

CITATION: *The Chief Executive Officer of Territory Families v MS and Others*[2019] NTLC012

TITLE OF COURT: LOCAL COURT

JURISDICTION: FAMILY MATTERS

FILE NO(S): 21815403

DELIVERED ON: 11 APRIL 2019

DELIVERED AT: KATHERINE

HEARING DATE(S): 25, 26, 27 FEBRUARY 2019 AND 15 MARCH 2019

JUDGMENT OF: JUDGE ELISABETH ARMITAGE

**CATCHWORDS:**

Care and Protection of Children Act; definition of family; parents; relatives; foster carers; the Aboriginal Child Placement Principle; Best Interests of the Child; attachment; views and wishes.

**REPRESENTATION:**

*Counsel:*

Applicant:	Ms Tregear
1st Respondent:	Mr Fawkner
2nd Respondent:	Self Represented
3rd & 4th Respondent:	Mr Whelan
5th & 6th Respondent:	Ms Blundell
Child Representative:	Ms Romeo

*Solicitors:*

Applicant:	Hunt and Hunt
1 <sup>st</sup> Respondent:	KWILS
2 <sup>nd</sup> Respondent:	Self Represented
3 <sup>rd</sup> & 4 <sup>th</sup> Respondent:	Whelan & Associates
5 <sup>th</sup> & 6 <sup>th</sup> Respondent:	MSP Legal
Child Representative:	Margaret Orwin, Barrister and Solicitors

Judgment category classification: A

Judgment ID number: 012

Number of paragraphs: 145

IN THE FAMILY MATTERS JURISDICTION  
OF THE LOCAL COURT OF THE NORTHERN  
TERRITORY OF AUSTRALIA  
AT KATHERINE

No. 21815403

IN THE MATTER OF

**THE CHIEF EXECUTIVE OFFICER OF  
TERRITORY FAMILIES**

Applicant

AND

**MS**

First respondent

**PB**

Second respondent

**CF & RF**

Third and fourth respondent

**NB & WB**

Fifth and sixth respondent

**CB**

Child

REASONS FOR JUDGMENT

(Delivered 11 April 2019)

JUDGE ELISABETH ARMITAGE

1. This is an application for a protection order for a 5-year-old Aboriginal<sup>1</sup> child, SB (the young boy), born 26 July 2013. The young boy's mother (M) is Aboriginal

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<sup>1</sup> s13 *Care and Protection of Children Act* contains the statutory definition of Aboriginal

and spends most of her time between Katherine, Amanbidji Station near Timber Creek in the Northern Territory, and Kununurra in Western Australia. The young boy's father (F) is Caucasian and resides in Katherine. The young boy's parents are no longer in a relationship. However, they continue to see each other from time to time and, according to F, have an amicable relationship.

2. Until he was 2 years and 7 months old, the young boy lived with M, or F, and for shorter periods with his elder paternal half-sister CB. The young boy first came into the care of Territory Families on 18 February 2016. The young boy came into care because F was suffering a serious mental illness such that he could no longer care for the young boy. At that time M could not be found and CB did not wish to care for the young boy. Territory Families placed the young boy with the Foster Carers and he has lived with them since that time.
3. The young boy was originally under a 2-year short-term order in the hope that he could be reunified with F. F's mental health did not improve as hoped and during 2017 longer-term plans for the young boy's care were discussed with F and the Foster Carers. At that time Territory Families had not found any relatives who were willing or able to care for the young boy. In April 2018 Territory Families applied for a long-term parental responsibility order until the young boy was 18 years of age because reunification with F was no longer considered viable. Territory Families proposed that the young boy would continue to reside with his Foster Carers on a permanent basis. That proposal was supported by the Foster Carers and, at least initially, by F.
4. However, in June 2018 F spoke to his sister who lives in Victoria. F was distressed because he thought he was losing his son. The young boy's Paternal Aunt contacted Territory Families and arranged to travel to the Northern Territory so she could better understand what was being planned for the young boy. The Paternal Aunt had not previously met the young boy, but following those enquiries, she sought to be responsible for the care and upbringing of the young boy.
5. In October 2018 Territory Families filed an amended application. The amended application sought short-term parental responsibility for a period of 2 years during which time Territory Families proposed the young boy would be transitioned into the care of his Paternal Aunt and move to Victoria. The amended application is supported by F and M but is contested by the Foster Carers. The Foster Carers seek long term parental responsibility for the young boy which, if granted, would see the young boy move with them to South Australia.
6. The Court must determine what is in the young boy's best interests. Is it in the young boy's best interests to remain with his Foster Carers with whom he has lived for the past 3 years? Or is it in his best interests to move from the Foster Carers into the care of his Paternal Aunt?

## The Background and Evidence Concerning the Parties to the Proceedings

### The Young Boy

7. In making a decision the Court must consider the wishes of the child<sup>2</sup>. In considering the views or wishes of a child the Court will have regard to the child's age and cognitive development in determining what weight should be given to those wishes. More weight might attach to the views of an older teenager than a young child. A young child lacks the cognitive development to appreciate the long term implications and complexities of decisions about where and with whom he should live until adulthood or what might be in his best interests. However, if a child has the capacity to express a view, that view should be given some consideration because even a young child is likely to be able to provide relevant views about their current physical and emotional experience.
8. The young boy has lived with the Foster Carers for the last 3 years and 2 months of his life. As the young boy was only 2 years and 7 months old at the time he came to live with the Foster Carers, it is reasonable to assume his only memory of family life is with the Foster Carers.
9. When the young boy came into the care of Territory Families, the Foster Mother reported that he was covered in small sores and lacked nourishment. He drooled excessively and an occupational therapist identified that his mouth muscles were underdeveloped from an inadequate diet. With exercises and a proper diet this has improved and is expected to fully resolve with time. The young boy was not toilet trained, but this was achieved within two weeks of him coming to the Foster Carers.
10. In the young boy's Care Plan dated 6 March 2017 it is recorded that,  
*"The young boy has a very strong relationship with his carers and has settled in well to his current placement. The young boy calls his carers "mum" and "dad", and has been observed to interact with them in a comfortable and safe manner."*
11. In the young boy's Care Plan dated 25 September 2017 it is recorded that,  
*"The young boy is a 4-year-old who has positive behaviours and emotional well-being. The young boy has been in the care of the CEO since 18 February 2016; and has been in the same placement with his carers since his time. This has allowed the young boy to develop positive emotional regulation and trust which supports his emotional well-being."*

...

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<sup>2</sup> s 130

*Prior to entering the care of the CEO; the young boy was raised solely by his father; F, and his oldest daughter; CB. The young boy has not had any contact with his mother or the maternal side of the family since his birth. The young boy has had one contact visit with his half-brother in Binjari; and whilst the young boy states that he didn't enjoy this, Territory Families and the Foster Carers will continue to try to develop this relationship.*

*The young boy sees his father every fortnight and whilst he can be resistant at the start of visits; the young boy enjoys seeing his father and maintaining that connection.*

...

*The young boy is a very sociable young person with great interpersonal skills. The young boy loves socialising with others and telling them about his fishing and other adventures.*

*The young boy does have a good level of protective behaviours; and if he doesn't know people, he will usually begin as being shy before he feels comfortable to talk to them.*

...

*The young boy has a very positive relationship with the Foster Carers and is observed to feel at home in their care.*

...

*The young boy states that he is happy with the Foster Carers and wishes to stay with them forever.*

*F has stated a number of times to Territory Families, Mental Health and Legal Aid that he wishes for the young boy to remain in the care of the Foster Carers long-term. F has stated that he does not want the child to return to the care of his maternal family; not due to any concerns about the care, but due to the close attachment that he can see between the young boy and the Foster Carers."*

12. On 28 January 2019 the young boy met his Court-appointed legal representative. He was clearly too young to understand her role or give instructions. However, the young boy's representative provided a brief statement of the young boy's views as expressed to her, which included the following,

*"The young boy was quite shy however he was aware that his Foster Carers and his Paternal Aunt and Uncle each wanted him to live with them. The young boy was clear in saying he wants to stay with his carers who he considers to be his mum and dad.*

*The young boy referred to his biological mother as “Mummy S” and his biological father as “Daddy P” and he does not wish to live with either of them.”*

13. The young boy’s wishes indicate that he is happy and secure with his Foster Carers and wants to stay with them. Those views have been repeated over an extended period of time. Those views point to a strong attachment to them which is consistent with the expert opinions.

### **The Mother (M)**

14. In making a decision the Court must consider the wishes of the mother<sup>3</sup>.
15. M is Aboriginal. She is 41 years old. Although the background information is limited, it appears that M was involved in the young boy’s care for perhaps a little over a year, possibly up to two years, after he was born. Territory Families received a report in April 2014 which raised concerns about the young boy’s care. The report pointed to M’s alcohol consumption, medical neglect, and a domestic violence incident involving the young boy’s older paternal half-sister (CB) as being matters of concern. At that time M was living in Binjari. In her affidavit M said that Binjari was not a good place for the young boy because there was too much drinking. In her affidavit M said “F took him” and he lived with F until “welfare came and got” him.
16. When the young boy came into care, Territory Families searched for but were unable to locate M. However on 15 January 2018 M attended the Territory Families office in Katherine. She advised that she had been living in Kununurra and that she had not seen the young boy for 4 years. M said that she would now be living in Katherine and wished to have contact with the young boy but she did not want the young boy to live with her because there was a lot of fighting and drinking where she lived. An access visit was arranged and took place on 6 February 2018. An access visit was arranged for 12 February 2018 but M did not attend. M attended access visits with the young boy on 28 May 2018 and 16 July 2018 but as at the date of the hearing she had not attended any further access visits.
17. Territory Families report that M is a chronic drinker. Since M’s return to Katherine, the young boy has seen M intoxicated in the street and noticed that there was something wrong with her.
18. In her affidavit M said that she first met the young boy’s Paternal Aunt and Uncle during Christmas 2018. M said “I think they are good, happy people. I believe they would care for the young boy well. I know if the young boy lives with them I will see him every school holidays when they come to Katherine with him.” M said she wanted the young boy to live with his Paternal Aunt and Uncle in Victoria.

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<sup>3</sup> s 130(1)(b)(ii)

19. As to M's wishes, I note that although M is the biological mother of the young boy, she has not demonstrated any commitment to his care or upbringing. M's recent contact with the young boy has been so limited that there can be little more than a biological bond between them. M has only met the Paternal Aunt and Uncle on one occasion. M's opinion of and wishes concerning the Paternal Aunt and Uncle are to be assessed in that light.

### **The Father (F)**

20. The Court must consider the wishes of the father<sup>4</sup>.
21. F is Caucasian and is 57 years old. F was a self-employed seed collector but is currently on a disability pension.
22. F has a lengthy and complex mental health history commencing in about 2006. F was hospitalised between July and September 2006 with a diagnosis of psychotic depression; during October 2006 with a diagnosis of severe major depression; and between February and March 2008 with a diagnosis of major depressive disorder.
23. After the young boy's birth but before he was taken into care Territory Families received six reports about incidents concerning the young boy's care. Territory Families record that in April 2014 CB (who was then caring for the young boy) threatened to harm herself and the police were called. In November 2015 F is reported to have behaved in an aggressive manner at the local health clinic and to have been driving with the young boy when experiencing paranoia. When F was taken to hospital for assessment, the young boy was left in the care of CB but Territory Families received a report raising concerns as to CB's commitment and ability to care for the young boy. F was hospitalised between November 2015 and January 2016 with a diagnosis of major depressive episode.
24. It was after the January 2016 hospitalisation that F decided that he could no longer properly care for the young boy. At that time F said that he wasn't functioning at all, he had lost 8 kilos, and his power and phone had been cut off. Before he relinquished care, F asked CB to take responsibility for the young boy. However, CB did not want to become the young boy's primary caregiver. In addition, a neighbour declined to take responsibility for the young boy's care.
25. On 18 February 2016 F relinquished the young boy's care to Territory Families. Since that time F has been further hospitalised: between June and July 2016 with a diagnosis of major depression with psychotic features; between July and September 2017 with a diagnosis of a severe depressive episode; and between August and September 2018 with a diagnosis of acute psychosis.
26. On 31 January 2017 Ms Jill Pettigrew, Psychiatrist with Katherine Mental Health Service, provided a letter in favour of F's application for a disability support pension. She said,

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<sup>4</sup> s130(1)(b)(ii)

*"F has a long and complex mental health history with Katherine Mental Health Service. He has had multiple admissions to the acute psychiatric unit in Darwin. The general pattern of F's illness since 2006 has been some reasonable inter-episodic functioning but he inevitably declines. Post the acute phase of illness he tends to be very low and flat in mood and it takes several months of treatment and support for him to return to a normal level of functioning often requiring readmission. His acute phase includes psychotic features with paranoia and often an elevated or flat mood with no insight. He has at times had suicidal ideation and/or an attempt on his life. However in this instance following his last admission in July 2016 he has not returned to a good level and remains unable to cope with many normal activities of daily living. He is forgetful and unable to function in many ways needing a lot of support from ourselves and Mission Australia.*

*In addition he has had to give up care to Territory Families permanently of his young son as he cannot cope to look after him anymore. It is felt by his treating team he is incapable of any meaningful employment and this feeling is shared by Mission Australia who have worked closely with him following his last breakdown and subsequent admission.*

...

*...F has attracted a number of diagnoses in the past however he is currently diagnosed with schizoaffective disorder and this seems the most appropriate."*

27. F told the Court that he continued to suffer from a debilitating mental illness for about 2 years after the young boy was taken into care. Concerning the impact of his illness, in June 2017, F reported to Territory families that: his house did not have running water and he did not know where to start to address the problem; there was no food in the house; he could barely look after himself and could not look after the young boy; and he was struggling to get out of bed.
28. Even though F was often very unwell, he maintained contact with the young boy when he could. He arranged for Mission Australia to transport him for access visits and communicated with Territory Families when he was not well enough to attend visits. F seemingly got on well with the Foster Carers and was very pleased with the quality of care they provided to the young boy. Over time, as it became clear that F was unlikely to be well enough to resume care of the young boy, the possibility of the young boy remaining with the Foster Carers under a long term order was discussed.
29. In the young boy's Care Plan dated 6 March 2017 it is recorded that F "has requested that no kinship placements be explored due to the young boy's relationship with his current carers" and F "has requested that the young boy remain in his current placement long-term". Further it is recorded that the Foster Carers "inform that they are willing and able to continue to provide long-

term care for the young boy child....(and) have indicated that they are supportive of reunification if possible; however, if reunification is not an option; they are willing to seek long-term care of the young boy through the courts.”

30. Territory Families had a meeting with F on 13 June 2017. In that meeting, concerning the young boy’s future care, F said “I won’t be able to look after him”. In addition the meeting notes record that: F stated that he did not want the young boy to grow up in kinship care in community; F wanted the young boy to be brought up by his Foster Carers; and, even though F knew the Foster Carers were moving interstate he believed that it was in the young boy’s best interest to move with the Foster Carers instead of being cared for by different carers.
31. The young boy’s Care Plan dated 25 September 2017 documents that F “informed that he wants the young boy to be in the primary and long-term care of the Foster Carers and recognised that his mental illness is going to prohibit him from caring for the young boy again; despite how much he would like the young boy to return to his care”. It is further documented that F “has stated that he does not want the young boy to return to the care of his maternal family; not due to any concerns about the care, but due to the close attachment that he can see between the young boy and the Foster Carers”. In addition it is noted in the Care Plan that the Foster Carers “have stated that they are very committed to the young boy’s long-term care and are seeking the long term and permanent care of the young boy. The Foster Carers have stated that they would commit to caring for the young boy with or without Territory Families’ ongoing involvement and support; and would continue to support the young boy to have a relationship and regular contact with his family if he was to stay with them”.
32. On 28 March 2018 F met with Territory Families and advised that he no longer wished for the young boy to be taken interstate by the Foster Carers. As at that date no other relatives had been identified who might provide care for the young boy. Although F said he wanted the young boy returned to him, Territory Families no longer considered reunification viable.
33. On 1 August 2018 F met with Territory Families and advised that he wanted his sister, the young boy’s Paternal Aunt, to care for the young boy. In his evidence in the proceedings F explained that his earlier views, which supported the Foster Carers having long term care, were influenced by his mental health issues. He explained that his current position was maintained during a period of relative health. Whatever the reason for changing his mind, August 2018 was the first time that the young boy’s caseworker learned from F that there was a Paternal Aunt. The case worker rang the Paternal Aunt who confirmed that she was interested in becoming involved in the matter. She knew of the young boy, but she had never met him.

34. Although F and the Foster Carers had maintained an amicable relationship over an extended period of time, this broke down in August 2018. It appears that a combination of mental ill health, together with the distress associated with these proceedings and the possibility of the young boy moving interstate with the Foster Carers, was too much for F. On 29 August 2018 F attended the office of the Foster Carers' lawyer where he yelled and was abusive. F then attended the office of Territory Families demanding the young boy be returned. Staff at Territory Families thought F was unstable and called the police. F then attended the young boy's school. Later F went to the Foster Carers' house and made threats. The Foster Carers applied for and were granted a personal violence restraining order against F, and F was readmitted into hospital.
35. As at the date of the hearing F's health had improved but in evidence he said that he was concerned about the likelihood of further periods of serious ill health. F did not think that he would be consistently or reliably well enough to regain care of the young boy. F told the Court that he wanted the young boy to live with the Paternal Aunt. F said that he planned to move to Victoria and live with his mother, the young boy's grandmother, so that he could continue to have regular contact with the young boy. F said that he had a good relationship with M and could facilitate contact between M and the young boy. Further, F said that he knew the young boy's extended Aboriginal family, and could facilitate contact between the young boy and his extended Aboriginal family. F said that the young boy "should be with his family".
36. It is clear that in spite of his mental ill health, F has done his best to maintain a loving and supportive relationship with the young boy. The young boy knows F is his father and refers to him as "Daddy P". In my view these are matters which add weight to F's expressed wishes.
37. While F's mental ill health might have played a part in the views he has expressed over time to Territory Families, F's original opinion, that the young boy should remain with the Foster Carers because their care was excellent and because the attachment between the young boy and the Foster Carers was obvious, was not unreasonable and was maintained and confirmed over an extended period. F's change of opinion coincided with what the Paternal Aunt described as a "manic phase" and F's subsequent hospitalisation. However, even if F's current opinion was formed during a period of ill health, it too is objectively reasonable and has now been maintained over an extended period of time. In my view F's present wishes have solidified and become firmer over time.
38. It is clear that F now wants the young boy to be raised within his biological family. Whilst it is apparent that F believes the Paternal Aunt and Uncle are the best persons to care for the young boy, part of their appeal lies in F believing he will move to Victoria and so will be able to have more regular contact with the young boy. F plans to live with F's mother (the young boy's grandmother) who lives about 300 kilometres from the Paternal Aunt and Uncle. There is no

evidence before me that the paternal grandmother would be willing for F to live with her. However I am prepared to accept that she would be, or alternatively, that other arrangements could be made. Whilst I am prepared to give some weight to F's plans to move, those plans cannot be said to be set in concrete and it is realistically possible they might not come to fruition, particularly in light of F's fluctuating mental health and the impact that has on his functional ability.

39. F also points to his capacity to assist the Paternal Aunt and Uncle to ensure the young boy develops and maintains relationships with his Aboriginal family. However, if the young boy remains with the Foster Carers, there is nothing preventing F sharing similar knowledge and connections with them. Although there has been a recent breakdown in the relationship between F and the Foster Carers, given the history of them working well together, and the willingness of the Foster Carers to mend the relationship, I consider it unlikely that F would deny the young boy the benefits of the paternal and maternal relationships out of anger or spite. Indeed in a lighter moment of his evidence, when contemplating the possibility of the young boy remaining with the Foster Carers, F said " Well I think the Foster Carers had better be careful because I will shift there" and the Foster Father responded "I think we'd go very well"<sup>5</sup>.
40. Finally, although F intends to maintain a close relationship with the young boy and to support him to establish relationships with his Aboriginal family, F's capacity to do so will largely be dependent on his mental health. Over the past 3 years, including the extended period when F had a good working relationship with the Foster Carers, he did not give them information that would assist them to better understand the young boy's Aboriginality, nor did he provide assistance to connect the young boy with his Aboriginal family. While F expresses positive intentions, his capacity to carry them through is untested. Further, it is sadly likely, based on F's recent history, that there may be extended periods of time when F is not well enough to put his intentions into action. In those circumstances, it will rest with the carers, to ensure that the young boy establishes and maintains meaningful connections to his extended Caucasian and Aboriginal families.

### **The Extended Aboriginal Maternal Family**

41. The young boy has 3 biological half siblings. AW is about 19 years old. She is an Aboriginal maternal half-sibling. There was no evidence before the Court to indicate any contact between AW and the young boy.
42. KW is 12 years old. He is an Aboriginal maternal half-sibling and lives with his paternal relatives in Binjari. The Foster Carers arranged for the young boy to meet KW and his family in Binjari, but further attempts by the Foster Carers to arrange ongoing contact were not reciprocated by KW's family and the contact ceased.

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<sup>5</sup> T p 215

43. CB is 23 years old. She is an Aboriginal paternal half-sibling. As noted above, CB provided some interim care to the young boy when F was unwell and before the young boy came into care. CB quite regularly accompanied F during access visits with the young boy and has spent time with the young boy at the Foster Carers' home. However, CB did not wish to be considered as a long-term carer for the child and it appears that she has her own challenges. CB attended court each day during the hearing and provided emotional support to F. During the proceedings the Court heard that when she was growing up she lived with her paternal grandmother in Victoria until she was about 4 years old and she knew her Paternal Aunt and Uncle from her childhood. I understood that there had been little recent contact between her and the Paternal Aunt and Uncle, up until their decision to join in these proceedings. In spite of the involvement of the paternal grandmother in her care from time to time, there appears to have been some disruption in CB's upbringing, which resulted in her moving between family members in the Northern Territory and Victoria. There was some evidence before the Court that CB had recently spent time in gaol arising from an incident involving a "stabbing" and had twice attended residential rehabilitation to address issues with alcohol.
44. The young boy's Aboriginal maternal grandmother, RS, is 60 years old and lives at Amanbidji Station near Timber Creek, together with other extended maternal family members. On 3 May 2017 RS indicated she was willing to be assessed by Territory Families as a carer for the young boy. However, on 16 November 2017 RS said she was no longer willing to be assessed as a carer. Although Territory Families discussed facilitating contact between the young boy and his extended Aboriginal family, no concrete arrangements for contact were ever followed through. Further, it appears that no extended maternal family members have approached Territory Families to initiate contact with the young boy.

#### **The Extended Caucasian Family**

45. The young boy's paternal grandmother is 83 years old and lives in Kerang, Victoria. She is listed as F's next of kin in his medical records. Although Territory Families went to some considerable effort to locate the young boy's extended maternal Aboriginal family with a view to ascertaining whether they could care for the child, it appears they made no attempt whatsoever to locate the young boy's extended paternal family. Territory Families failure to search for potential paternal family has likely substantially contributed to the complexity of these proceeding and damaged the relationships between the Foster Carers and the young boy's biological family.
46. Although Territory Families made no contact with the paternal family, after the young boy was taken into care, F phoned his mother from time to time. The paternal grandmother was aware that the young boy was in care and she passed this information on to the Paternal Aunt and Uncle.

47. The Paternal Aunt and Uncle have been joined as parties in these proceedings<sup>6</sup>. Accordingly, they are persons that the Court considers have a direct and significant interest in the well-being of the young boy and their wishes must be considered<sup>7</sup>.
48. The Paternal Aunt is 45 years old and is the sister of F. The Paternal Uncle is 47 years old. They have been married for 24 years, live in Horsham, Victoria, and have 4 children. Their two eldest children (22 and 19 years old) live, study at university, and work part-time in Melbourne. The two younger children live at home and attend a local Protestant high school.
49. The Paternal Aunt is tertiary-educated and is employed as a teacher's aide and administrative officer in the school her children attend. The Paternal Aunt's extended family largely live in Victoria. The Paternal Uncle is tertiary-educated and is a primary-school teacher at the same school as his wife and children. The Paternal Uncle's extended family largely live in Adelaide, South Australia.
50. The Paternal Aunt describes herself as having a close relationship with her older brother F, but concedes that because of distance and his mental health issues it has not always been possible for her to maintain consistent contact with him. In particular, she said contact was difficult when F did not have a landline or mobile phone. Although she had never met the young boy, she said she had received some information from F and CB about him and had sent him birthday presents. In 2016 the Paternal Aunt was informed by her mother that the young boy was in care, but she did not have direct contact with F and she was not fully appraised of the circumstances of the young boy or F. She was at a loss as to what to do and did not make any concerted effort to contact her brother or find out about the young boy's circumstances at that time. In her affidavit dated 8 November 2018 she said,
- "We wish we had stepped into the situation earlier. When it first became apparent that F was struggling, looking back it did cross our minds that maybe we should step in somehow, but we had no idea of the true extent of the situation and originally thought it was best that the young boy stay up in the Territory where he could continue to see his Dad, Mum and sister. As well as that, early in the piece we had a full house with four children, one in the later stages of his education and our third child going through a rather difficult time as she entered puberty. I guess this was all compounded by F's illness and deep depression that lasted for a couple of years when he did not feel like communicating and didn't want to bother us. Our situation is now different."*
51. While in no way being critical of the Paternal Aunt and Uncle, who were raising their own family of four and working, the factual situation is that they had quite limited contact with F and CB since the young boy's birth. They had not seen F or met the young boy, they did not know if F or CB had a mobile phone. Nor did

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<sup>6</sup> s125(2)(d)

<sup>7</sup> s130(1)(b)(iv)

they have any other way of reliably contacting F. Although they knew the young boy was taken into foster care, they made no significant efforts to check on his welfare. They were largely content to receive brief, second-hand information about F and the young boy from the paternal grandmother, and assume the best.

52. In July 2018 F rang the Paternal Aunt and asked if she could look after the young boy. Thereafter the Paternal Aunt was very proactive. The Paternal Aunt agreed to contact Territory Families to explore the possibility. The Paternal Aunt phoned Territory Families and shortly after, when she did not hear back from them (possibly because the allocated case worker was on leave), she wrote to the CEO and then contacted the Children's Commissioner in order to progress her enquiries.
53. On 7 August 2018 Territory Families commenced assessing the Paternal Aunt as a carer. Based on discussions with the assessor, the Paternal Aunt understood that when her assessment was successfully completed, the young boy would come into her care.
54. On 28 September 2018 the Paternal Aunt and Uncle travelled to the Northern Territory to meet the young boy and to discuss his future care with F and Territory Families. In her evidence the Paternal Aunt said that they came to the Territory "to assess the situation, to meet the young boy, to see if he had a connection with us and to make an informed decision from that point on". The Aunt and Uncle enjoyed 3 face-to-face visits with the young boy. In her affidavit dated 23 February 2019 the Paternal Aunt said that she felt that she had a "deep connection" with the young boy and that "he belonged back in our family". She said "we came home with a new insight and the only thing for us to do was to keep pressing forward and get custody of the young boy".
55. On 23 October 2018 weekly Skype sessions commenced between the young boy and the Paternal Aunt and Uncle. Skype sessions were conducted on 23 October; 6, 13, 20, and 27 November; and 4, 11, and 18 December. In addition the Paternal Aunt and Uncle and other family members wrote to the young boy during this period of time.
56. Between 24 December 2018 and 11 January 2019 the Paternal Aunt and Uncle and their children stayed in Katherine for holidays and had 5 hours of contact with the young boy each weekday. During this period of time the young boy engaged in family holiday activities with the Paternal Aunt and Uncle and his older cousins. The young boy spent time with the paternal family on: 24, 27, 28, and 31 December 2018; and 2, 3, 4, 5, 8, 9, 10, and 11 January 2019. The Paternal Aunt described the visits as warm, engaging and happy. F and CB were present some days and the young boy referred to F as "Dad P" and CB as "Sister C".
57. Following the holiday period weekly access visits recommenced between F and the young boy. Logistics largely prevented a second weekly Skype call to be

conducted with the Paternal Aunt and Uncle, and further Skype contact with the Paternal Aunt and Uncle was limited to occasions when F initiated calls during his access visits. Calls occurred on 22 and 29 January and 5 February. During this period the Paternal Aunt and Uncle continued to write to the young boy.

58. If the young boy lives with the Paternal Aunt and Uncle they plan for him to attend the school where they work and their youngest children attend; and to encourage and support him to play guitar, attend the local church, engage in the local gymnastics club, and be involved in swimming or other sporting activities.
59. The Paternal Aunt and Uncle submit that they are “best placed to ensure that the young boy has contact with his Indigenous family as we already have a relationship with the young boy’s half-sister CB, and F; and CB will be able to help us facilitate contact with his maternal relatives”. In addition they assert that the young boy “would also get the opportunity to spend time with his paternal grandmother and other aunts, uncles and cousins who all live in Victoria”. If the young boy lives with his Paternal Aunt and Uncle they understand that F plans to relocate to live in Victoria, and so would have contact with the young boy.
60. In her affidavit the Paternal Aunt said,  
*“We have both the means and ability to support and raise another child, as we have already successfully raised 2 children to adults and they are both well – functioning members of society. We certainly want the best for the young boy and believe we can make a significant contribution to this outcome... If granted parental responsibility of the young boy, we will take direct and full responsibility for his care and upbringing”.*
61. In evidence the Paternal Aunt said: “there’s this underlying thing in all of us as humans, we want to know who our blood family is, where we come from and be connected with them. We are naturally connected to our blood”; and “I didn’t want the young boy coming to me when 15 which probably he will and say to me “Aunty, why didn’t you fight for me?” The Paternal Aunt and Uncle said they would be willing to relocate to Katherine for 6 months if necessary to effect a smooth transfer of the young boy into their care. The Paternal Uncle said “we’ll push heaven and earth... six months would not be a problem”.
62. As noted earlier, both M and F support an outcome that sees the young boy living with the Paternal Aunt and Uncle. Territory Families also support this outcome. In his affidavit of 11 January 2019 the young boy’s case worker said,  
*“Territory Families are applying for another 2-year protection order for the young boy to assess if a transition to the care of the Paternal Aunt and Uncle is possible and if so to allow a transition to the Paternal Aunt and Uncle and provide support until the young boy settles in. If all goes well Territory Families are expecting the Paternal Aunt and Uncle to assume long-term parental*

*responsibility after the protection order expires... The transfer of the young boy to the Paternal Aunt's care will provide an opportunity for the young boy to maintain his relationship with his parents F and M. It will also provide him with an opportunity to develop his identity and knowledge of his family. The Paternal Aunt and Uncle are expected to provide a stable and nurturing environment for the young boy to develop relationships in connection with other family members and expand his family network".*

63. The Paternal Aunt and Uncle presented as well grounded, caring, intelligent, educated, and family-oriented people. In spite of those strengths and attributes, the Paternal Aunt and Uncle did not establish a relationship with the young boy or actively check on his well-being for 2 ½ years even though they knew he was in foster care. While I accept that their reasons may have been valid, the fact remains that over that period the child developed strong attachments to the Foster Carers. Although the Paternal Aunt and Uncle have now gone to considerable lengths to commence a relationship with the young boy, given the short period of time that they have been able to spend with the young boy, their relationship with him is still immature. Although the young boy responded warmly to spending holiday time with his Paternal Aunt and Uncle, I do not infer from that that he bonded with them in a parental way. In my view, that he was happy and open with them was to be expected given his nature, the fun activities they engaged in together, knowing that he was simply visiting them, and in light of his secure attachment to the Foster Carers to whom he returned each day. While the Paternal Aunt felt a strong connection with the young boy, I do not think it likely that in such a short period of time the young boy would have formed a strong attachment to the Paternal Aunt and Uncle.
64. If the young boy were to live with the Paternal Aunt and Uncle they would largely rely on F to ensure the young boy established and maintained contact with his Aboriginal family. Save for the fact that F has been living in the Northern Territory, the Paternal Aunt and Uncle have no other connection to the Northern Territory or Katherine, and have apparently only visited since these proceedings commenced. As noted earlier, there are real questions about whether F can put his intentions into effect.
65. The young boy has never lived with the Paternal Aunt and Uncle and does not have a pre-existing relationship or attachment to them. While one expert considered it likely that the young boy will develop a strong attachment to the Paternal Aunt and Uncle, it is not certain that he will; and there remains a risk that any attachment will not progress or deepen as hoped.

### **The Foster Carers**

66. The young boy came into the care of the Foster Carers on 18 February 2016 when he was 2 years and 7 months old. Initially the placement was only for 4 days but it continued during a two-year short term protection order from 16

April 2016 – 15 April 2018, and then during the course of these proceedings. The young boy is now 5 years and 9 months old.

67. The Foster Carers have been joined as parties in these proceedings<sup>8</sup>. Accordingly, they are persons that the Court considers have a direct and significant interest in the well-being of the young boy and their wishes must be considered<sup>9</sup>.
68. The Foster Mother is 29 years old and the Foster Father 31 years old. The Foster Father is a member of the RAAF and has been posted to Tindal for the past 12 years. Given the length of time in Katherine and their sociable natures the Foster Carers are well connected within the RAAF and with the larger Katherine community. The Foster Carers' family unit includes the young boy, another Aboriginal child of a similar age in their foster care, and a biological son aged about 1. They are expecting the birth of another child in March 2019.
69. When the young boy came into their care, the Foster Carers were careful to include F and CB in the young boy's life. This cannot have been easy or straightforward given F's serious mental health condition, and CB's imprisonment and periods in rehabilitation. However, F and CB were invited to FC's home including at Christmas time. In addition, the Foster Carers have taken the young boy to F's property. The Foster Carers were able to maintain an amicable relationship with F until his most recent mental health deterioration in August 2018.
70. The Foster Carers worked with Territory Families to ensure the young boy saw M when she returned to Katherine. In addition, the Foster Carers consistently expressed a commitment to support contact between the young boy and his extended Aboriginal family. According to the young boy's Care Plans, the responsibility for arranging "culture and identity" contact rested primarily with M, F, and the Territory Families Aboriginal case worker. The Foster Carers actively pursued access with the young boy's half-brother in Binjari, but their efforts to establish a meaningful relationship were thwarted due to the Binjari family failing to reciprocate. The Foster Carers were willing to travel with the young boy to Aminbidji Station, so that he could know his extended Aboriginal family. However, the Territory Families Aboriginal case worker (who had responsibility for making those arrangements) failed to facilitate such plans.
71. In her affidavit dated 8 May 2018 the Foster Mother said,  
*"The young boy has been with us since he was two years old. In this time the young boy has become a part of our family. The young boy calls us mum and dad, a choice he made on his own. We have taken the young boy on all our family holidays since being in our care and he is considered family by all of our extended family and friends. The young boy calls our nephews his cousins and*

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<sup>8</sup> s 125 (2) (d)

<sup>9</sup> s 130(1)(b)(iv)

*refers to our parents as Nanna/Pop and Grandma/Granddad along with our siblings as Aunt/Uncles.*

*The young boy came to us when he was only 2 and we have taught him to speak, count, learn letter, shape and colour recognition. We have toilet trained him, taught him to swim, fish, ride a bike and many other things that “parents” do.*

*Also in the time we have had the young boy we have taken him to Perth, Adelaide, Victoria, Newcastle, Brisbane, Townsville, Byron Bay and many other places. We also applied to get the young boy’s passport so that we could take him to Singapore and Japan with us in July 2017. On this holiday we took him to Disneyland, Lego World, zoos and many other family activities.*

*Since being a part of our family the young boy has been enrolled and participated in preschool, swimming lessons, athletics, footy, RAAF Tindal fishing club where he won junior champion angler 2017, Katherine Game Fishing club where he completed at the Big Horse fishing competition. He is a member of the local library and has made great friends through all his activities.*

*We are currently expecting a new addition to our family and the young boy calls the baby his little brother or sister and is very excited to meet and welcome this new addition into our little family.*

*We have extended our current posting to Katherine for another year in the hope that the young boy would be allowed to stay a permanent part of our family and move when required with us. We love him dearly and already consider him our son and couldn’t imagine our lives without him in it, which is why we have such a significant interest in his well-being and life.*

*We understand that the young boy is an Indigenous child and that his culture plays a huge part of his life and always will. We are always happy to seek further information and education so that the young boy will always have an understanding of his cultural background.*

*We also keep in contact with F and CB and we have had them to our house on several occasions and even for Christmas as we believe that it is in the best interests for the young boy to have a relationship with all his family...*

*We believe that we can offer the young boy a wonderful life full of love, affection and support and that we can respect and teach him about his culture and Indigenous background and provide him with a permanent home for him to grow and develop alongside us as his family.”*

72. In his affidavit of 8 February 2019 the Foster Father said,
- “The young boy is closely bonded to myself and my wife as well as the other child in our care and our baby.... He refers to us as dad and mum. We did not encourage him to do this but it happened naturally....*
- He is an outdoor child. He loves to go fishing or play football. I am the coach of his football team. We have bought him a 4 wheeler motorbike and he loves to drive it around out bush.*
- He is happy to go to school and his attendance and his progress there is good....*
- He has been treated as a member of our family. He has gone on several interstate trips to meet our family and is treated as one of the extended family. We have also taken him overseas with us. He was taken to a family wedding and participated in the wedding as a family member. He is much loved by his extended family and they give him gifts for Christmas and birthdays.*
- If he is allowed to move with us to South Australia he will reside with us at RAAF Edinburgh. He will enjoy all the benefits and facilities defence families have.*
- The RAAF Indigenous Liaison Officer has advised us they will assist me to be invited to Indigenous community events and outreach programs so that the young boy can be kept in touch with his Aboriginal culture.*
- I believe the young boy would be deeply traumatised by being removed from our family. He is very attached to all of us. He has already been removed once from his father’s care. I believe he regards us as his family and we regard him as part of our family.*
- We have nothing to gain financially by having the child as our family. We understand that if we obtain parental responsibility of the young boy will be our financial responsibility”.*
73. As noted in the young boy’s Care Plans, as early as March 2017 it was apparent that the likelihood of reunification with F was becoming more remote and F’s stated preference was that the young boy remain with the Foster Carers long-term. In addition, Territory Families had been unable to find any relatives willing or able to care for the young boy. In those circumstances, Territory Families discussed with the Foster Carers the possibility of them having long-term care of the young boy. The Foster Carers consistently expressed their willingness to care for the young boy long-term.
74. The Foster Carers were not aware of the existence of the Paternal Aunt and Uncle before September 2018. They had not received any telephone calls, letters, or presents from the young boy’s Victorian relatives. Although the young boy engaged warmly when he was with the Paternal Aunt and Uncle, the Foster

Carers said that he was reluctant to attend Skype sessions, became anxious about those sessions, and had to be encouraged by them to attend. They provided that encouragement.

75. The Foster Carers have demonstrated that they recognise the importance of the young boy knowing and spending time with his extended biological family by their efforts thus far at maintaining a good relationship with F and CB. They consider the recent problems in their relationship with F can be repaired. If they retain care of the young boy, the Foster Carers say that they will continue to ensure the young boy knows and has contact with his paternal relatives. In particular, the Foster Father advised he had a brother who lives close to Horsham, and with whom the family regularly holidayed (including having visited the young boy). The proximity of the Foster Father's brother to the young boy's Paternal Aunt, Uncle and Grandma's home towns would assist the Foster Carers to ensure the young boy knew and had contact with his extended paternal family. Additional opportunities for contact could be arranged through Skype, phone, photos, and sharing school reports.
76. The Foster Carers recognised the importance of the young boy knowing and spending time with his mother, half-siblings and extended Aboriginal family as demonstrated by their efforts to date to support the young boy to have contact with M, with CB (including taking the young boy to see her in residential rehabilitation) and his half-brother in Binjari. That the Foster Carers have not been more successful to date in establishing meaningful contact with the young boy's Aboriginal family is, in my view, at least partly attributable to the involvement of Territory Families. The young boy's Care Plans placed considerable responsibility on the Aboriginal case worker to make arrangements for the young boy's cultural development and Aboriginal connections. It appeared to me that the Foster Carers have been careful to operate within the parameters of the Care Plan. Under the Foster Care arrangements it seems to me that the Foster Carers did not have the latitude to pursue connections with the young boy's Aboriginal family except via arrangements made and supported by the case workers. It is possible the Foster Carers will have more success in engaging effectively with the young boy's Aboriginal family without the involvement of Territory Families. As they have an extensive friendship group in Katherine, the Foster Carers plan to return to Katherine for visits, and Aboriginal family contact or contact with F (if in Katherine) and CB would be a goal of those visits.
77. The Foster Carers' commitment to the young boy's well-being is demonstrated by the exceptional care they have provided to him, their attachment to him and his attachment to them. When F was supportive of the young boy remaining in the Foster Carers' care, he repeatedly commented on the quality of the care that they provided to the young boy and the degree of attachment the young boy had formed with them. That the Foster Carers have twice delayed the Foster Father's promotional transfer to Edinburgh, South Australia, until after

these proceedings are finalised is a testament to their commitment to and their willingness to put the young boy first.

## **The Expert Evidence**

### **Dr Kerri Thomas, Clinical Psychologist**

78. In late July 2018, Territory Families sought a parenting assessment from Dr Kerri Thomas. Having considered her experience and training I consider her to be an appropriately qualified expert. At the time of her assessment, Territory Families had applied for a long-term protection order with the proposal that the young boy remain with the Foster Carers. It is apparent from Dr Thomas's report of September 2018 that she was well apprised of the young boy's background, the background and medical conditions of F, and the background and challenges facing M and CB. Dr Thomas knew that the Foster Carers planned to move interstate with the young boy. Dr Thomas considered that this was a "complicating factor" as the "implications of the young boy moving interstate and not being near his biological parents and cultural heritage are strong factors requiring consideration in this matter".
79. Although Territory Families had commenced assessing the Paternal Aunt as a potential carer as early as 7 August 2018, Dr Thomas was provided little or no information about her and was not asked to consider the possibility of the Paternal Aunt assuming care of the young boy.
80. Dr Thomas was unable to interview F as he was in hospital, but was aware that at the time of her report he no longer supported the young boy remaining with the Foster Carers long-term.
81. Dr Thomas was unable to interview CB as she was in prison.
82. Dr Thomas did not interview M as she failed to keep her appointment for assessment. Dr Thomas was aware that M was not pursuing reunification and understood that Territory Families considered her to be a chronic drinker. Dr Thomas noted that M had failed to demonstrate any parental commitment to the young boy and her very limited contact with the young boy was not sufficient to have formed or maintained any real or meaningful bond. Dr Thomas understood that M did not support the young boy remaining with the Foster Carers as they were not Aboriginal.
83. In preparing her report, Dr Thomas interviewed the young boy's case worker and the Foster Carers and observed the young boy at home with the Foster Carers.
84. Concerning the Foster Mother, Dr Thomas reported inter alia ,  
*"The Foster Mother (aged 29) presented as a pleasant, warm, engaging, Caucasian woman.... (She) was thoughtful in her speech and very considered in her accounts of her life with the child and his relationship with his biological parents. The Foster Mother seemed to be a genuine and emotionally grounded*

woman who is upbeat and has a lot of energy and enthusiasm for her children and life with the Foster Father...

The Foster Mother stated that she has a close-knit family and her parents have been happily married for 35 years; they are very affectionate people and the Foster Mother has always felt very loved and secure in her family...

The Foster Carers were married in 2015. The Foster mother described a very happy, nurturing, and supportive relationship with the Foster Father....

The Foster Mother had worked in childcare for 10 years before starting foster care. When she moved to Katherine she was working at the Little Mangoes Childcare for 3 years and was the director of the Centre for the last 18 months of her tenure.... The Foster Carers started foster care 4 years ago...

The Foster Carers have had approximately 22 foster children over the last 4 years; some of these children she remains connected with through respite care...

(The Foster Carers) had a baby boy on 3 May 2018.... (and) have recently found out that (they are) pregnant...

The Foster Mother emphasised that one of the greatest disappointments of the court proceedings has been the loss of relationship between the Foster Carers and F. The Foster Mother advised that F has previously demonstrated insight into his illness and would choose not to see the young boy when he was unwell. She has always felt supported by F caring for the young boy and is upset and aggrieved that things have changed so dramatically...

In summary, the Foster Mother presents as a stable, strong, resilient and caring woman who has an abundance of enthusiasm and love to offer her family. She reported a stable and nurturing upbringing which bodes well for a well-adjusted adulthood. The Foster Mother reported some stress related to the young boy's care and ongoing court case which is normal and expected, given the circumstances. She has a loving and close support network comprised of her husband, family, and friends with no mental health concerns. It is anticipated that the Foster Mother will continue to thrive personally as she nurtures her young family. It is expected that following the completion of this court case she will be able to relax into her role as the young boy's mother, knowing that they all have long-term security and stability moving forward."

85. Concerning the Foster Father, Dr Thomas reported inter alia, "The Foster Father (aged 30) presented as a genuine, calm, down-to-earth, friendly Caucasian man. His mood was upbeat... The Foster Father was succinct in his speech but also warm and considered. Interactions with the Foster Mother and his 3 children were gentle, supporting, and loving.

*The Foster Father reported that he grew up in North Queensland with devoted parents who have been married for 35 years...*

*The Foster Father had the same account as the Foster Mother...on their marriage. He reported that they are strong and stable, nurturing and loving. He asserted that they work well as a team and actively keep the relationship strong with communication....*

*With regards to parenting, the Foster Father reported that he is heavily involved in his children's lives. He is Vice President of the fishing club ... and the young boy and their second foster child are both members. The Foster Father is also the assistant coach for the rugby team that the young boy is playing his first season with this year....*

*Overall the Foster Father presented as an articulate, grounded, stable man who values and prioritises his family. He appears to have had a loving and nurturing childhood and reported that he maintains close relationships with his parents, 3 siblings, and extended family. It is expected that the Foster Father will continue to thrive personally and professionally if awarded long-term parental responsibility of the young boy and is given opportunities to be promoted within the air force, which involves an interstate posting."*

86. Dr Thomas reported that the Foster Carers had expressed some concerns about recent interactions between the young boy and F. The young boy was reluctant to see F and had returned distressed from visits. When Territory Families determined that the visits were to be supervised, F ceased contact with the young boy. The Foster Carers noted that CB had previously attended access visits with F which the young boy enjoyed, but CB was no longer attending access visits due to her incarceration. In addition, the young boy had seen his mother drunk in the street. The young boy had noticed her behaviour and had asked "what's wrong with her face?" In her evidence Dr Thomas said, and I find, that the Foster Carers were perceptive and had insight into the young boy's emotional state, had proactively prepared the young boy for visits with his family, had nurtured his emotional health, and supported his emotional resilience during a period of uncertainty.

87. Concerning the young boy, Dr Thomas reported inter alia,  
*"It was evident during the assessment that the child is an outgoing, social active boy who has a great relationship with the Foster Carers, his foster sister, and the Foster Carers biological baby. He was happily playing and laughing with his foster sister outside and was more than happy to come inside for lunch and play with his Lego. The young boy was actively engaged with the Foster Carers and was also able to take gentle direction when prompted. It was evident in interactions at home that there is a loving and nurturing environment where the*

*young boy is thriving on a physical, emotional, and psychological level. The Foster Carers were sensitively attuned to the young boy's needs and showed this by offering praise to him but also being able to set appropriate boundaries. The young boy was lovingly encouraged and there was an abundance of warmth and love between the family as a whole....*

*In summary, the young boy is a healthy 5-year-old boy who appeared confident, well engaged with his family, loving towards his brother and sister and foster parents, and appears securely attached and nurtured within the family unit. Research has shown that secure childhood attachment is predictive of superior emotional regulation, confidence in navigating different environments, and these children are generally empathetic and caring of others. It is expected that the young boy's secure attachment to the Foster Carers will be the greatest predictor of his well-being moving forward."*

88. Dr Thomas opined,

*"It has now been 2 years and 7 months since the young boy has been in care with the Foster Carers. There is a general consensus that the young boy is developing at an age-appropriate level and he is thriving in his current placement with carers who are positively engaged and nurturing. The research is clear that all children in foster care need secure arrangements, and careful long-term planning is needed to reduce the uncertainty in their lives. Permanency planning focuses on relationships, identity, and a sense of belonging, and is important, as long-term care arrangements for children with families can offer lifetime relationships and a sense of belonging.*

*A secure attachment with caregivers is the foundation for trust and important for forming relationships throughout life. It is widely understood and acknowledged that children's best interests lie in the preservation of their attachment ties and that repeated ruptures of such ties constitute a severe trauma. Undisputedly, the young boy requires a stable, safe and long-term nurturing environment to ensure a secure attachment is maintained with his caregivers. It is evident from my assessment that the young boy has a strong secure attachment with the Foster Carers and I would consider it detrimental and traumatic if he were to be removed from their care. It is important for the young boy's well-being that permanency, stability and continuity of care be the presiding factors in his long-term care arrangements.*

*At present, there are no kinship placements available to consider for the young boy.... Territory Families are investigating a kinship placement with a relative of F who has never met the young boy. Research has shown that kinship care has many advantages, including children finding a placement with known family members less traumatic than a placement with strangers, cultural and religious*

*practices are more likely to be continued, contact with parents is more frequent, and may facilitate eventual reunification.... However, I would not consider a kinship placement with a relative who is unknown to the young boy to be in his best interests...*

*I am of the view that family reunification is not a reasonable goal for the young boy as neither F nor M have demonstrated an ability to provide consistent, secure, nurturing care, over a long period of time.*

*Since family reunification does not seem likely, it is necessary to consider a permanent care arrangement for the young boy that promotes lifetime family connections that can be nurtured and preserved. In consequence, I am of the view the Foster Carer's application for a long-term parenting order granting parenting responsibility until the age of 18 years is appropriate and will provide the best outcome for the young boy's nurturance and well-being....*

*The Foster Carers are planning an interstate move... This has obvious implications for the young boy and his access and visitation with F and M.... It is important that the young boy remain connected to his biological parents, culture, and country.*

*The Foster Carers reported that they understand the importance of keeping a young boy connected to their heritage and culture....*

*The Foster Carers maintained that they will ensure the young boy remains connected to his culture and family and recognise the importance of his heritage, and not in a tokenistic way.... At present, the young boy is not associated with any community and it is important that Territory Families are able to pinpoint the cultural identity of his community and the language and customs of this community, to ensure the Foster Carers can start introducing this into his life, irrespective of whether they live in Katherine or interstate.*

*The guiding principles of child welfare activity are well-established as being based on the premise of maintaining safety, permanency, and well-being. Based on the available information I recommend that the Foster Carers be granted a long-term protection order with parental responsibility for the young boy until he is 18 years of age. I consider this action to be the most suitable protection provided there is a Care Plan that includes: (i) A clear cultural plan... so that the young boy can experience his Aboriginal culture and maintain that aspect of his identity...; (ii) Continues to identify age-appropriate cultural events and ceremonies which are crucial to the young boy's identity and development; and (iii) Facilitates access visits with F and M when possible... including regular scheduled facetime/Skype calls to ensure there is regular contact between face-to-face visits." (Citations omitted)*

89. Dr Thomas gave evidence in the proceedings. Although submissions were made as to the limitations of her report, given that she had not had an opportunity to interview F or the Paternal Aunt and Uncle, when she gave evidence she had been provided all the material that was available to the Court, including the affidavits of the Paternal Aunt and Uncle and the expert report of Ms Louise McKenna. Given the content of the affidavits and Miss McKenna's report which were detailed and readily understandable, in my view the fact that Dr Thomas had not had an opportunity to interview all of the parties did not diminish her professional assessment or opinion. Having considered all the material Dr Thomas said,
- "I was quite surprised that we (Miss McKenna and myself) interviewed the same people, barring the Paternal Aunt and Uncle and that we came up with very different conclusions regarding the young boy's care. Namely, that I would consider it to be severe trauma to remove the young boy from the care of the Foster Carers, given they have such a secure attachment. Ms McKenna stated that given the secure attachment the young boy wouldn't suffer any mental health consequences as a result of moving, which I would strongly disagree with. I think that the overriding concern for the young boy's care and for his well-being would be to continue his attachment with his current caregivers; namely, that they are his family; he stated that they are his everything, and that I think he would be very traumatised if he was forced to leave."*
90. In addition, in her evidence Dr Thomas also pointed to the close relationships the young boy had formed with his "siblings", namely, the Foster Carers' biological child and their second long-standing foster child. She considered that separating the young boy from the sibling relationships would add to the young boy's trauma.
91. Dr Thomas pointed to the risk when secure attachments are severed which increased if the trauma was repeated. In her evidence she said "even one rupture could cause severe trauma" and emphasised the importance of "not doing further harm, which I think severing the attachment would be doing further harm".
92. Dr Thomas expressed the opinion that transition to the Paternal Aunt and Uncle would "disrupt his secure attachment... would constitute a severe trauma, which needs to be well-managed if it if he is to transition." Dr Thomas pointed out that successful transitions do occur when children have had secure attachments with more than one family member, so for example, children who have a secure attachment to grandparents may be able to transition from a parent's care to a grandparent's care successfully. Dr Thomas further noted that a secure attachment is formed over a long period of time. However, when asked whether she thought the young boy could be moved successfully to the Paternal Aunt and Uncle Dr Thomas said,

*"I disagree at this point in time. I think that would have been true if it had been at the start of the placement. I firmly believe, at this point in time, and from my clinical practice where I see adults now who have moved placements and their secure attachment ties have been ruptured, to be strongly detrimental to their physical and mental health and the research strongly supports that. So yes that would have been the best of option if it had happened early in the piece.... We know that the more placements there are, the worse the child's mental health outcomes are and their physical health outcomes are but in this case, that's not relevant because he does have a permanent care arrangement in place that could be permanent.... There is a lot of research that says we must consider the secure attachment and not rupture that first and foremost, as being in the child's best interests.... If he was to leave the Foster Carers' care, that would be considered a rupture in his attachment with them and I think that would have detrimental long-term outcomes for him.*

*... There is a lot of evidence, a lot of research, that would support that one rupture would cause severe trauma. And in this instance if there wasn't such a strong attachment and if it hadn't been over such a long period of time that may have been mitigated. But we're talking three years of a secure bond and attachment, and also with siblings."*

93. Dr Thomas went on to say,

*"I would propose that the ideal outcome would be that the young boy remained with the Foster Carers and remain with that secure attachment as his home base. And that he have contact with the Paternal Aunt and Uncle and with his parents definitely. And that might be, you know, monthly, school holidays or whatever it is. But I would propose that he stay with his home base. I firmly believe that is in the best interests of the young boy."*

94. Concerning the alternative, namely, moving the young boy to the Paternal Aunt and maintaining contact with the Foster Carer's Dr Thomas said,

*"I wouldn't see that has the best outcome. I think that maintaining regular contact with the Foster Carers would help to mitigate the risk of there being a problem with his mental well-being moving forward, but I would not consider that to be in his best interests. I think there are too many other variables that could go wrong. I think that's a riskier scenario."*

95. My observations of the Foster Carers during the court proceedings were consistent with those of Dr Thomas. They impressed me as a calm, grounded, and emotionally intelligent. There was no doubt that they loved the young boy, were closely bonded to the young boy and that the bond was reciprocated, that they had his best interests at heart, would act in his best interests, and that they were genuinely committed to ensuring that the young boy would remain

connected with his biological and Aboriginal family and culture. Whilst I was convinced as to the Foster Carers' intentions, concerning ensuring paternal and Aboriginal family connections were established and maintained, in my view ultimately the success of those relationships will be equally dependent on the paternal and Aboriginal family making reciprocal efforts.

**Ms Louise McKenna, Senior Psychologist**

96. Ms McKenna provided a report dated January 2019. Having considered her experience and training I consider her to be an appropriately qualified expert. I accept that she has considerable experience in attachment theory. It is apparent from her report that she was well appraised of the background and current circumstances of the young boy, his extended biological family, and the Foster Carers. Ms McKenna was provided with all additional material that was available to the Court.
97. Ms McKenna interviewed the Paternal Aunt and Uncle. Ms McKenna noted that the Paternal Aunt and Uncle had been married for 24 years. The Paternal Aunt informed Ms McKenna that she knew that the young boy had been placed in the care of Territory Families in 2016 but did not feel the need to intervene as she believed this was a temporary arrangement which enabled F and CB to maintain regular contact with the young boy. The Paternal Aunt advised that when F finally discussed the situation with her, he was highly distressed at the idea that the young boy would leave Katherine with the Foster Carers and that he would lose meaningful contact with him. The Paternal Aunt said that she and her husband arranged to come to Katherine in September 2018 to see F (in hospital), CB (in prison), and to meet the young boy. The Paternal Aunt and Uncle were surprised by how well the young boy responded to them and that he seemed keen to spend time with them. The Paternal Aunt said that since that time they had regular Skype sessions with the young boy facilitated by Territory Families. She said "after spending time with the young boy, meeting with his carers and having more in-depth discussions with F about his wishes, (they) made the commitment to provide the young boy with full-time care. They have discussed the decision with their children who are all supportive of having the young boy live with them on a full-time basis." Although the Paternal Aunt and Uncle recognised that moving the young boy from the Foster Carers will represent a significant loss for him, it was their view, that in the longer term such a move would be in the young boy's best interests because he would be raised by his own family, would have the ability to maintain regular contact with F and CB and would be able to maintain contact with M. The Paternal Aunt also recognised that it would be important for the young boy to maintain an ongoing relationship with his Foster Carers and to this end, was willing to facilitate the young boy spending holidays with his Foster Carers and having Skype communication, once he was settled into their Victorian home. The Paternal Aunt and Uncle perceived that they had the necessary skills to enable the young boy to transition into the care. They described themselves as being loving,

patient and child-focused as well as being well connected to community and family. They had access to an extensive support network through their Christian faith and school community. They both had extensive knowledge of child development. The Paternal Uncle is a primary school teacher who is fully cognisant of the developmental needs of a young child. The Paternal Aunt works as a teacher's aide. They are experienced in their role as parents having raised 4 children. The Paternal Aunt and Uncle indicated an awareness of the importance of the young boy maintaining a connection to his Indigenous community. They are keen to travel to the Northern Territory to enable the young boy to spend time with M and with his extended family.

98. Ms McKenna observed the young boy interacting with the Paternal Aunt and Uncle and 3 of their children. Ms McKenna noted that although he was initially shy the young boy responded positively to the warm and natural welcome of the paternal family and generally initiated and sustained a comfortable and appropriate level of engagement with family members. When he was shown photos of other members of the family the young boy was comfortable and curious and showed no evidence of anxiety or distress. Observations of the Paternal Aunt and Uncle interacting with their own children demonstrated a strong and loving relationship and their children appeared relaxed and confident in their parent's care.
99. Ms McKenna interviewed the Foster Carers. From her report it is clear that the Foster Carers provided an accurate and detailed account as to how the young boy came into their care, how they have managed the relationship with F, and the communications with F and Territory Families which led them to become committed long-term carers of the young boy. Ms McKenna noted that the Foster Carers considered the young boy to be a member of the family and noted that both sides of their extended family had embraced him. Similarly to the Paternal Aunt and Uncle, the Foster Carers indicated that they would support the young boy to maintain contact with his extended family both in Katherine and in Victoria. They pointed to Skype and telephone contact as a way of managing this and were willing to visit Katherine during school holiday periods to maintain contact with the young boy's Indigenous extended family. The Foster Carers also pointed to support that could be provided by the Defence Indigenous Cultural Advisor in this regard. The Foster Carers advised that they had a close family member who lived 30 kilometres from Paternal Aunt and Uncle which would assist in facilitating ongoing contact between the young boy and his paternal family.
100. Ms McKenna observed the young boy with the Foster Carers, their 7-month-old son, and their second foster-child. McKenna described the young boy as busy, engaged and comfortable with his family members. The young boy sought out physical contact with the Foster Father by standing close to him, touching his arm and lying against him when he was holding the baby. The Foster Mother was observed to demonstrate active interest in the young boy's activities and

the child responded positively to her comments. The young boy referred to his Foster Carers as mum and dad. The interactions were spontaneous, warm and inclusive. The young boy moved easily between the Foster Father and the Foster Mother and engaged in focused activities with them both. The young boy was able to use his Foster Carers as a secure base for exploration and showed confidence in his own abilities.

101. Ms McKenna interviewed the young boy. She described him as a “charming, confident 5-year-old boy of slim build and a cheeky smile”. When discussing his family members the young boy indicated his Foster Mother was mum and his Foster Father was dad. The young boy also said he had a “Daddy P” and a “Mummy M” and a “Sister C”. He demonstrated a rudimentary understanding of the Paternal Aunt and Uncle and referred to them as “Aunty N” and “Uncle M”. When asked if he would like to live the Paternal Aunt and Uncle he said “I would miss (the Foster Carers). They want me to tell the big man (Magistrate) that I want to stay with them”. When asked what he would miss about the Foster Carers the young boy replied “everything”. In evidence Ms McKenna accepted that the Foster Carers were the young boy’s “emotional family”.
102. In the course of evidence, there was some concern expressed as to the appropriateness of the young boy being aware that a person he referred to as the “big man” was making a decision about where he might live. The Foster Carers explained that they had been told by a Territory Families case worker to answer any questions the young boy might raise in that way. While it might have been preferable for the young boy to have been completely protected from the knowledge of these proceedings, given the introduction of the Paternal Aunt and Uncle into his life, and all the other matters attendant to these proceedings such as lawyers, affidavits, and attendances at court, it is not surprising that the young boy “cottoned on” that something was going on concerning his living arrangements. In my view it would be unfair to criticise the Foster Carers’ handling of the matter, particularly in light of the difficult circumstances and advice given by Territory Families.
103. Ms McKenna interviewed F, who said he wanted the Paternal Aunt and Uncle to raise the young boy. He considered the Paternal Aunt and Uncle to be loving parents, who had done a tremendous job raising their own children, and he wanted the young boy to have the benefit of being raised in the same way. He said that M also supported the young boy living with the Paternal Aunt and Uncle. F said he appreciated the standard of care that the Foster Carers had provided to the young boy and acknowledged that the young boy had thrived in the care and had developed a close and loving relationship with them. F accepted that he may never be well enough to provide the young boy with the standard of care required and so wanted the young boy to be cared for by his own family and not by persons unrelated to him. F said he had a large extended family who wanted the young boy to be part of their lives and he believed that it was in the young boy’s best interests to be raised by members of his own

family. Because of his contact with M and her family, F believed that his family were best placed to ensure that the child had regular and ongoing access to his Indigenous family in the Katherine region. F did not think that the Foster Carers would be able to achieve the same level of contact. F said his long-term plan was to return to Victoria. F expected the Paternal Aunt and Uncle to have parental rights and he implicitly trusted his sister and brother-in-law to care for the young boy as their own child.

104. It was Ms McKenna's opinion that the young boy's long-term interests would be best served if he was placed in the care of the Paternal Aunt and Uncle. In her evidence Ms McKenna emphasised the importance of biological family to the development of a child's personal identity and sense of connection and noted that a disconnection with biological family would likely result in negative consequences later in the young boy's life. Ms McKenna considered that living with the Paternal Aunt and Uncle would enable the young boy to grow up within his own family, who were demonstrably competent caregivers, and who were clearly capable of providing the young boy with a stable, nurturing home. Ms McKenna noted that such a placement would assist the young boy to develop relationships with his paternal grandmother, as well as with his large extended paternal family. Ms McKenna further considered that, through the auspices of F, the Paternal Aunt and Uncle would be better placed to ensure the young boy had contact with his Indigenous family and with his cultural heritage.
105. Ms McKenna pointed to research which indicated that children raised with relatives do better than children raised with non-relatives because they experience fewer placement disruptions, are less likely to be maltreated, and are more likely to have regular contact with their parents than children in non-relative foster care. However, in her evidence Ms McKenna conceded that in this case the likelihood of a placement breakdown with either the Foster Carers or the Paternal Aunt and Uncle was very slim.
106. Ms McKenna said that the Foster Carers were to be commended for the high standard of care they had provided to the young boy and she did not question their commitment. However, consistent with the research, she did not think that the Foster Carers would be able to maintain and support regular contact with child's Aboriginal family to the same extent as the Paternal Aunt and Uncle, because of the Foster Carer's limited interactions with M and because neither M nor F supported them having care of the young boy on a permanent basis. However, I was satisfied on the evidence that the Foster Carers had demonstrated their capacity to facilitate and maintain contact and engagement between the young boy and the members of his biological family who had reciprocated an interest in knowing him. In addition, the Foster Carers had a 12-year connection to Katherine which would likely result in an ongoing connection to their social networks in the region. By contrast the Paternal Uncle and Aunt had only recently visited as a result of these proceedings. The Paternal Aunt and

Uncle would have no direct connection with the area if F moved to Victoria as he planned.

107. Ms McKenna acknowledged that the young boy would experience distress in the short-term and would likely regress in his behaviour when moving from the Foster Carers to the Paternal Aunt and Uncle. In her evidence Ms McKenna said that the disruption would be “without a doubt” traumatic but she considered that the adults involved in the process would be able to support the young boy and reduce the levels of distress that he experienced. Ms McKenna considered that because the young boy had formed a “secure attachment template” in his early years, that attachment template had allowed him to attach securely to the Foster Carers and would enable him to transition to and attach securely with the Paternal Aunt and Uncle. In her evidence Ms McKenna said:

*“... Given that attachment template... His attachment style being quite a secure attachment has continued. Given that he’s got that foundation of attachment, his ability and to re-establish relationships with others, he has already got the foundations for that. Now, that doesn’t mean it’s not going to be challenging for him or that he’s not going to show a grief reaction in response... if he was to change carers. He will. But because he has that secure attachment template the ability for him to then reform and attach with a new carer is a lot stronger than if you did not have a secure attachment template.”<sup>10</sup>*

108. In reaching her conclusion that the young boy had a “secure attachment template” Ms McKenna seemed to rely in her report on the following information provided to her by F:

*“F described himself as the young boy’s primary caregiver from birth until he was 2 years 7 months. M also assisted in caring for the young boy when F was working away, and during such times, she was able to maintain sobriety. He said that his daughter had also played a role in the young boy’s care, particularly when he had periods of hospitalisation due to poor mental health.”*

109. In addition in her evidence Ms McKenna said:

*“Now, going on the history that I’ve read for the young boy and, you know, the information that’s been provided, including a whole range of photographs provided, this child has no history of severe trauma, there was no abuse and, to all extent and purposes, he was a very happy, well cared for baby, despite the fact that his father had mental health issues.”<sup>11</sup>*

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<sup>10</sup> T p 101

<sup>11</sup> T p 101

110. Seemingly based on that information Ms McKenna formed the opinion that the young boy was:
- “... A child who has experienced a secure attachment during the critical period for the development of attachment (6 months to 2 years). Photographs provided by F of the young boy as a baby and toddler indicate a happy, contented child who appears responsive and confident in exploring his environment. The young boy’s secure attachment-base enabled him to manage when he moved from F’s care to the Foster Carer’s care. Given that, he has a secure attachment template and has no history of severe trauma and abuse he can transfer his attachment to other carers without significant impact on his mental health.”*
111. However, I found this important aspect of Ms McKenna’s opinion troubling. As pointed out by the child’s representative, not much weight can be attached to happy family photographs, because it is unlikely children are photographed when in distress. Nor is it likely a family member would photograph evidence of neglect. Including the photographs as a basis for her opinion seemed flimsy. More importantly, it seemed that Ms McKenna uncritically accepted F’s account as to the young boy’s early years as a basis for her conclusion that the young boy had a “secure attachment template”. Ms McKenna did not grapple with the competing evidence concerning the young boy’s familial circumstances in those early years. In my view her opinion did not adequately consider or address: the 6 notifications of concern that Territory Families had received before the young boy was taken into care; the affidavit of M in which M stated the young boy had been taken from her by F because there was “too much drinking and trouble”; the concerns reported about the young boy being left in the care of CB and her capacity to care for the young boy (particularly in light of current information concerning her issues with alcohol and her imprisonment seemingly for a violence offence); the fact that F had attempted to leave the young boy with neighbours (about whom little is known except that they were unwilling to care for the young boy); the state of F’s home when the young boy was taken into care, namely, that F described it as without power, telephone, water or food; the state of F, namely, that he was described by Territory Families as unkempt and dirty; nor the physical state of the young boy as described to Dr Thomas, namely, that he was covered in small sores because he was malnourished and suffered from undeveloped mouth muscles due to an inadequate diet.
112. In my view the competing evidence consisted of adverse admissions from F which are likely to be reliable, adverse admissions by M which are likely to be reliable, and reasonably detailed and specific contemporaneously documented reports which are likely to be reliable. In light of that body of evidence, I was not persuaded that I should accept Ms McKenna’s opinion that the young boy had a “secure attachment template”. If the young boy had an attachment style which was less robust than that proposed by Ms McKenna, which I consider to be likely, then the risks associated with transitioning him to new carers were likely

greater than envisaged by Ms McKenna. In my view the risks of any such transition were more in line with the evidence and opinions of Dr Thomas.

## **The Statutory Regime**

### **Who is “Family” Under the Act?**

113. An issue arose in this hearing as to who should be considered “family” for the young boy under the Act. In particular, were the Foster Carers “family” under the Act?
114. Section 17 defines the parent of a child under the Act:
- (1) A parent of a child is the child’s father, mother or any other person who has a parental responsibility for the child.
  - (2) A parent of an Aboriginal child person who is regarded as a parent of the child under aboriginal customary law aboriginal tradition.
  - (3) However, any of the following must not be regarded as a parent of a child:
    - (a) the CEO (of Territory Families);
    - (b) a person who has responsibility for the care of the child only on a temporary basis;
    - (c) a person, such as a teacher or child care worker, who has responsibility in relation to the child because of a professional relationship.
115. Applying the definition in s 17, it is clear that F and M are the parents of the child<sup>12</sup>. Although the young boy was under a two-year Care and Protection Order and the CEO of Territory Families had parental responsibility, under the Act the CEO must not be regarded as a parent<sup>13</sup>. The CEO placed the young boy with the Foster Carers under that two-year order. At the time of the placement it was envisaged the young boy would remain with the Foster Carers until the young boy was reunified with F or until the expiration of the order (even though longer-term planning was also under way in which the Foster Carers were being considered for long-term care). In addition, the CEO could cancel the placement arrangement and replace it with another arrangement at any time<sup>14</sup>. The Act provides that a person who has responsibility for the care of the child only on a temporary basis must not be regarded as a parent<sup>15</sup>. I consider that a placement with a foster carer on a two-year order, which could be cancelled at any time, is a placement “on a temporary basis” and accordingly the Foster Carers cannot be considered the parents of the young boy under the Act.
116. Parent is also defined in s 153 of the Act for the purpose of Part 2.4 of the Act which provides for the transfer of orders and proceedings to another jurisdiction. Section 153 provides that the parent “for a child, includes anyone

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<sup>12</sup> s7(1)

<sup>13</sup> s7(3)(a)and (b)

<sup>14</sup> s77

<sup>15</sup> s7(3)(b)

who would have parental responsibility for the child if the order had not been made". Although that definition is not directly relevant to the matters in this case, that definition also results in the conclusion that the young boy's parents are M and F.

117. Section 18 of the Act defines "relatives":

(1) A relative of a child is any of the following:

- (a) a parent, grandparent or any other ancestor of the child;
- (b) a step parent of the child;
- (c) a sibling of the child;
- (d) an uncle or aunt of the child;
- (e) a cousin of the child;
- (f) a person who is related to the child in accordance with:
  - (i) any customary law or tradition applicable to the child; or
  - (ii) any contemporary custom practice.

(2) to avoid doubt, a relationship covered by subsection (1) may include a relationship that arises through common ancestry, adoption, marriage, de facto relationship or any customary law or tradition.

118. It is clear that the maternal grandmother, RS, and the paternal grandmother are grandparents of the young boy. Given the breadth of the definition, in my view half-siblings must clearly be included as siblings. Accordingly, I find that AW, KW, and CB are sibling of the young boy. The Paternal Aunt and Uncle are relatives of the young boy, as are their children who are cousins of the young boy.

119. Section 19 of the Act defines "family" to include:

- (a) the relatives of the child; and
- (b) the members of the extended family of the child in accordance with:
  - (i) any customary law or tradition applicable to the child;
  - (ii) any contemporary custom practice; and
- (c) anyone who is closely associated with the child or another family member of the child.

120. Section 19 (c) of the Act seemingly creates an extended definition of family which includes "anyone who is closely associated to the child". Although they could not be considered parents, were the Foster Carers persons closely associated to the child such that they fell within that definition of his family? I

heard submissions on behalf of M, Territory Families, and the Paternal Aunt and Uncle that the young boy's family was to be determined having regard to the time that he came into the care of the CEO in February 2018, and as the Foster Carers were strangers to the young boy at that time they should not be considered family. To the contrary, the Foster Carers submitted they were closely associated to the young boy when the current proceedings commenced in April 2018 and so fell within the young boy's family under the statutory definition.

121. The definition of "family" under the Act is extremely broad<sup>16</sup>. Extended biological family are clearly covered under the definition of "relatives" of the child. The definition includes "extended family" by reference to customary law, tradition, contemporary custom or practice. I consider this might encompass persons unconnected by biology to a child but who are broadly accepted within a child's cultural community to be family or who are recognised as having familial-like responsibilities or obligations to a child. However, the definition is broader still and includes persons closely associated with a child or another family member of the child. It seems to me that there is some fluidity attached to the definition of family. Families can grow over time and, at least in the social sense, also retract. At the time of these proceedings the Foster Carers had developed a close emotional bond with the young boy and were undoubtedly closely associated with the young boy; they were his emotional family. The Foster Carers had been joined as parties to the proceedings and were seeking long term parental responsibility of the young boy. Given there is the possibility of fluidity and change concerning a person's family, I consider the proper time for determining who is family for a child is at the time of the proceedings before the Court and not some earlier point in time.
122. However, even if the definition of family is, on a literal interpretation, broad enough to include the Foster Carers, I must also consider whether such an interpretation is consistent with the objects and principles of the Act.
123. Section 4 of the Act sets out the objects of the Act, namely:
  - (a) To promote the well-being of children, including:
    - (i) to protect children from harm and exploitation; and
    - (ii) to maximise opportunities for children to realise their full potential; and
  - (b) To assist families to achieve object in paragraph (a); and
  - (c) To ensure anyone having responsibilities for children as regard to the objects in paragraphs (a) and (b) in fulfilling those responsibilities.
124. In addition, s 8 of the Act explains the role of the family as follows:

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<sup>16</sup> MM and SM & SD v CEO DCF, LD and AD, File No 21330067, unreported decision in the Local Court Family Matters Jurisdiction per Oliver (SM), 23 October 2015, at [10]

- (1) The family of a child has the primary responsibility for the care, upbringing and development of the child.
- (2) In fulfilling that responsibility, the family should be able to bring up the child in any language or tradition and foster in the child in cultural, ethnic or religious values.
- (3) A child may be removed from the child's family only if there is no other reasonable way to safeguard the well-being of the child.
- (4) As far as practicable, and consistent with section 10, if a child is removed from the child's family:
  - (a) contact between the child and the family should be encouraged and supported; and
  - (b) the child should eventually be returned to the family.

125. In the circumstances of this case, the young boy was removed from the care of F. In my view s8 (4) (b) points to the young boy possibly being returned to the family from which he was removed, but is clearly wide enough to permit "return" to any part of the young boy's family. So, for example, where parents are separated, have little or nothing to do with each other, and one parent (let's say the mother) has had full custody of a child; if the mother became unable or unwilling to care for the child then other potential family must be considered for the child. This would properly include a consideration of the extended maternal family (if any), the father (if his identity is known and he can be located) and the extended paternal family (if any). An assessment of the family members' various capacities and what was in the best interests of the child might see the child "returned" to the paternal family and not the maternal family, even though the child was removed from the mother. This might occur even if there was no previous contact between the two sides of the family. Under the "return" policy, it appears to me that cultural family can be included without defeating the objects and purpose of the section. Further, there does not appear to me to be any good reason or necessity arising from the purpose or intent of the "return" policy for "persons closely associated with the child or a family member of the child" to be excluded. It is possible to envisage a situation where, for example, refugee families form close supportive connections and communities. If the parent(s) of one family in such a group became unable or unwilling to care for their child, it would be proper to consider whether another adult in that group, who was closely associated to the parent or the child could care for the child. I consider such an approach would be consistent with the purpose of s 8.

126. Although one of the objects of the legislation is to strengthen and preserve families I consider that the primary objective is to promote the well-being of the child<sup>17</sup>. I do not consider that the purposive approach to statutory

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<sup>17</sup> s90

interpretation required the extended definition of family to be narrowly confined.

127. It seemed that one of the motivations behind the submissions against the Foster Carers coming within the extended definition of “family”, concerned the priority and weight that should attach to the competing evidence. The thrust was, that greater weight should be given to the evidence, wishes and claims of the biological family, than to persons who fell within the extended definition.
128. There is some force to this argument. Biological family can be objectively determined and is not as fluid or as subjective as family determined by a closeness of association. However, the Family Matters jurisdiction exists because biological care can and does fail children. So, when the Court takes into account the wishes of the parents, the same weight need not necessarily be given to the views of each parent. The views of a parent who is protective of a child might be given greater weight than the views of a less involved or neglectful parent. While biology is a relevant factor in determining what weight is to be given to evidence, in my view it is not determinative of the issue.

### **The Aboriginal Child Placement Principle**

129. Section 12 sets out principles of placement applicable to Aboriginal children. Relevantly it provides:
- (1) An Aboriginal child should, as far as practicable, be placed with a person in the following order of priority:
    - (a) a member of the child’s family;
    - (b) an Aboriginal person in the child’s community in accordance with local community practice;
    - (c) any other Aboriginal person;
    - (d) a person who:
      - (i) is not an Aboriginal person; but
      - (ii) in the CEO’s opinion, is sensitive to the child’s needs and capable of promoting the child’s ongoing affiliation with the culture of the child’s community (and, if possible, ongoing contact with the child’s family).
  - (2) In addition, an Aboriginal child should, as far as practicable, be placed in close proximity to the child’s family and community.
130. *REF and SJP v CEO, Territory Families* [2019] NTSC 4 (*REF v CEO*) is a case in which the question arose as to whether a child should remain with her foster carers (interstate) or live with an Aboriginal grandmother (in an Aboriginal community). (I note as an aside that in *REF v CEO* the question of whether that

child's foster carers might also be "family" does not appear to have been raised even though that child had been living with her foster carers (and not her biological family) for all 5 years since her birth). When considering the statutory regime, although he found the "Aboriginal Child Placement Principle" to be ancillary to the "best interests of the child" principle, Barr J acknowledged:

*"... that the Department was required to have regard to the "Aboriginal child placement principle", incorporated into s 12 (3) of the Care and Protection of Children Act 2007, which requires that an Aboriginal child should, as far as practicable, be placed with a member of the child's family and indeed any other Aboriginal person in preference to someone who is not an Aboriginal person."*<sup>18</sup>

131. This principle ensures that weight and proper consideration is given to a child's Aboriginality when determining where they should live. Under the Act, Aboriginality is ancestral or inherited<sup>19</sup>. In other words, the principle gives weight to a child's biology in determining with whom a child should live.
132. Even while attaching weight to a child's Aboriginality, under the principle the first placement priority is "a member of the child's family". The section does not specify Aboriginal family. Although the young boy is Aboriginal, he is the son of mixed-race parents. In my view the principle requires that priority be given to either side of the young boy's family, and Aboriginal family does not take priority over non-Aboriginal family.
133. As the principle attaches weight to a child's ancestry and biology, by extension it seems that under this principle, priority is to be given to biological family over non-biological family. Accordingly, in my view, the application of this principle in this case weighs in favour of the young boy living with the Paternal Aunt and Uncle.
134. However, the application of this principle is not determinative of the matter. In *REF v CEO* Barr J explained:  
*"...s 12(3) must be read subject to s 10(1) of the Care and Protection of Children Act 2007 which dictates that, in any decision involving a child, the best interests of the child are the paramount concern."*<sup>20</sup>

### **Best Interests of the Child**

135. Pursuant to s 129 of the Act:

The Court must make the protection order if the Court is satisfied:

- (a) the child:
  - (i) is in need of protection;

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<sup>18</sup> *REF and SJP v CEO, Territory Families* [2019] NTSC 4 [27]

<sup>19</sup> s 13 definition of Aboriginal

<sup>20</sup> *Ib id* [27]

(ii) would be in need of protection but for the fact that the child is currently in the CEO's care, and

(b) the order is the best means of safeguarding the well-being of the child.

136. In this case there is no dispute between the parties that the young boy would be in need of protection but for the fact that he is in the CEO's care.

137. Section 10 of the Act sets out the matters that the Court must take into account in determining the best interests of the child. I will address each factor below.

(1) When a decision involving a child is made, the best interests of the child are the paramount concern.

(2) Without limiting subsection (1), consideration should be given to the following matters in determining the best interests of a child:

(a) the need to protect the child from harm and exploitation;

- I am satisfied on the evidence that both the Paternal Aunt and Uncle and the Foster Carers would protect the young boy from harm and exploitation.

(b) the capacity and willingness of the child's parents or other family members to care for the child;

- I am satisfied on the evidence that neither parent is capable of caring for the young boy. M does not seek to resume care of the young boy, nor has she demonstrated any willingness or commitment to do so. Although F would like to be able to care for the young boy, he recognises that because of the seriousness and unpredictability of his mental health he does not have capacity to care for the young boy.
- The Paternal Aunt and Uncle are close biological family members that have the capacity and willingness to care for the young boy. The Foster Carers are closely associated with the young boy and also have the capacity and willingness to care for the young boy.

(c) the nature of the child's relationship with the child's family and other persons who are significant in the child's life;

- The young boy knows that M is his mother and refers to her as "Mummy M". However he had no contact with M for 4 years and she has only attended four access visits in 2017 the last being about 8 months ago. I am satisfied that the young boy does not have a meaningful relationship with M, nor she with the young boy. However, efforts should continue to ensure the young boy knows M.
- The young boy knows F is his father and calls him "Daddy P". Given his young age when he came into care, I assume that the

young child has no memory of living with F. When F is well he maintains fortnightly contact with the young boy. Contact ceases when F is unwell. I am satisfied that the young boy does have a meaningful relationship with F. In my view it is in the best interests of the young boy that that relationship be maintained. F lives in Katherine, and on either scenario the plan is for the young boy to move interstate.

- If F remains in Katherine it will be incumbent on him to be available for phone and Skype contact with the young boy, to visit the young boy interstate, or to make himself available if the young boy returns to Katherine for family contact or holidays. Given the difficulties the Paternal Aunt experienced in maintaining contact with F by phone, F's capacity to maintain meaningful contact with the young boy by electronic means will likely be dependent on his mental health.
- F said that if the young boy lives with the Paternal Aunt and Uncle, he planned to move to Victoria. If F moved to Victoria, this would likely provide additional opportunities for the young boy to develop and maintain a meaningful relationship with F, as F would be living closer to and would be welcome at the Paternal Aunt and Uncle's home.
- The Foster Father also has a brother who lives in Victoria, not far from the Paternal Aunt and Uncle. If F moved to Victoria, the Foster Father said that the proximity of his brother would assist the Foster Carers to travel to Victoria so that the young boy could engage in and maintain meaningful contact with F, the Paternal Aunt and Uncle and extended paternal relatives.
- However in my view, it is not certain that F will relocate to Victoria especially in light of his fluctuating health. He has lived in the Northern Territory for a long time and owns a block of land here. In addition, I have not heard evidence from his mother with whom he proposes to reside.
- The young boy has a warm relationship with his half-sister CB and calls her "Sister C". In my view it is in the best interest of the young boy that that relationship be maintained. CB lives in Katherine. On either scenario contact could be maintained by Skype or telephone, and visits by the young boy to Katherine. I understood that CB would be welcome to visit the Paternal Aunt and Uncle although their only recent contact arose because of these proceedings. Although I did not hear direct evidence on this point, the Foster Carers have extended hospitality to CB and

supported the young boy's relationship with her, and I would expect that to continue.

- The young boy does not have any meaningful contact with his extended Aboriginal family. F could assist in facilitating such contact. F could provide that assistance to either the Paternal Aunt and Uncle or the Foster Carers. Although the relationship between F and the Foster Carers has recently been difficult, I am satisfied that because of their lengthy history of cooperation their relationship can be repaired. Certainly the Foster Carers are more than willing to mend the relationship.
- The young boy knows the Paternal Aunt and Uncle because he spent holiday time with them in Katherine during September and Christmas time 2018. In addition the young boy has participated in numerous Skype sessions with them. That relationship is in its infancy. However, in my view it is a meaningful relationship and it is in the young boy's best interest for that relationship to be encouraged and maintained. That would occur if the young boy went to live with the Paternal Aunt and Uncle. Alternatively, it could be maintained through Skype sessions, phone calls and holiday visits.
- The young boy has lived with the Foster Carers since he was 2 years and 7 months of age and he is now 5 years and 9 months old. He calls them mum and dad. They are for all intents and purposes his family. He has a secure attachment to them, as observed by F, the young boy's caseworker, and the expert psychologists. In my view this is the most consistent, important, and significant relationship in the young boy's life. The young boy is also attached to the Foster Carer's biological son and their second foster child.
- If the young boy was to live with the Paternal Aunt and Uncle, this would necessarily mean changing and weakening his secure attachment to the Foster Carers. That exercise would be traumatic and might result in a severing of that attachment. I am satisfied that exposing the young boy to such a traumatic experience would put his psychological, emotional and physical well-being at risk in both the short and long term. The young boy might form a new secure attachment with his Paternal Aunt and Uncle but there remains a risk that a similarly secure attachment would not redevelop. Further there is a risk that a new relationship might lack the closeness and security provided by the existing parental relationship with the Foster Carers. As to the likely level of trauma and risk, I was persuaded by and

accepted the evidence of Dr Thomas. I was troubled by the evidence of Ms McKenna, and did not accept her opinion concerning the young boy's attachment template. In my view Ms McKenna's opinion was based on a rosy and unsubstantiated version of the first two and a half years of the young boy's life.

- (d) the wishes and views of the child, having regard to the maturity and understanding of the child;
  - Given his young age it would not be appropriate to place much if any weight on the young boy's wishes. However, I note that over an extended period of time the young boy has expressed his wish to remain living with the Foster Carers.
- (e) the child's need for permanency in the child's living arrangements;
  - I am satisfied that both the Paternal Aunt and Uncle and the Foster Carers would provide permanency in the young boy's future living arrangements. On the evidence, both families are financially sound and both marriages are committed and strong.
- (f) the child's need for stable and nurturing relationships;
  - I am satisfied that both the Paternal Aunt and Uncle and the Foster Carers have the capacity to provide a nurturing relationship to the young boy. However, the Foster Carers currently provide such a relationship to the young boy. The stability of that nurturing relationship will be maintained if the young boy stays with the Foster Carers. If the young boy moves to the Paternal Aunt and Uncle, the existing stability of his relationship with the Foster Carers will be weakened or broken. Having accepted the evidence of Dr Thomas, I consider that there is a genuine risk as to the young boy's ability to reattach and regain stability were he required to move to the Paternal Aunt and Uncle.
- (g) the child's physical, emotional, intellectual, spiritual, developmental and educational needs:
  - I am satisfied that both the Paternal Aunt and Uncle and the Foster Carers have the capacity to meet all of these needs.
- (h) the child's age, maturity, gender, sexuality and cultural, ethnic and religious backgrounds;
  - I am satisfied that both the Paternal Aunt and Uncle and the Foster Carers have the capacity to meet all of these needs. In each case their success in meeting the cultural needs of the young boy will in part depend on F's ability and willingness to

facilitate cultural engagements, and the desire and capacity of the young boy's Aboriginal family to engage with the young boy.

- (i) other special characteristics of the child;
- Save for his Aboriginality, there are no other known special characteristics of the young boy. Should any special needs arise I am satisfied that both the Paternal Aunt and Uncle and the Foster Carers would identify any matters of concern and seek appropriate help or implement strategies to assist the young boy.
  - The Foster Mother is experienced in early childhood care, having managed a day-care centre in Katherine. The Foster Mother initially identified developmental issues around the young boy drooling excessively and implemented the recommendations of an occupational therapist to largely rectify the issue.
  - The Paternal Aunt and Uncle have raised their own 4 children. The Paternal Uncle is a primary school teacher who has experience with special needs children. The Paternal Aunt works as a teacher's aide.
- (j) the likely effect on the child of any changes in the child's circumstances.
- If the young boy remains with the Foster Carers he will be moving with them and their other children to Adelaide. This move will be facilitated by RAAF, and so is likely to be smooth. As I understand it, the family will move to a new RAAF base, and will likely readily form new relationships in that community. In addition, there will likely be no issues surrounding housing or school re-enrolments. As the entire family unit will be moving together I do not anticipate this to be different to any other family move. The young boy will not immediately be able to enjoy face-to-face contact with F and CB. However, Skype and phone calls can be immediately commenced.
  - If the young boy moves to the Paternal Aunt and Uncle, there would need to be a transition period during which his existing familial attachments are broken, and during which it is hoped that he would form new attachments with the Paternal Aunt and Uncle. According to both experts, the breaking of the existing familial attachments will be traumatic for the young boy. It is envisaged that this transition would occur in Katherine over a period of time. It is to be hoped that any such transition would be closely monitored and supported by a child psychologist, although in the Court's experience it cannot be taken for granted or assumed that Territory Families have the resources and means

to provide the appropriate level of professional assistance or support to the young boy or the transitioning families. In spite of a stated willingness to do so the Court's experience of Territory Families workloads (particularly in the Katherine region) is that they have limited human resources to allocate to contact visits, let alone to lengthy transition periods as proposed. Further, the difficulty Territory Families experience in engaging appropriate experts is regularly raised with the Court. At the end of the transition period, the young boy would then be subject to further disruption by moving from Katherine to Victoria. Given that the Paternal Aunt and Uncle own their home and work at a local school there will be no issues concerning housing or re-enrolment.

- In my view, taking into account the evidence of Dr Thomas, any such attempted transition carries with it a real and not a remote risk of detrimental mental and physical outcomes for the young boy.

## Decision

138. This has been a difficult and sometimes emotional matter. I have carefully considered the evidence. I have considered the matters required to be considered in assessing what is in the best interests of the child. I have considered and given weight to the Aboriginal Child Placement Policy. I have considered and given weight to the wishes of the parents, but gave extra weight to the wishes of F. I have considered the wishes of the Paternal Aunt and Uncle and the Foster Carers. I have evaluated the evidence of the experts. Having considered and weighed all those matters, I am firmly of the view that it is in the best interests of this young boy to remain with the Foster Carers.
139. Over a three year period, more than half this young boy's life, the Foster Carers have proven their ability to prioritise and meet the needs of the young boy. They have placed the young boy's best interests ahead of other choices which would have benefited the Foster Father's career and the family's finances. They have provided him with a loving and stable home. They have an established, healthy, nurturing parental relationship with the young boy. Their relationship with him is the most significant relationship in his life and in my view the stability of this relationship is central and critical to his future well-being.
140. In addition, this decision eliminates the potential risks to young boy's psychological and physical well-being arising from the trauma he would otherwise be exposed to if his secure attachment to the Foster Carers was weakened or broken. The decision eliminates the risk concerning the young boy's capacity to reattach. I consider these risks and the associated potential for harm to be real and not remote, particularly in light of the evidence of some instability in his care before living with the Foster Carers.

141. I am satisfied that the Foster Carers have a good understanding of the significance of the young boy's Aboriginality, and will encourage and foster the young boy's engagement with his Aboriginal family and culture in a genuine and meaningful way. I am persuaded that the Foster Carers will work with F, CB and other family members to promote such connections and opportunities.
142. This decision in no way diminishes the role of the young boy's biological family. Relatives have an important part to play in a child's life. Although their role will not encompass parental responsibility, it will involve a continuing commitment to strengthening their existing relationships with him. I encourage the biological family not to be disheartened by the outcome of these proceedings or to feel devalued. I consider that the young boy needs to know his biological family, to know that he is part of their lives, to know that he is loved and valued by them, and to know that they are always there for him. That knowledge and those feelings will significantly contribute to his understanding of who he is, his sense of security and belonging, and his overall well-being. Based on the evidence in these proceedings, I am confident that the young boy's biological family will continue to play a significant part in this young boy's life.
143. This decision does not turn on the definition of family. Even if my interpretation of family is wrong, in my view the best interests of the young boy are that he stays with the Foster Carers.
144. Finally, I find that it is in the best interests of the young boy that he have permanency and stability in his familial relationships. I consider that is best achieved by granting long-term parental responsibility to the Foster Carers. In coming to that conclusion I am satisfied that giving long-term parental responsibility to the Foster Carers is the best means of safeguarding the young boy's well-being and there is no one else who is better-suited to be given that responsibility<sup>21</sup>.
145. I will hear the parties as to costs and any other ancillary orders.

Dated this 11th day of April 2019

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Judge Elisabeth Armitage  
LOCAL COURT JUDGE

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<sup>21</sup> s 130 (2)