular additional requirements to be addressed. The permanency planning must address how the plan has complied with the principles of participation and self-

determination set out in s 13 of the *Care Act:* s 78A(3). It should also address the principle set out in s 9(2)(d) which requires that the child's identity, language and cultural ties be, as far as possible, preserved. Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child or young person is 'intrinsic' to any assessment of what is in the child's best interests: *Department of Human Services and K Siblings* [2013] VChC 1 per Magistrate B. Wallington at p.4.

117 It follows that the need to consider Aboriginality and ensure the participation of families and communities must be applied across all aspects of child protection decision making.

118 If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility: s 79(1).

119 Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children: s 3. The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

120 For example, the Court can allocate complete responsibility to the Minister, or allocate only some aspects to the Minister and other aspects to the parents, or some other person. Or it might make orders for shared responsibility between the Minister and others: s 81.

121 The specific aspects of parental responsibility that might be separately or jointly allocated are unlimited, but include residence, contact, education, religious upbringing, and medical treatment: s 79(2).

122 When allocating parental responsibility, the Court is required to give particular consideration to the principle of the least intrusive intervention, and be satisfied that any other order would be insufficient to meet the needs of the child: s 79(3).

123 Where a person is allocated all aspects of parental responsibility, the Court may make a guardianship order: see sections 79A - 79C.

124 The maximum period for which an order may be made allocating all aspects of parental responsibility to the Minister, following approval of a permanency plan involving restoration, guardianship or adoption, is 24 months: s 79(9), unless there are special circumstances that warrant a longer period: s 79(10).

125 This restriction marks an upper limit for the reasonable period within which there might be a realistic possibility of restoration.

126 It also places the onus on the Secretary to bring an application for rescission under s 90 of the *Care Act* if a staged restoration breaks down within that two year period.

127 Where the Secretary assesses that there is no realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the Court: s 83(3).

128 The Secretary may consider whether adoption is the preferred option: s 83(4).

129 Importantly, where there is not to be a restoration, the permanency planning must also include provision for appropriate and adequate arrangements for contact: s 9(2)(f), s 78(2).

130 There are a series of important statutory provisions by which the practice and procedure of care proceedings are substantially differentiated from other civil proceedings.

131 Care proceedings are to be conducted in closed court: s 104B, and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1).

132 Care and protection proceedings are not to be conducted in an adversarial manner: s 93(1).

133 The proceedings are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2).

134 The Children's Court is not bound by the rules of evidence, unless it so determines: s 93(3).

135 Nevertheless, the Court must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision-making that might

appear capricious, arbitrary or without foundational material: *JL v Secretary, Department of family and Community Services* [2015] NSWCA 88 at [148]; *Sudath v Health Care Complaints Commission* [2012] NSWCA 171.

136 The standard of proof in Care proceedings is on the balance of probabilities: s 93(4) of the *Care Act*. The High Court decision in *Briginshaw v Briginshaw* [1938] HCA 34 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Secretary of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

137 The *Care Act* provides that all care matters are to proceed as expeditiously as possible: s 94(1). The Court is required to avoid adjournments, which should only be granted where it is in the best interests of the child or there is some other cogent or substantial reason: s 94(4).

Findings and conclusions

138 This case involves a decision to be made under s 83 of the *Care Act* as to whether there is a realistic possibility of restoration within a reasonable period of Fiona to her father. S 83 now provides:

> **"83 Preparation of permanency plan**
>
> (1) If the Secretary applies to the Children's Court for a care order (not being an emergency care and protection order) for the removal of a child or young person, the Secretary must assess whether there is a realistic possibility of the child or young person being restored to his or her parents within a reasonable period, having regard to:
>
> (a) the circumstances of the child or young person, and
>
> (b) the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.
>
> (2) If the Secretary assesses that there is a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan involving restoration and submit it to the Children's Court for its consideration.
>
> (3) If the Secretary assesses that there is not a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan for another suitable long-term placement for the child or young person and submit it to the Children's Court for its consideration.
>
> (4) In preparing a plan under subsection (3), the Secretary must consider whether adoption is the preferred option for the child or young person. Note. See section 10A (3) (e) in relation to adoption of Aboriginal and Torres Strait Islander children and young persons.

(5) The Children's Court is to decide whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period:

(a) in the case of a child who is less than 2 years of age on the date the Children's Court makes an interim order allocating parental responsibility for the child to a person other than a parent—within 6 months after the Children's Court makes the interim order, and

(b) in the case of a child or young person who is 2 or more years of age on the date the Children's Court makes an interim order allocating parental responsibility for the child or young person to a person other than a parent—within 12 months after the Children's Court makes the interim order.

(5A) However, the Children's Court may, having regard to the circumstances of the case and if it considers it appropriate and in the best interests of the child or young person, decide, after the end of the applicable period referred to in subsection (5), whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period.

(6) If the Children's Court does not accept the Secretary's assessment, it may direct the Secretary to prepare a different permanency plan.

…..

…..

8(A) A ***reasonable period*** for the purposes of this section must not exceed 24 months."

139 The *Care Act* was amended earlier this year and the words "within a reasonable period" were added to subsections 83(1), 83(2), 83(3), 83(5), and 83(5A), and that period was limited by new subsection 83(8A) to a maximum period of 24 months (2 years).

140 Thus, Secretary must now assess whether there is a realistic possibility of the child or young person being restored to his or her parents **within a reasonable period** (emphasis added).

141 If this case was falling to be decided before the addition of those words I may have to come to a different conclusion. But this matter, it seems to me, represents precisely the sort of situation that the legislature had in mind when it amended s 83 by adding those words.

142 As I said in 2008 in the case which became known in this Court as *Re Saunders and Morgan* [2008] CLN 10, cited *In the matter of Campbell* [2011] NSWSC 761:

"…a possibility is something less than a probability; that is, something that it is likely to happen… a possibility is something that may or may not happen."

143 Thus, now, a realistic possibility of restoration is to be assessed in the context of something that may or may not happen within a reasonable period, provided that possibility is realistic.

144 The word "realistic" is less easy to define, but clearly it was inserted to require that the possibility of restoration is real or practical. As I said in *Re Saunders and Morgan* it must not be fanciful, sentimental or idealistic, or based upon unlikely hopes for the future. Amongst a myriad of synonyms in the various dictionaries I consulted, the most apt in the context of the section were the words sensible and commonsensical.

145 Furthermore, the determination must be undertaken in the context of the totality of the *Care Act*, including the paramountcy principle.

146 I said recently in *DFaCS & the Steward Children* [2019] NSWChC 1, that the amendments to s 83 enable the Children's Court to take into account future events subsequent to the day of the hearing which might occur within a reasonable period, such period to be determined according to the facts of each individual case, but no longer than a period of two years, namely to approve restoration in circumstances where a parent has already commenced a process of improving his or her parenting and that there has already been some significant success on the part of that parent which enables a confident assessment that continuing success might be predicted.

147 That to my mind aptly describes the present case.

148 The assessment now necessarily involves a consideration of possible future events. That is something upon which reasonable minds will differ. In this case, already, minds have differed. Two caseworkers have formed diametrically opposed views on restoration. Two clinicians have expressed different opinions about the father. And two independent legal representatives have taken different positions.

149 In my assessment of the father, he has come a considerable distance on his voyage to insight, and I am satisfied he is now likely to be able to satisfactorily address the issues that led to the removal of Fiona from his care.

150 Any risk of harm posed to Fiona in the care of the father is in my view limited to inappropriate exposure to the mother. The danger postulated by those opposed to restoration derives from an historical inability on the father's part to fully appreciate the seriousness of the mother's mental condition, and that he was either unable or unwilling to act protectively for his daughter. In particular, it is submitted, he stepped away from Fiona at critical moments, and failed to alert authorities, or to engage and communicate with caseworkers, and obfuscated in relation to his presence in the home and about his relationship with the mother. It was even suggested that he should have physically removed Fiona from the home.

151 It is submitted that his past behaviours are predictive of his likely future conduct. I disagree. My view of the history of the events that unfolded is that the father was a victim of a set of difficult circumstances. He was aware of the mother's problems, but shut out by her. She pushed him into the background and refused to give him any significant involvement in caring for Fiona. He was conflicted between trying to avoid confrontation, and supporting the mother. He took the line of least resistance. To suggest he should have been more forceful and proactive in reporting what was happening to authorities, is to my mind wisdom with hindsight. My assessment of his conduct is that it is explicable and understandable in light of the difficult circumstances in which he found himself. What is more important, however, is the future, and my assessment of him going forward is that he understands the risk posed by the mother's mental illness and is sufficiently equipped, emotionally, to take appropriate protective measures.

152 The suggestion that he is still in a relationship with the mother, or is likely to resume a relationship with her, is just that, a suggestion. I am satisfied that he has severed all emotional ties with the mother and will have the capacity in the future to put Fiona's safety, welfare and well-being ahead of the interests of the mother.

153 To the extent that the father's engagement with support workers and caseworkers in the past has been less than optimal, and his obfuscation, minimisation, or lack of candour has been problematic, I see these issues as

historical. Going forward, in my assessment, I do not consider these issues will impact on his parenting of Fiona or his capacity to protect her, or diminish his ability to satisfactorily address the issues that have led to the removal of the child, or pose any future unacceptable risk of harm.

154 There is positive evidence of strong support for the father when Fiona is restored to his care, from both his family and various services, not the least of which is Newpin, which has offered significant assistance. Suggestions by the ILR that the child will be at risk of inadequate nourishment, or exposed to the cold by inadequate clothing, were in my view unhelpful.

155 I am satisfied that any risk to Fiona posed by a restoration to the father, by a carefully managed and supervised process, is minimal. Such risk as there may be is acceptable, or, is capable of being mitigated and ameliorated to an acceptable level, by supports or other available protective mechanisms.

156 I find that in all the circumstances of this case, a reasonable period for the purposes of s 83 is the full 24 month period.

157 For all these reasons I find that the father is likely to be able to satisfactorily address the issues that led to the removal of the child from his care.

158 I now turn to the other limb of s 83 I must have regard to, namely the circumstances of the child.

159 It is always a difficult decision whether or not to uproot a child from a placement that is working well. In this case there is the added complication of separating Fiona from her sister Mary.

160 Given my concern in relation to this issue, I took the trouble to raise it with Dr Tong: see the Transcript at T91.34:

> "Q Just one last question, and I think you've sort of touched on it, so Mary is currently three, Fiona is one year and five months, or 17 months, and you've read the latest material filed by both the Secretary and the father. Have you got any concern of the impact that separation of the siblings if Fiona was to be restored to the father? Have you got any concerns of the ongoing psychological impact that may have on the siblings being separated?
>
> A. Not if the contact arrangements work. There will be ongoing contact."

161 I accept that it is not ideal to separate these sisters. I am however, satisfied that Fiona's best interests will be served by her growing up with her father, as

opposed to growing up in foster care. Adequate contact between the girls will assist in preserving the sibling relationship.

162 It pains me to have to criticise the casework in this matter, as I have the highest admiration for the caseworkers in this field, and I am on record for having decried inappropriate attacks on them in the Children's Court. In *DFaCS re Day* [2012] NSWChC 14 I was critical of a solicitor who criticised a caseworker without any proper basis for doing so. He levelled accusations of bias, devious and egregious behaviour, and unbalanced, even unprofessional, conduct on the part of the caseworker, and accused her of disliking Mr Day, and allowing that dislike to influence inappropriately her decision-making. I said:

> "These submissions were totally unfounded, were unnecessary and eristic. As I commented to the solicitor for Mr Day during his oral submissions, on my view of the evidence, the caseworker had done nothing in her administration of the Day children other than what she sincerely believed appropriate and otherwise in their best interests. The criticism of her was misconceived and inappropriate… I have dwelt on this aspect, both to restore the integrity of the officer concerned and as a general message to practitioners in the Children's Court that ill-founded and unjustified criticism of departmental officers in care and protection matters is not the soundest form of advocacy, and is to be expressly discouraged."

163 I was concerned, however, in the present matter, as to the conduct of the Acting Manager Casework, Ms G, who appears to have unilaterally reversed the Secretary's assessment as to restoration in the Further Amended Care Plan of 22 January 2019, from a mere reading of the file, without consultation, and in particular without speaking to the father. She did so notwithstanding there had been no change in any of the surrounding circumstances. It seems to me that as a process, her conduct lacked rigour and fairness, and was high-handed and somewhat peremptory. This was compounded by the apparent lack of rigour in reviewing this case following the amendments to the legislation in February 2019.

164 I raise these matters for the Department to review in terms of process and fairness.

165 I am satisfied that a restoration in this matter is sensible and practical, and that it is not fanciful, sentimental or idealistic, or based upon unlikely hopes for the future.

166 For all these reasons, having had regard to the circumstances of the child and the evidence that the father is likely to be able to satisfactorily address the issues that have led to the removal of the child from his care, I find that there is a realistic possibility of restoration of Fiona to her father within a reasonable period.

Disposition

167 I do not, therefore, accept the Secretary's assessment that there is not a realistic possibility of restoration of Fiona to her father within a reasonable period.

168 Accordingly, I direct the Secretary to prepare a different permanency plan, one that provides for restoration of Fiona to her father.

169 I invite the parties to agree upon a timetable for the further conduct of these proceedings.