# [2016] FCWA 17

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| **JURISDICTION** | **:** | FAMILY COURT OF WESTERN AUSTRALIA |
| **ACT** | **:** | FAMILY COURT ACT 1997<br>CHILDREN AND COMMUNITY SERVICES ACT 2004 |
| **LOCATION** | **:** | PERTH |
| **CITATION** | **:** | FARNELL & ANOR and CHANBUA [2016] FCWA 17 |
| **CORAM** | **:** | THACKRAY CJ |
| **HEARD** | **:** | 9–13 NOVEMBER 2015, 15 DECEMBER 2015, 30 MARCH 2016 |
| **DELIVERED** | **:** | 14 APRIL 2016 |
| **FILE NO/S** | **:** | PTW 3718 of 2014 |
| **BETWEEN** | **:** | DAVID JOHN FARNELL<br>First Applicant<br><br>WENYU LI<br>Second Applicant<br><br>AND<br><br>PATTARAMON CHANBUA<br>Respondent<br><br>AND<br><br>CEO, DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT<br>First Intervener<br><br>AND<br><br>AUSTRALIAN HUMAN RIGHTS COMMISSION<br>Second Intervener<br><br>AND<br><br>ATTORNEY GENERAL FOR WESTERN AUSTRALIA<br>Third Intervener |

*Catchwords:*

CHILDREN – Surrogacy – With whom a child lives – The applicants entered into surrogacy arrangement with the respondent birth mother – Twins born in Thailand as a result – The girl was brought to Western Australia to live with the applicants, while the boy remained in Thailand with the birth mother – The applicants seek an order for the girl to continue living with them – The birth mother seeks an order for the girl to live with her in Thailand – The male applicant is a convicted sex offender but expert evidence indicates that there is a low risk of him abusing the girl – This risk must be weighed against the high risk of harm to the girl if she is removed from her current home – Orders for the girl to live with the applicants and for them to have parental responsibility – No orders requiring the applicants to allow the birth mother to spend time with or communicate with the girl – Applicants required to send some of the girl's schoolwork to the birth mother – Formal findings made that the applicants did not abandon the boy and did not try to access his trust fund.

JURISDICTION – Parentage – Powers of the Family Court of Western Australia ("FCWA") – Whether the matter falls for determination under the *Family Law Act 1975* (Cth) ("the federal Act") or the *Family Court Act 1997* (WA) ("the State Act") – Turns on whether the child is a "child of a marriage" – s 60H and s 60HB of the federal Act override the parentage presumptions in that Act – The *Surrogacy Act 2008* (WA) does not apply – By operation of the *Artificial Conception Act 1985* (WA), the child's parents are the birth mother and her husband, who were in a de facto relationship at the time of the artificial fertilisation procedure – s 60H(1) of the federal Act does not apply to surrogacy – s 60F(1)(b) of the federal Act does not apply to children born as a result of artificial conception procedures – The child is therefore not a "child of a marriage" and the State Act applies.

DECLARATION – Parentage – The applicants seek a declaration that the male applicant is a parent of the child – Discussion of the source of power for making a declaration of parentage in proceedings under the State Act – The *Artificial Conception Act 1985* (WA) overrides the parentage presumptions in the State Act – The court cannot declare something to be the case when the law provides to the contrary – Application for declaration dismissed.

CHILD PROTECTION – Protection order (supervision) – The child protection authority seeks a protection order (supervision) if the child remains with the applicants – Discussion of standard of proof in child protection proceedings and the meaning of "likely" in s 28(2)(c) of the *Children and Community Services Act 2004* (WA) – There is a possibility that cannot sensibly be ignored that the child will suffer harm if she is left in the care of the applicants – No order principle applied because the same level of protection can be achieved under the State Act – Orders made under the State Act to protect the child.

JURISDICTION – Child protection – s 36(2) of the State Act does not limit the power of the FCWA to make orders under the *Children and Community Services Act 2004* (WA) – If a protection order (supervision) is made, the consent of the child protection authority is not required under s 202(1) of the State Act before making orders under the State Act because the child would not be "under the control or in the care … of a person under a child welfare law".

CHILDREN – Change of name – Registration of birth – The child currently has the former surname of the birth mother – The applicants seek that the child have the male applicant's surname – Discussion of policy considerations relating to name changes in surrogacy and adoption matters – It is in the child's best interests to have the same surname as her carers –

The child's surname cannot be changed until her birth is registered in Western Australia – The applicants cannot register the child's birth because they are not her parents – The FCWA has power to order the Registrar of Births, Deaths and Marriages to register the child's birth and approve changes to the child's name – The birth mother and her husband should be recorded as the child's parents, but the Registrar is invited to consider recording that the applicants have parental responsibility for the child.

PUBLICATION ORDER – Publication of an account of the proceedings permitted because the story is already in the public domain, there is public interest in it, and the applicants seek and are entitled to some restoration of their reputation – Conditions to protect the child.

EVIDENCE – Perjury – The applicants lied under oath concerning the genetic make-up of the child – Whether to refer the papers to the Director of Public Prosecutions – No need to refer papers as the Attorney General is already aware of the perjury.

*Legislation:*

*Acts Interpretation Act 1901* (Cth), s 15A
*Adoption Act 1994* (WA), s 4(1), s 4A, s 74(2), s 75(1)
*Artificial Conception Act 1985* (WA), s 3, s 4, s 5, s 6, s 6A, s 7
*Australian Citizenship Act 2007* (Cth), s 8
*Australian Constitution*, s 51, s 75, s 76, s 118
*Births, Deaths and Marriages Registration Act 1988* (WA), s 4, s 13, s 17, s 18, s 20, s 22(5), s 33, s 49
*Child Welfare Act 1947* (WA), s 4(3)
*Children Act 1989* (UK), s 31(2)
*Children and Community Services Act 2004* (WA), s 3, s 4, s 6, s 7, s 8, s 9, s 21, s 28, s 30, s 32, s 44(2), s 45, s 46, s 47, s 48, s 49, s 50, s 51, s 52, s 53, s 143, s 144, s 147, s 151, s 237
*Convention on the Rights of the Child*, art 3(1), art 7(1), art 35, art 43
*Criminal Code* (WA), s 12
*Evidence Act 1995* (Cth), s 140(2)
*Evidence Act 1906* (WA)
*Family Court Act 1997* (WA), s 5(1), s 7A, s 36, s 66, s 66A, s 66C, s 69(1), s 70A(1), s 88, s 89AC(3), s 92, s 162, s 185, s 191(1), s 192, s 202(1), s 207(2), s 243
*Family Law Act 1975* (Cth), s 4(1), s 4AA, s 60A, s 60EA, s 60F, s 60H, s 60HA, s 60HB, s 64B(2), s 69S, s 69U, s 69VA, s 69ZE(2), s 69ZH
*Family Law Amendment Act 1983* (Cth)
*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth)
Family Law Regulations 1984 (Cth), reg 12C, reg 12CA, reg 12CAA
Family Law Rules 2004 (Cth), r 6.02
*Human Reproductive Technology Act 1991* (WA), s 18(1)
*Interpretation Act 1984* (WA), s 5, s 13A
*Judiciary Act 1903* (Cth)
*Marriage Act 1961* (Cth), s 90, s 93
*Prohibition of Human Cloning for Reproduction Act 2002* (Cth), s 21
*Surrogacy Act 2008* (WA), s 8, s 17, s 19, s 21, s 24, s 25, s 66

*Category:* Reportable

**Representation:**

*Counsel:*

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|---|---|---|
| First Applicant | : | Mr M Nicholls QC |
| Second Applicant | : | Mr M Nicholls QC |
| Respondent | : | Mr R Hooper SC |
| First Intervener | : | Ms C Thatcher |
| Second Intervener | : | Ms P Giles |
| Third Intervener | : | Ms N Eagling |
| Independent Children's Lawyer | : | Mr M Berry SC |

*Solicitors:*

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|---|---|---|
| First Applicant | : | Lewis Blyth & Hooper |
| Second Applicant | : | Lewis Blyth & Hooper |
| Respondent | : | Kim Wilson & Co |
| First Intervener | : | State Solicitor's Office |
| Second Intervener | : | Human Rights Commission |
| Third Intervener | : | State Solicitor's Office |
| Independent Children's Lawyer | : | Legal Aid WA |

**Case(s) referred to in judgment(s):**

AA v Registrar of Births, Deaths & Marriages and BB (2011) 13 DCLR (NSW) 51
AB v Chief Executive Officer, Department of Child Protection [2014] WASC 87
Aldridge & Keaton (2009) FLC 93-421
Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1
ASIC v Edensor Nominees Pty Ltd (2001) 204 CLR 559
Attorney-General (Vic) v The Commonwealth (1962) 107 CLR 529
B v J (1996) FLC 92-716
B v Medical Superintendent of Macquarie Hospital (1987) 10 NSWLR 440
Blake and Anor [2013] FCWA 1
Briginshaw v Briginshaw (1938) 60 CLR 336
Bropho v Western Australia (1990) 171 CLR 1
Carlton & Bissett (2013) 49 Fam LR 503
Chief Executive Officer of the Department for Child Protection and Family Support v AP [2016] WACC 1
Coco v R (1994) 179 CLR 427
Deiter & Deiter [2011] FamCAFC 82
Devries v Australian National Railways Commission (1993) 177 CLR 472
Director General for Family and Children's Services v E (1998) 23 Fam LR 546
Donnell & Dovey (2010) FLC 93-428
Dougherty v Dougherty (1987) 163 CLR 278

Dudley & Chedi [2011] FamCA 502
Ellison & Karnchanit [2012] 48 Fam LR 33
Flanagan & Handcock (2001) FLC 93-074
Foskey v L (1987) 12 Fam LR 407
G v H (1994) 181 CLR 387
Goodwin v Phillips (1908) 7 CLR 1
H v Minister for Immigration and Citizenship (2010) 188 FCR 393
Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW) (1982) 148 CLR 88
Hunt v Minister for Immigration and Ethnic Affairs (1993) 41 FCR 380
In re B (Children) (Care Proceedings: Standard of Proof) [2008] 2 FLR 141
In re H (Minors) (Sexual abuse: Standard of Proof) [1996] AC 563
In re LC (Children) [2014] AC 1038
In re O (Minors) (Care: Preliminary Hearing) [2004] 1 AC 523
In re S-B (Children) (Care Proceedings: Standard of Proof) [2010] 1 AC 678
In re X & Y (Foreign Surrogacy) [2008] EWHC 3030
In the marriage of Cormick; Salmon (1984) 156 CLR 170
In the matter of Adam and Michael [2004] CLN 3
In the matter of J (a child); S v Paskos (1992) 8 WAR 561
J v Lieschke (1987) 162 CLR 447
KLR v Director General, Department of Community Services (Unreported, WASC, Anderson J, BC9201021, 11 September 1992)
Lynam v Director-General of Social Security (1983) 52 ALR 128
M v M (1988) 166 CLR 69
Maldera & Orbel (2014) FLC 93-602
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638
Mallett v McMonagle [1970] AC 166
Malpass & Mayson (2000) FLC 93-061
Minister for Immigration and Multicultural and Indigenous Affairs v B (2004) 219 CLR 365
Murray v Murray (1960) 33 ALJR 521
MW v Director-General of the Department of Community Services (2008) 82 ALJR 629
Nairn v O'Reilly (1986) 11 Fam LR 472
Neat Holdings Pty Ltd v Karajan Holdings (1992) 110 ALR 449
PJ v Director General, Department of Community Services [1999] NSWSC 340
Plaintiff M70/2011 (2011) 244 CLR 144
Prantage & Prantage [2015] FamCAFC 145
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
PVS v Chief Executive Officer, Department for Child Protection (No 2) [2011] WASC 318
Qantas Airways Limited v Gama (2008) 167 FCR 537
R v Cook; Ex parte C (1985) 156 CLR 249
R v Lambert; Ex parte Plummer (1980) 146 CLR 447
R v Wallis (1949) 78 CLR 529
Re Births, Deaths and Marriages Registration Act 1997 (2000) FLC 93-021
Re C and D (1998) FLC 92-815
Re D and E (2000) 26 Fam LR 310
Re F; Ex parte F (1986) 161 CLR 376
Re Michael (Surrogacy Arrangements) (2009) 41 Fam LR 694
Reynolds & Sherman [2015] FamCAFC 128
Sedgwick and Rickards [2013] FCWA 52

Teo & Guan (2015) FLC 93-653
Tillmanns Butcheries v Australasian Meat Industry Employees' Union (1979) 27 ALR 367
Tobin v Tobin (1999) FLC 92-848
Truman and Clifton [2010] FCWA 91
V v V (1985) 156 CLR 228
Valentine & Lacerra (2013) FLC 93-539
Vodicka v Vodicka (2005) 194 FLR 246
W and C [2009] FCWA 61
W v G (1996) 20 Fam LR 49
Watson v Thomas (1985) 22 A Crim R 56
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Yamada & Cain [2013] FamCAFC 64
Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1

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**THE PRINCIPAL REGISTRAR OF THE FAMILY COURT OF WESTERN AUSTRALIA HAS AUTHORISED THIS VERSION OF THE JUDGMENT FOR PUBLICATION BY THE MEDIA. THE NAMES OF SOME INDIVIDUALS REFERRED TO IN THE JUDGMENT HAVE BEEN REDACTED.**

## Part 1: The essential facts and a brief explanation of the decision

### The issues

1 I am asked to decide which of two outcomes is more likely to promote the best interests of Pipah, a little girl who is unaware of the international furore surrounding her conception and separation from her twin brother. In these reasons, I will touch on some contentious social and ethical issues, but my focus must be on Pipah's welfare.

2 The only options for Pipah are to remain in Australia with the couple who have raised her from birth, or to return to Thailand to live with her brother and the woman who gave birth to them pursuant to a commercial surrogacy arrangement.

3 If I decide Pipah should remain here, I must also decide whether the State should be involved in keeping her safe, given she is living with a man who was convicted, although many years ago, of molesting young girls. This will involve me ruling on whether I should make a "protection order" as sought by the child protection authority.

### The facts

4 Pipah Li Minjaroen was born in Thailand in December 2013. She lives with David Farnell and his wife, Wenyu Li, in Bunbury, the largest regional city in Western Australia. Ms Li is sometimes known as "Wendy Farnell" and I will refer to her as "Mrs Farnell".

5 Pipah's twin brother, Nareubet Minjaroen, is known as "Gammy". He lives in Thailand with Pattaramon Chanbua and her husband, Nid Chanbua. Mrs Chanbua is Gammy and Pipah's birth mother.[1] She was known as Kwanrudee Minjaroen before her marriage in 2014.

6 The lives of the Farnells and Mrs Chanbua were set on a tragic collision course when the Farnells saw a documentary about commercial surrogacy in Thailand. The Farnells had been trying to have a baby for years, including undergoing 10 cycles of IVF. They knew that commercial surrogacy was illegal in Australia, and saw Thailand as their last chance.

[1] "Birth mother" is the expression used in the *Surrogacy Act 2008* (WA). Although one of the Farnells' affidavits described Mrs Chanbua as the "gestational carrier", I consider that the use of that term runs the risk of dehumanising a woman who carries a baby for another. I accept that Mrs Chanbua fell in love with the twins before their birth, and that her role in giving them life extended well beyond that of a "carrier". I have therefore referred to her as the "birth mother", although I know that this expression can also be contested: see 'Report on Parentage and the *Family Law Act*' (Family Law Council, December 2013) xxvii.

7 The Farnells gained the impression from the documentary that commercial surrogacy in a country with a developing economy is a "win-win" situation for intended parents and birth mothers. They therefore engaged a business called Thailand Surrogacy to find them a suitable woman. The proprietor, Antonio Frattaroli ("Antonio"), told them that he paid his surrogates more than other agencies did.

8 After taking medical advice, the Farnells abandoned their plan to have embryos created from Mrs Farnell's eggs and instead decided to combine Mr Farnell's sperm with ova from an unidentified woman. They were assured by the Department of Immigration that any resulting child would receive Australian citizenship.

9 At around the same time, Mrs Chanbua found herself in debt, which prompted her to offer her services as a surrogate mother. She was introduced to Thailand Surrogacy by an agent. She already had two children, but was told by her agent that she was too young to become a surrogate. She therefore assumed the identity of an older relative using fake papers.

10 On 23 May 2013, two embryos were implanted in Mrs Chanbua at a clinic operated by Dr Visut Suvithayasiri ("Dr Visut"). Mrs Chanbua was in a de facto relationship with Mr Chanbua at the time. He consented to the procedure. Neither he nor Mrs Chanbua had received any legal advice or counselling about the arrangement.

11 On 3 June 2013, the Farnells were thrilled when advised that Mrs Chanbua may be carrying twins. After this was confirmed, the Farnells recognised that Mrs Chanbua might need better medical care and agreed to pay rent for an apartment for her that was closer to the hospital in Bangkok where she was to have the babies.[2] They also arranged for Thailand Surrogacy to send a little extra money to her, which would otherwise have been refunded to them from a deposit they had previously paid.

12 On 28 September 2013, the Farnells received an email from Antonio advising that a test had revealed there was a "risk of Down's syndrome", but reassuring them that the doctor did not think anything was wrong. Antonio advised the Farnells that another test was available if they were concerned about the initial result. They asked for the test to be undertaken.

13 On 22 October 2013, the Farnells were advised that the further test had revealed that the male foetus had Down syndrome. Later in these reasons, in dealing with the Farnells' request for a finding that they did not abandon Gammy, I will discuss what occurred from the time the results became known to when the babies were born. However, in summary, Mrs Chanbua insists she was told that the Farnells wanted her to have an abortion, while the Farnells vehemently deny ever making such a request.

14 On at least one occasion in October 2013, Mrs Chanbua's doctor discussed with her the possibility of an abortion. Mrs Chanbua also had discussions with Thailand Surrogacy in which that option was discussed. These involved Antonio and his employee, Kamonthip Musikawong ("Joy"). I am not persuaded that the Farnells ever asked for Mrs Chanbua to have an abortion, nor am I persuaded that Joy or Antonio

[2] The drive from Mrs Chanbua's home in Si Racha to Bangkok takes about two hours (and longer on the bus).

ever discussed abortion as anything more than an option. Nevertheless, Mrs Chanbua gained the impression that the Farnells only wanted the "healthy" baby.

15 Although I cannot be sure of all that was said at around this time, it is clear that Mrs Chanbua had fallen in love with the twins she was carrying and had decided she was going to keep the boy. She told Joy, "I love the babies. They are my children". She was also told by a fortune teller that the boy would bring good luck.[3] This was significant at least for her grandmother, who had taken Mrs Chanbua to the fortune teller when it was discovered the boy might have Down syndrome.

16 While it is far from clear, I consider it likely that the Farnells became aware that Mrs Chanbua was talking about keeping the little boy. There was nothing they could do about this until the children were born, but I consider the Farnells were prepared to contemplate an outcome where they were only able to have the girl.

17 Although the Farnells did not request Thailand Surrogacy to ask Mrs Chanbua to have an abortion, they were angry with Antonio for not ensuring the testing was done earlier, so they could have considered that option. They were also disillusioned with Antonio for other reasons. At one point, they demanded their money back.

18 The Farnells nevertheless continued to prepare for the arrival of the babies. For example, they agreed with Antonio that the twins should be born at Bangkok Christian Hospital because of its expertise with Down syndrome children.

19 The twins were born on 23 December 2013. They arrived even earlier than expected, so the Farnells were not present for their birth, but they made their way to Thailand as quickly as they could. Upon their arrival in Bangkok on 29 December, the Farnells were surprised to find that the twins had been born at a suburban hospital rather than at Bangkok Christian Hospital. They also learned that Mrs Chanbua had left the twins in hospital and returned to her home town.

20 The Farnells were not able to see the twins without Mrs Chanbua's permission. They saw them for the first time on 30 December 2013, when they met Mrs Chanbua and some of her relatives at the hospital, with Joy acting as an interpreter. I accept there was truth in the statement Mr Farnell later made to an interviewer from *60 Minutes* that the concerns they had about Gammy having Down syndrome dissipated after they saw the babies.

21 Both children were in intensive care. They were very frail and underweight. Neither could breathe without assistance. Pipah had serious complications including fungal septicaemia, kidney problems, fluid retention and swelling, and bleeding on the brain and behind the eyes. She required a blood transfusion and high doses of antibiotics. Gammy's condition was even worse. The Farnells were told that he had a hole in his heart and a poor chance of surviving. Gammy was ultimately kept in the hospital for five months, before being moved to another hospital.

22 Mr Farnell was unwell after his arrival in Bangkok and therefore unable to go to the hospital every day, although Mrs Farnell did. I accept the Farnells' evidence,

[3] Mrs Chanbua's recollection was that the fortune teller told her that "Gammy is going to be a good boy and he's going to bring good luck. Please, look after him well. He's lucky to be born with you".

which was corroborated by Joy, that they paid the same attention to Gammy as they did to Pipah, although their capacity to handle Gammy was more limited because he was so unwell. They also bought nappies and milk for both babies.

23 Mrs Chanbua was only able to visit the hospital a couple of times a week. When she did, she brought milk she had expressed for both babies. According to her husband's evidence, Mrs Chanbua was only ever able to hold Pipah once.

24 The Farnells met Mrs Chanbua only a few times. Apart from seeing each other three times at the hospital, they saw her on 3 January 2014, when the surrogacy agreement was belatedly signed; on 21 January 2014, when DNA samples were taken; and on 3 February 2014, when Mrs Chanbua was interviewed at the Australian Embassy. Mr Farnell agreed with Mrs Chanbua's senior counsel that Mrs Chanbua and her family seemed to be "very nice, polite, family-orientated people", although they were not able to communicate directly because of the language barrier.

25 While there is no evidence that the Farnells read the surrogacy agreement when it was presented to them to sign after the babies were born, the document stated that they were aware "of the risks that the child may possess physical, mental, genetic and/or congenital abnormalities or defects", but that they would nevertheless "take immediate custody of the child at birth and shall assume full and absolute parental responsibility for the child, regardless of the child's health, gender, or physical or mental condition, except as otherwise specifically provided in this agreement".

26 The Farnells say that they saw Gammy being wheeled away from the Intensive Care Unit in January 2014. He had been critically ill, and the Farnells claim they thought he was being taken away because he was about to die. On 10 January 2014, Mr Farnell emailed his daughter, Jane, saying, "We have had to say goodbye to our little, little boy". Although the email did not say so, the implication was that Gammy had died. In fact, the Farnells saw Gammy the next day, but Mr Farnell did not contact Jane again for a week and, when he did, he did not tell her Gammy was alive. I consider it probable that, by this time, Mr Farnell knew Mrs Chanbua was not going to let them have Gammy, so he decided to lead his family to believe he had perished.

27 The Farnells deposed that during their first visit to the hospital, they gave Mrs Chanbua a piece of paper on which Mr Farnell had written the proposed names for the twins, including "Noah" for the boy. Mrs Chanbua says she was only given Pipah's name, but I am more inclined to accept the Farnells' evidence.

28 Mrs Chanbua arranged birth certificates for the children. Pipah's was issued on 8 January 2014. Mrs Chanbua gave it to Joy, but did not hand over Gammy's certificate. Joy arranged for Pipah's certificate to be translated and then gave it to the Farnells on or after 11 January 2014.[4] The Farnells wanted Pipah to have Mr Farnell's family name on the certificate, but this did not happen. Pipah was registered with Mrs Chanbua's (then) surname, although her given names were those chosen by the

[4] Although Joy was a reliable witness, she was not able to recall some of the chronology, including precisely when she gave Pipah's birth certificate to the Farnells. However, the certificate bears a stamp indicating that it was translated on 11 January 2014, and Mr Farnell and Joy both said that the original was provided to the Farnells at the same time as the translated copy.

Farnells. The Farnells also wanted Mr Farnell to be shown as Pipah's father, but that did not happen either.

29 It is unclear precisely when the Farnells realised that Mrs Chanbua intended to carry out her plan to keep Gammy. Notwithstanding Mr Farnell's recollection that they learned of her intentions after they were given Pipah's birth certificate, I find it probable they already knew this was likely by 10 January 2014, when Mr Farnell sent the email to Jane about saying "goodbye" to Gammy.

30 The Farnells asked Joy to plead with Mrs Chanbua for them to have both children. At one point, Joy had what she described as a "fight" with Mrs Chanbua about her wanting to keep Gammy. Joy said she was "mad" because she felt that Mrs Chanbua was breaching the agreement.

31 Mrs Chanbua admitted that Joy had asked her to agree to the Farnells having both children, but says she refused because Joy told her that if the Farnells took Gammy, he would be put in an institution. I do not accept that the Farnells said this, apart from anything else because it would make no sense for them to insist on having both children if their intention was to put one in an institution, especially as they knew Mrs Chanbua wanted to keep Gammy.

32 On 20 January 2014, the day that Pipah was discharged, Joy informed the Farnells that Mrs Chanbua had asked permission to discharge Gammy so she could take him to her home town, but that the hospital had refused because he was so ill.

33 The Farnells were not challenged on their assertion that they continued to visit Gammy after Pipah was discharged. Mrs Farnell gave evidence that from the time of Pipah's discharge until they left Thailand on 13 February 2014, they visited Gammy about six or seven times. As the staff would not allow Pipah to be taken into the ICU, Mrs Farnell would spend one or two hours with Gammy while Mr Farnell looked after Pipah, and then they would swap places.

34 Although the Farnells still wanted both children, they finally accepted that Mrs Chanbua would not allow this. In any event, they knew Gammy could not leave the hospital, let alone travel to Australia. At the urging of Antonio and Joy, the Farnells then set about making arrangements to secure Pipah's passage back to Australia without Gammy.

35 Mrs Chanbua cooperated, including by visiting the Embassy to assist in obtaining citizenship for Pipah. Mrs Chanbua spoke to the staff in the absence of the Farnells, but neither she nor the Farnells revealed the existence of Gammy. Joy had advised the Farnells not to mention Gammy, and Mr Farnell explained that they thought that the process would otherwise have taken a lot longer, and that they might not even have been able to have Pipah. I accept they were told by Embassy staff that the necessary papers for Pipah would normally take six to eight weeks to process. However, because of the civil unrest that had broken out in Thailand, the papers were processed immediately and were available on the day after the visit to the Embassy.

36 Joy continued to assist the Farnells during this time, even though she had been dismissed from her job with Thailand Surrogacy. She felt real concern for the

Farnells, who she observed to be very upset about Mrs Chanbua's decision to keep Gammy. She wanted to be sure they would keep at least one of the children they had gone to so much trouble to obtain.

37 On 6 February 2014, Joy telephoned the Farnells while they were at the Embassy. She said Mrs Chanbua was becoming "difficult" and was claiming she had not been paid in full by Thailand Surrogacy. Joy also said that Mrs Chanbua was threatening to keep both children and involve the police. In this or some other conversation, Joy said Mrs Chanbua "had all the power" and that she did not know what to do about her keeping Gammy. She also said the entire arrangement may be illegal because of Mrs Chanbua's deception about her identity.

38 Later the same day, Joy sent the Farnells a message which said: "I just talked to [Mrs Chanbua]. Unfortunately, they don't agree with what we say … I don't understand them anymore … They said they will keep two babies ... so just for you to be prepared. I don't know what they will do next."

39 By this time, it was unsafe to travel the streets. One day, when they were on their way to the Embassy, the Farnells heard gunshots and saw people "running and scattering everywhere". Antonio was also encouraging them to believe that Pipah might be taken if they did not move quickly. On 7 February 2014, he emailed the Farnells urging them to change hotels immediately:

> I have a call now with my staff. PLEASE take my advice. Change hotels tomorrow so she and Joy will not know where you guys are. I know Joy is helping her. That is one of the main reasons I fired Joy. I will have my staff contact [Mrs Chanbua] to calm her down. I think there was some problem with her receiving the money. She is so hungry for money. Just like some pheasant [sic] ... One thing to keep in mind. She signed up with the hospital with a FAKE ID card. If anyone is calling the police, it will be us.

40 After this email, the Farnells were unable to make contact with Antonio while they were in Thailand.

41 On 11 February 2014, Pipah was issued with her Australian passport. When Mr Farnell went to collect it the next day, he was told by Embassy staff that a travel warning had been issued and they should leave the country as soon as possible. Mr Farnell went straight to the airport and changed the date of their flight home.

42 On 13 February 2014, the Farnells returned to their home in Bunbury, which they had set up for two babies. Although they were home, they were petrified the authorities might come to retrieve Pipah. They were also traumatised as a result of leaving Gammy behind. Being too upset, or not wanting to reveal what had really happened, they initially allowed their family in Bunbury to continue to believe that Gammy had died.

43 Jane Farnell gave evidence that she asked her father and stepmother about the little boy a couple of times, but they had broken down crying. On one occasion, Mrs Farnell left the room, and Mr Farnell explained to Jane that Mrs Farnell was upset

because the eggs that had been used were not hers. However, a couple of weeks after their return to Bunbury, the Farnells explained to Jane the real reason they had not been able to bring Gammy home.

44 On 17 February 2014, Joy told the Farnells that Gammy had been transferred to a hospital in Mrs Chanbua's home town, whereas Mrs Chanbua says he was not transferred until May 2014. Whatever Mrs Chanbua may have told Joy, I accept that the Farnells believed from February that Gammy was no longer in Bangkok.

45 On 25 February 2014, the Farnells sent Joy $2,500 to give to Mrs Chanbua, which she did. Mr Farnell deposed that they still hoped Mrs Chanbua might agree to them having Gammy, and that the payment was to cover costs until they could collect him. I doubt this is true. Joy had a vague recollection that the Farnells, after returning to Australia, had sent her an email saying that Mrs Chanbua would take "good care of Gammy" because they believed that she and her "mother" were "very kind and good people". The Farnells certainly took no positive action to seek to obtain Gammy. I consider they felt relieved even to have Pipah, and would have done nothing to "rock the boat", which would have been difficult anyway, as they thought Gammy had been taken to Mrs Chanbua's "village".

46 In about March 2014, the Farnells received advice from a politician in Bunbury that they should change Pipah's surname so she could be registered with Medicare and other agencies. Their application to the Registrar of Births, Deaths and Marriages was refused on the basis that the consent of the birth mother was needed.

47 After the dust had settled, the Farnells set about trying to regularise Pipah's status, which was difficult because Mr Farnell was not shown as the father on the birth certificate and Pipah did not have his family name. The Farnells therefore decided to apply to the Family Court of Western Australia for an order giving them equal shared parental responsibility and permission to change Pipah's family name. In doing so, they falsely deposed that Mrs Farnell had supplied the eggs for the embryos.

48 I accept that, in lying to the court, the Farnells were motivated by a desire to present Pipah to the world as if she was genetically their own child. I also accept that they did not think Mrs Chanbua would be prejudiced by their deceit, as she anticipated they would care for Pipah and there is no reason to think she thought Pipah would keep her name. Had the Farnells sought advice, they would almost certainly have been informed that the origin of the eggs would make no difference to the outcome.

49 In May 2014, someone contacted the Department for Child Protection and Family Support ("DCP") to express concern that Mr Farnell had a child in his home.[5] The concern arose from the fact that Mr Farnell is a child sex offender, albeit there is no evidence of him reoffending since his release from prison in 1999. The DCP office in Bunbury did not act on this notification due to "competing priorities". Mr Farnell also did not appear on the DCP database as someone who may pose a risk to children.

[5] A clue to the identity of the informant was revealed by a senior Western Australian politician, notwithstanding that the law prohibits public disclosure of information that could identify a "notifier".

50 In August 2014, the information about Pipah living with Mr Farnell passed into the public domain. In the media frenzy that followed, the story was spread all around the world that the Farnells had abandoned "baby Gammy" because he had Down syndrome.[6] The anguish this caused the Farnells was exacerbated by the fact that the story was untrue.

51 During the course of these proceedings, information was leaked to the media asserting that the Farnells were trying, for their own benefit, to access a large trust fund set up for Gammy. This sparked further public outrage, but again the story was untrue. The Farnells did not seek access to the fund for their own benefit, and they had in fact donated to the fund all the money they were entitled to receive from *60 Minutes* for the interview they gave when the original story broke.[7]

52 Since arriving home in February 2014, the Farnells have had no contact with Gammy, and Mrs Chanbua has had no contact with Pipah. Pipah has settled into her new home, where she is thriving in the care of a loving network of family and friends, including Mr Farnell's ex-wife and their three adult children and their families.

53 Since being finally discharged from hospital, Gammy has settled into Mrs Chanbua's home, where he has the love and support of the members of her extended family. He too appears to be thriving.[8] Much of Gammy's care has been provided by his great-grandmother and aunt, as Mrs Chanbua worked full-time (28 days a month) until just before the trial in November 2015.

54 Mrs Chanbua has moved into a better home, which has been made available by the generosity of the members of the public who donated funds to help Gammy. She gave evidence of her belief that Gammy will become the owner of the home when he turns 20, but this is not so. Mrs Chanbua continues to receive 15,000 Baht per month from Hands Across the Water, which is the charity managing Gammy's trust fund.

55 Mrs Chanbua has now arranged for Gammy to become an Australian citizen.[9] She said this was done in the hope that Australia will provide for Gammy if she becomes unable to do so. She envisages that Gammy might even come to live in Australia, although she was adamant he would never live with the Farnells.

## The conflicting stories

56 I accept that Mrs Chanbua believed the Farnells did not want Gammy, and that she now wants Pipah to live with her because she is appalled at the thought of Pipah living with a paedophile. However, in seeking to reconcile her evidence with the evidence of the Farnells, it is important to recognise that this case resembles a play

[6] Mrs Chanbua acknowledged receiving payment from five media outlets that published the story.
[7] The Farnells' participation in the *60 Minutes* interview was designed to give their side of the story after being pilloried in the media. At the time, they were described as "the most hated couple in Australia".
[8] The photographic spread accompanying the story about Gammy in the December 2015 edition of *WHO* magazine depicts a beautiful little boy, well cared for, and in robust health.
[9] The *Australian Citizenship Act 2007* (Cth) provides that a person born outside Australia is eligible to become an Australian citizen if their parent was an Australian citizen at the time of the birth. I will later discuss how this fits in with the rest of the laws in Australia relating to children born as a result of a surrogacy arrangement.

that was watched by different people who left the performance at different times and later told others about it.[10]

57 Mrs Chanbua saw parts of the drama, while the Farnells saw other parts. They did not share a common language, and were dependent on third parties to fill them in on what had happened when they were not personally involved in the action. One of the third parties, who had a clear conflict of interest, decided to keep part of the story to himself. Added to this muddle were not only cultural differences, but also differences in the levels of sophistication of the actors. Their ability to recall what happened, and in what order, has been impaired by the anxiety felt for the health of the babies, and by the tensions that arise when a woman's body is rented for the benefit of others and where the unit of exchange is measured in the life of a new human being.

58 It is little wonder that misunderstandings arose along the way.

## The trial

59 Although the proceedings have been pending since July 2014, it was only in April 2015 that Mrs Chanbua applied for Pipah to live with her. Thereafter, I have given the matter as much priority as the circumstances of the case permitted. In giving the matter priority, I recognised that if Pipah were to be returned to Thailand, it would be better for this to happen before she became even more settled in the Farnells' home.

60 The trial was held over five days in November 2015. Regrettably, Mrs Chanbua could not attend, although her presence was still being discussed as a possibility by her counsel on the first day. She ultimately gave evidence by videolink.[11]

61 Mrs Chanbua was represented, pro bono, by Mr Rodney Hooper SC, who was instructed, pro bono, by Kim Wilson & Co. The Farnells were represented by Mr Michael Nicholls QC, who was instructed by Lewis Blyth & Hooper. Mr Michael Berry SC represented the Independent Children's Lawyer, Ms Robin Cohen of Legal Aid WA. DCP intervened and was represented by Ms Carolyn Thatcher. The State Attorney General also intervened and was represented by Ms Naomi Eagling. The Australian Human Rights Commission, which intervened at my request, was represented by Ms Penelope Giles, who appeared pro bono, with pro bono assistance from others.

62 I record my appreciation of the considerable help I have received from counsel and those who instructed and assisted them. As I sought to explain to Mrs Chanbua, the substantial public and private resources devoted to this dispute demonstrate the importance the Australian legal system has placed on Pipah's welfare.

63 After the trial, all parties filed written submissions to supplement those provided before the trial. A further day was allocated in December 2015 for oral submissions. The matter was then adjourned pending the results of DNA testing that was ordered during the trial at the request of the Farnells and Mrs Chanbua.

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[10] This apt analogy was provided by Mr Michael Nicholls QC, who represented the Farnells.

[11] A daily "running transcript" was available after DCP and Legal Aid agreed to contribute $5,000 and $1,000 respectively towards the cost. This has not covered the full cost, the balance of which the court will meet.

64 There was a long delay in the DNA testing and the results were still not available more than four months after the order was made. Given the unacceptable delay, I conducted a directions hearing on 30 March 2016, at which time I published my judgment in draft. In doing so, I invited comment inter alia in relation to the proposed form of orders. I also said that the parties could make further submissions on any matters about which they felt they had not been given an adequate opportunity to be heard. Submissions were received from all involved except the Human Rights Commision and the Independent Children's Lawyer.

65 On 13 April 2016, I received advice that the samples taken in Thailand had still not been received by the DNA laboratory in Perth. The delay is unacceptable, especially as the tests were ordered only because the Farnells and Mrs Chanbua decided at the last minute that they wanted them. I therefore intend to proceed on the basis that the evidence establishes on the balance of probalities that Pipah is the product of Mr Farnell's sperm and the eggs of an unknown woman. I stress, however, that the result would have been the same if testing had established something different. I have decided to publish my reasons now because it is in the interests of everyone, but especially Pipah, for this litigation to come to an end.

**The court's decision**

66 For the reasons that follow, I have decided Pipah should not be removed from the only family she has ever known, in order to be placed with people who would be total strangers to her, even though I accept they would love her and would do everything they could to care for all her needs.

67 In reaching my decision, I have primarily taken into account the strong attachments that Pipah has now formed with the Farnells and many others in Bunbury, as well as the quality of the care she is receiving. While it is a matter of grave concern to leave any child in the home of a convicted sex offender, I have accepted the expert evidence that while there is a low risk of harm if Pipah stays in that home, there is a high risk of harm if she were removed. I have also taken into account the measures that can be put in place to ensure Pipah is kept safe.

68 It must be stressed that there were only two options. I have chosen the one least unsatisfactory for Pipah, whose best interests are the paramount consideration.

69 My decision is supported by the submissions and opinions of:

- the Independent Children's Lawyer;
- the court-appointed Single Expert; and
- a specialist firm of consultants engaged to advise DCP.

70 I have also taken into account:

- the evidence of highly experienced DCP workers who spoke very favourably of the quality of care that Pipah is receiving from the Farnells;

- the submissions made on behalf of the Australian Human Rights Commission concerning the human rights of both Pipah and Gammy; and
- the submissions made on behalf of the Attorney General for Western Australia, concerning the complex legal issues.

## Part 2: Background

### Mr and Mrs Farnell and their families

71 David Farnell is 58 years old and a self-employed electrician. He has lived in Bunbury most of his life. He was married to Penelope Farnell for many years, although their marriage ended around the time he was charged with criminal offences.

72 In 1998, Penelope and the three young Farnell children wrote poignant letters to the Parole Board pleading for Mr Farnell to be given parole. Penelope's letter said:

> David has always had and will continue to have, the full love and support of his children. There are no words to describe how important he is to them and how important they are to him. They will spend as much time as they wish with him and I will be there to provide all the support to encourage this.

73 Mr Farnell and his ex-wife are still on good terms. She is a regular visitor to his home, and is known to Pipah as "Aunty Penny". Their three adult children are also regular visitors, and appear to be close to their father and his new wife.

74 Mr Farnell is now married to Wenyu Li, who is 50 years old. Mrs Farnell is a Chinese citizen, but has permanent residence here, having married Mr Farnell in 2004. She has lived with Mr Farnell in Bunbury since May 2005, and has worked and studied in and around that city. Mrs Farnell comes from a high achieving, well-off family, and is fluent in Cantonese and Mandarin. Her father, brother and sister live in China, but her mother died in August 2014 at the height of the media frenzy.[12]

75 Mrs Farnell was introduced to Mr Farnell through a friend. After their relationship was cemented, Mr Farnell told Mrs Farnell about his criminal history and confessed that he had spent time in prison. Mrs Farnell said she did not want to know the details. She later told a DCP psychologist that she believes everyone has a past and can change if they take responsibility for their wrongdoing.

76 Mr Farnell's daughter, Jane, lived with Mr and Mrs Farnell from June 2014. Jane has a son, Jackson, who was born in January 2015. At the time of trial, Jane and Jackson were waiting to move into their new residence. Their new home is in the Bunbury area, and Jane intends to visit her father and his family regularly.

77 Mr Farnell's mother is 82 and lives in Bunbury. She is now a widow, as Mr Farnell's father died in 2014, in the same month as these proceedings were

[12] Mrs Farnell told her psychologist that she attributes her mother's death to the trauma of the media coverage.

commenced. Mrs Farnell Senior is an almost daily visitor to the home. DCP officers speak highly of her as a grandmother.

**Mrs Chanbua and her family**

78 Pattaramon Chanbua was born in Thailand and is aged 22 years. She recently set up a small business in her home and seems now primarily to be occupied in caring for Gammy and her two other children: Game, born in April 2008; and Gam, born in September 2010.

79 Mrs Chanbua's husband, Nid Chanbua, is aged 39 years. He works as a painter six days a week. He was earning 9,000 Bhat per month in his previous job, but there was no evidence of the income he receives from his present employment.

80 Mr and Mrs Chanbua have lived together since August 2012, and were married in February 2014, just after the birth of the twins. After Gammy and Pipah were born, Mrs Chanbua again advertised her services as a surrogate, but she did not pursue this when she found out international commercial surrogacy had been banned in Thailand, apparently as a result of the furore about Gammy.

81 Mrs Chanbua's father died when she was a girl and her mother died in 2013. She had little contact with her mother, and was raised by her grandmother and her grandmother's husband, with whom she still lives.[13] Her grandmother is 55 and her step-grandfather is 45. Although Mrs Chanbua has a half-brother and half-sister, she has very limited contact with them.

82 Mrs Chanbua had her first child when she was 14, and her second when she was 17. I accept her evidence that she "entered into a ceremony but not a formal marriage" with the father of her children. It is significant that Mrs Chanbua was not married at the time of the procedure by which she became pregnant with Pipah and Gammy. It is equally important to know if she was in a de facto marriage at the time.

83 Senior counsel for the Farnells submitted that the Chanbuas were in a de facto marriage at the time of the procedure, whereas it was argued for Mrs Chanbua that they were only in a "boyfriend/girlfriend" relationship. It is therefore necessary to give reasons for my conclusion that they were in a de facto relationship at the time.

84 For reasons later explained, these proceedings are governed by Western Australian law. Subsection 13A(1) of the *Interpretation Act 1984* (WA) dictates that a "reference in a written law to a de facto relationship shall be construed as a reference to a relationship … between 2 persons who live together in a marriage-like relationship". Subsection 13A(2) then sets out a number of indicia to assist in determining whether a de facto relationship exists.

[13] There was some confusing evidence about the man Mrs Chanbua described as her "grandfather". It was not apparent until she gave her oral evidence that this man is still a member of Mrs Chanbua's household (in her affidavit she stated that Gammy was sharing a bedroom only with her grandmother). I am satisfied that the man referred to is Mrs Chanbua's step-grandfather.

85 I discussed the difficulty in interpreting the term "marriage-like relationship" in *Truman and Clifton* [2010] FCWA 91, where I asked rhetorically at [338]:

> How then is a judge expected to decide whether a relationship between a man and a woman (or indeed under this legislation same-sex couples) is "marriage-like" in circumstances where married couples straddle the spectrum from the deliriously happy to the homicidally estranged?

86 Gleeson CJ pointed out in *MW v Director-General of the Department of Community Services* (2008) 82 ALJR 629 at [10] that there is a significant difference between "living together" and living in a relationship that is "marriage-like" or "in the nature of marriage". Where the line is drawn will depend upon an assessment of all elements of the relationship. As the Full Court of the Federal Court said in *Lynam v Director-General of Social Security* (1983) 52 ALR 128 at 131 (emphasis added):

> Each element of a relationship draws its colour and significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. **In any particular case, it will be a question of fact and degree, a jury question,** whether a relationship between two unrelated persons of the opposite sex meet the statutory test.

87 It is for the Farnells to prove the de facto relationship, since it is they who assert its existence. Part of their difficulty is that the cross-examination of Mrs Chanbua touched on this issue only incidentally, and much of the evidence on which the Farnells now seek to rely came from Mr Chanbua. Nevertheless, I find that, having commenced cohabiting in August 2012, the Chanbuas were having sexual intercourse and living together in the home of Mr Chanbua's aunt by May 2013.[14] Mr Chanbua confirmed that he and Mrs Chanbua had a debt which they had "built together" (which I infer was the one that persuaded Mrs Chanbua to offer herself as a surrogate). Mr Chanbua also acknowledged that they had been in a relationship for "quite a long time" before May 2013, and that their friends at the time "look at us just like husband and wife". Significantly, Mr Chanbua attended Mrs Chanbua's consultations with Dr Visut, at one of which he agreed in writing to Mrs Chanbua becoming a surrogate. Considered together, the evidence persuades me that the couple were in a marriage-like relationship when Mrs Chanbua underwent the procedure.[15]

88 In reaching this conclusion, I have not rejected the submission of Mrs Chanbua's counsel that "cultural norms and expectations around formative relationships … may be quite different in Thailand". However, I have rejected his argument that it is "not

[14] See Mrs Chanbua's evidence at transcript, 11 November 2015, p 79 (lines 30–44) and p 102 (line 36) to p 106 (line 9). Also note p 104, where Mrs Chanbua's counsel conceded, "My client says they were living together. This man says they were living together. Our case is they were living together".

[15] Had federal law applied, I would also have found the Chanbuas were in a de facto relationship, since that law imposes a somewhat less stringent test, given there is no need to establish a "marriage-like relationship".

proper to impose the factors set out in … the Interpretation Act to an arrangement between two non-Australian citizens in another country simply to satisfy the intellectual consideration of jurisdiction to make Orders in Australia". This submission cannot be accepted because I am bound to apply the Interpretation Act when seeking to construe all written laws of Western Australia.

**DCP's initial involvement and first assessment**

89 DCP became aware of concerns about Pipah on 15 May 2014, when someone informed their Bunbury office that she was living with the Farnells. DCP commenced their investigations only after the story about Gammy surfaced in the media on 4 August 2014. A Safety and Wellbeing Assessment was then quickly undertaken. The resulting report noted that due to the "extreme media scrutiny and public interest", the assessment had been undertaken in consultation with high-level officers, including the Acting Director General of DCP.

90 Although completed in a short space of time, the DCP assessment was thorough, with many people being interviewed, including one of Mr Farnell's victims. The report noted that while the media interest may have provided encouragement for other victims to come forward, none had done so. Although this was seen as providing some evidence that Mr Farnell had not reoffended since leaving prison, the report noted that some victims may never come forward, "due to the shame, disempowerment, trauma and risk of dysfunctionality, associated with many victims of sexual abuse". However, the report emphasised that Mr Farnell's offending was known to all his family, and very well known around Bunbury. This was seen as significant because of the strong link between sexual abuse and secrecy, and it was felt by DCP that the notoriety of Mr Farnell's offending itself provided a "degree of safety" for children who might come into contact with him.

91 The report commented on the many letters supporting Mr Farnell that DCP had received, and it noted that "this may indicate that [Mr Farnell] is genuinely reformed, but may also indicate that he is a well-liked member of the community who people do not conceive capable of reoffending". The report also noted that the Farnells' commitment to living in Bunbury "provides them with a support network and also means that people are more likely to be aware of the concerns around [Mr Farnell's] offending".

92 The report went on:

> [Mrs Farnell's] ability to protect Pipah is somewhat incalculable at this time. [Mrs Farnell] has been seen by workers to be a loving, nurturing primary carer to Pipah. Pipah presents as well cared for, bright, responsive, very engaging and indeed very engaged in her surroundings. She appears healthy, clean and well presented. [Mrs Farnell] has been seen to tend to Pipah in a loving and nurturing way by appropriately comforting her, playing with her, cuddling her and feeding her. Pipah certainly appears to be the centre of [Mrs Farnell's] world.

> [Mrs Farnell] was not aware of the details of [Mr Farnell's] offences. Whilst she states that prior to their marriage [Mr Farnell] told her he had spent time in prison for inappropriately touching girls, it became apparent [throughout] this assessment that [Mrs Farnell] had no idea of the details of the offending including the ages of the children or the number [of] victims or offences. On the basis that it would be impossible for [Mrs Farnell] to protect Pipah without understanding the offences and with [Mr Farnell's] consent, [Mrs Farnell] was provided with the details … with an interpreter present. [Mrs Farnell] remains a strong advocate for [Mr Farnell] and has repeatedly identified that he is a changed man and that the past does not matter to her. [Mrs Farnell] has stated that she does not have any experience of sexual abuse and that she does not understand signs that it is taking place, other than that children might not be happy.

93 The report said that Mrs Farnell was providing Pipah's primary care, including all of her "intimate care". It was also noted that members of the family and their friends "have come together to form an active safety network to work with the Department to address safety concerns in a [cooperative] manner".

94 The report summarised "the strengths which identify protection for Pipah and other children" and DCP's remaining concerns. It is unnecessary for me to repeat these, since a further, more comprehensive risk assessment has been undertaken.

95 Having noted information still missing, including a current assessment of the likelihood of Mr Farnell reoffending, the report set out DCP's findings:

> Due to [Mr Farnell's] history of sexual offending, there is a significant risk of sexual harm to Pipah and children, in particular girls, who spend time with [Mr Farnell] in the future. Risk of sexual harm will be substantiated.
>
> Substantiation of risk of sexual abuse is assessed, in part, because of the significance of the impact of sexual abuse on children, the ongoing effects into adulthood and the intergenerational effects on families and communities. Trauma such as sexual abuse and intimate violence are associated with poor physical and mental health outcomes, increased likelihood of substance misuse and lower than optimal brain development in children.
>
> Due to the safety network, their knowledge understanding of the Department's concerns and their [ongoing cooperation] with the Department, and the evidence which suggests [Mr Farnell] has not reoffended since leaving prison, Pipah is assessed as safe enough to remain in the care of [the Farnells].
>
> Due to the risk of grooming, which may take place from a very young age, Pipah is assessed as not safe alone in the company of [Mr Farnell]. It is identified that Pipah should never be alone in the company of her father.
>
> Currently, due to the incalculable level of [Mrs Farnell's] ability to protect Pipah from grooming behaviours, [Mrs Farnell] is not to be the person

> who supervised contact between [Mr Farnell] and Pipah. A member of the safety network will do this. Presently [redacted] has moved into the home of the Farnells to assist with this. Other members of the network have assisted when this is not possible.
>
> Pipah is the subject child in this assessment, however no harm has occurred to her, therefore harm is not substantiated. [Mr Farnell] does not meet the criteria to be named as a person assessed as causing harm (ASH) for this reason. Sexual harm of Pipah, does however remain a concern for the reasons discussed above.

96 The report also recorded DCP's intention to provide "Child Centred Family Support", the aims of which were to:

- Establish a strong plan to ensure that Pipah is never left alone in the company of [Mr Farnell].
- Develop a Words and Pictures explanation to explain to Pipah why she is not to be left alone in company of her father and to explain to members of the safety network why this is the case. Members of the safety network will read this to Pipah.
- Complete further assessments. [Mr Farnell] will undertake further psychological assessment to understand more about his risk of reoffending, and interventions which may lower that risk. [Mrs Farnell] will undertake parenting capacity assessments to establish her ability to protect Pipah from sexual harm, and to establish interventions to improve this.
- Provide referrals for suggested interventions as necessary and monitor their uptake and outcomes.
- Monitor the safety plan and make adjustments where needed until such time as it is clear that the safety network are able to do this independently.
- Support the wellbeing of Pipah in relation to her complex cultural needs. Specifically, around preparing her family for explanations around her conception and her Thai heritage in partnership with her family and with advice from Departmental Clinical Psychological Services.

97 It will be recalled that, at the time the report was prepared, there was no indication that Mrs Chanbua wanted to have Pipah returned. The statutory role of DCP was to assess whether Pipah was in need of protection and, if she was, to determine the best way to protect her. Appropriately, the DCP officers ignored the publicity, save to the extent that the media intrusion had impacted on the life of the family, and therefore on Pipah.

98 The DCP report was not only thorough, but also well balanced in the way it emphasised the gravity of Mr Farnell's offending; the risk of further offending; the

existence of protective factors; and the quality of care being provided to Pipah. It is a testament to the independence and integrity of DCP and its workers that they resisted what must have been the temptation to remove Pipah from her home, especially in light of the negative media, and in circumstances where a senior officer had told the Farnells that "the norm would have been to remove Pipah first and then work out how she can be put back into the family safely".

**Subsequent involvement of DCP and its consultants**

99 DCP has worked intensively with the Farnell family since the assessment in 2014. The experienced workers who have been assigned to the case have been assisted by an expert firm known as Resolutions Consultancy, which also worked with DCP in developing its Signs of Safety Child Protection Practice Framework. That framework was developed in Western Australia, but has since been adopted in many places around the world. It has been described as a "solution and safety oriented approach to child protection casework [that] provides a way of assessing child protection issues and working with families and their networks to keep children safe".

100 Resolutions Consultancy explained the application of the Signs of Safety approach in the present case in these terms:

> The aim of this approach is to achieve a more [balanced] process in relation to Pipah's long-term welfare and safety. Most child protection departments faced with the circumstances of this case would ... remove the child believing it is not possible to reconcile safety with the child's emotional and wider attachment needs. The Signs of Safety/resolutions work in child sexual abuse cases, enables an ongoing risk assessment that puts children at the centre of the work, balancing their emotional needs, wishes and feelings (including their primary and wider attachment bonds) with their need for clear future safety.

101 Resolutions Consultancy and DCP developed a safety plan for Pipah, which included a requirement for Mr Farnell to move out of his home for six weeks. This was in accordance with the approach recommended by Resolutions Consultancy in other cases involving concerns about sexual abuse. The six-week period occurred just after Mrs Farnell and Pipah returned from China after the funeral of Mrs Farnell's mother. The focus of the work in this period was to assess and support Mrs Farnell's capacity to keep Pipah and other children safe. It was also designed to allow Mrs Farnell to demonstrate that she was drawing on the safety network for support and was not solely reliant upon Mr Farnell.

102 Documents were prepared to assist and guide DCP's work. One of these, created in consultation with the Farnells and the safety network, was a "Words and Pictures Story" to be read to Pipah. The "final" version of the Words and Pictures Story was completed in March 2015 (and will now be translated into Chinese for the benefit of Mrs Farnell's family). In essence, the document records, in terms a young child will learn to understand, the history and method of Mr Farnell's offending. It is designed to help Pipah understand why she is not permitted to spend time alone with her father, and serves as a reminder to the safety network of the need for vigilance.

103 The story was first read to Pipah by Jane Farnell in the presence of the Farnells and some other members of the safety network in March 2015. It is proposed that the story will be read every three months, along with other "Keep Safe" literature. All members of the safety network have committed to sharing the story with Pipah. Since the story was first read, there have been review meetings approximately every 10 weeks involving DCP and members of the network. As part of these reviews, members of the network and the Farnells have been requested to complete a document identifying the ways they have been complying with the safety plan. It is proposed that the Farnells will continue completing that document during the period of any protection order that I might make on the application of DCP.

104 DCP officers have made regular home visits to ensure that the Farnells and members of the network have been complying with the safety plan. The records indicate full compliance. There were 24 visits between September 2014 and September 2015, some scheduled, but many unannounced. Mr Farnell has never been found alone with Pipah. Mrs Farnell has always been there, and Jane or Mrs Farnell Senior have often been present.

105 The DCP worker who made the home visits reported that:

> Pipah has presented as a happy, healthy child who appears to have a strong bond with Mr Farnell, [Mrs Farnell], their extended family and friends ... [The Farnells] appear to be meeting effectively Pipah's needs: they have engaged her in swimming lessons, playgroups and other activities that assist in meeting her social, emotional and developmental needs as well as making her visible in the community.

106 DCP also wanted Mrs Farnell to meet with a Mandarin-speaking psychologist for counselling and to improve her understanding of safety issues relevant to Pipah. Being unable to source a suitable external psychologist, DCP engaged one of its own who speaks Mandarin. Mrs Farnell's counselling with the psychologist commenced in July 2015. They had eight sessions (some face-to-face and some by telephone) between July and September 2015, and it is proposed that the counselling will continue during the period of any protection order.

107 The DCP psychologist has made a number of recommendations for Mrs Farnell's support, including regular ongoing counselling. In doing so, she reported (original emphasis):

> Mrs Farnell has settled well into therapeutic sessions, engaging openly and enthusiastically. She appears to enjoy the opportunity to voice her thoughts and feelings in a safe environment and the one-on-one focus provided within sessions.
>
> …
>
> Mrs Farnell understands and knows all the details about Mr Farnell's offences. She believed that Mr Farnell is very remorseful about his wrongdoings. Mrs Farnell further said that in the 11 years of their

> relationship, Mr Farnell has not done or said anything that has made her feel unsafe.
>
> …
>
> Mrs Farnell is aware of his criminal history and if Mr Farnell is to reoffend and [she] has any worries about Pipah's safety, she will "do the right thing" to keep Pipah and herself safe. "Do the right things" means that she will leave Mr Farnell and go to her safety network to seek help. Mrs Farnell has demonstrated an understanding that there is a possibility that offenders can re-offend.
>
> ...
>
> Mrs Farnell stated that it had been a long journey and a lot of hard work to have Pipah in her life. If anyone tries to harm Pipah, she will not "let them go". Upon exploring this [phrase] further with Mrs Farnell, she states "let them go" (Mandarin) means she will not let them get away with it. She will report them to the authorities and ensure safety for Pipah. She further states that if a person is able to harm their *own* children, "they are worse than animals".
>
> Mrs Farnell reported that not being able to conceive naturally is devastating for her. She was told by friends and family that being able to raise their own children is an exceptional experience. Now she has Pipah in her life, she will do anything to make sure Pipah is safe physically and emotionally.
>
> Mrs Farnell reported that she understands that Pipah needs to have a story of "who is Pipah?" Mrs Farnell understands that it is important for Pipah to know the full story about Pipah and her brother, Mr Farnell's criminal history, why Pipah (and her friends) cannot be left alone with Mr Farnell, Pipah's safety plan, and the court matters. Mrs Farnell expressed she understands that Pipah will have more questions when she gets older and Mrs Farnell wants to be ready. As such, she is planning to write a story for Pipah. She also stated that she has no intention of keeping anything from Pipah. She would rather Pipah hears this story from her than from reading or hearing it from other people.
>
> ...
>
> Mrs Farnell has demonstrated an understanding of the safety plan that was established by [DCP]. She reported that she does not leave Pipah alone with Mr Farnell. When she has to attend appointments, she leaves Pipah with her mother-in-law, stepdaughter or Pipah's godparents. ...

108 As part of the safety planning proposed by DCP, Mr Farnell has also had counselling. This has been provided by [Mr A], who is a clinical and forensic psychologist. Mr A had eight sessions with Mr Farnell in 2014–2015, all of which

involved Mr Farnell travelling to see Mr A in Perth, and all but one of which were at Mr Farnell's expense.

109 Mr A had previously provided services to Mr Farnell through a program for offenders in 1999 and 2000, and he prepared Mr Farnell's pre-parole report in 1999. It is proposed that Mr A's counselling will continue during the period of any protection order. His sessions with Mr Farnell were not directed at reducing the risk of him reoffending, but rather to "supporting, advising and coaching on mental health and emotional management techniques". As Mr A pointed out, while the sessions would not be considered "sex offender treatment", they are "a logical part of managing the risk of any aberrant or problematic behaviours". Mr A reported that in his recent work with Mr Farnell, he did not "identify any pressing/imminent risks that I needed to focus on, beyond the negotiated agenda of 'coping skills and emotional/mental health management'".

110 The extent of work undertaken with the Farnells by Resolutions Consultancy can be seen in the September 2015 report of [Ms B], who was previously a caseworker with DCP and held other positions in DCP before joining Resolutions Consultancy. Her report concluded that the Farnells and the safety network have shown commitment to the safety plan. Importantly, noting that this report was prepared at a time when it was known Mrs Chanbua wanted Pipah returned to her, Ms B wrote (emphasis added):

> **Our view is that the risk of abuse [to] Pipah is currently low, and that it is in her best interest to remain living within her family supported by their network**. We are of the opinion that the risk of abuse to Pipah at this time is low.
>
> Research in the UK has shown that on full completion of this work the risk to a child like Pipah is low, at around 4 to 7%. This is similar to the level of risk of future offending for Mr Farnell outlined in the Psychologists report. The UK research highlighted a number of key factors. The main one being the importance of regular reviews of the Safety plan and the need to alert the authorities of any changes to that plan, e.g. safety network members not being allowed into the home to see Pipah, the family moving to another district away from the safety network, and future agencies not being aware of the Safety plan. …
>
> Our view based on our professional experience and the current research and literature, is that as long as this family continue to implement all aspects of the Safety Plan then the risk of abuse to Pipah or her future friends visiting the home is low. To ensure that the Safety plan remains in place and is reviewed regularly we would recommend the following:
>
> a. It is important that the Safety Network members agree a Liaison/Co-ordinator person or two who will link with the Department when and if necessary. This person would eventually take over the co-ordination of reviews once the Department is no longer involved. It is recommended that [Ms C] and [Father D] jointly take on this role.

b. Mrs Farnell's family in China will need two video link sessions so that they have a copy and understand the Words and Pictures and Safety Plan documents, (translated into Chinese). Should Mr and Mrs Farnell arrange a holiday in China with Pipah, they will need to agree some safety network people to help continue the safety plan and liaise with [DCP] or liaison person when/ if necessary.

c. Once [DCP] have ended their official involvement. There should be a named [DCP] person, whom the network can contact direct if there are any significant changes to the Safety Plan, preferably someone with detailed knowledge about the case and safety plan and with sufficient decision making capacity to decide what follow up is required and by whom. This is to make sure that such changes are easy to pick up on and check in the long term.

d. All new key professionals e.g. Doctor, health visitor, Principal of Pipah's school, are all given a copy of the Words and Pictures and Safety Plan in order to be informed and support the future safety for Pipah and her family.

e. Finally when all the above are in place, usually at the conclusion of any official [DCP] role, we would recommend six monthly reviews by the network.

111 Resolutions Consultancy advises that a good safety network is at the centre of safety planning in such cases. Importantly, they advised DCP that:

> The members of the network do not have to agree with the level of danger the department might see but they must commit to taking the Departments [sic] concerns seriously. They need to show that they understand the issues in such cases; and also to demonstrate by their actions as a Safety network that they will make sure that Pipah is safe in the future. It is important to have sufficient safety network people to cover all aspects of family life. The minimum needed in a case such as this one, would be 6 to 7 people with a roughly an even number from each side of the family i.e. [Mrs Farnell's] friends or family and [Mr Farnell's] friends or family...

112 Resolutions Consultancy stressed that whether Mr Farnell's likelihood of reoffending is deemed to be high, moderate or low, this cannot be "a definitive assessment for all time". Therefore they considered it

> important to underline to the family that whatever the result of a forensic assessment given the seriousness of the convictions the Department will always need a clear demonstration that Pipah cannot be sexually abused by [Mr Farnell] and that this is also necessary to protect [Mr Farnell] and the Department given the high level of ongoing scrutiny this case will continue to attract.

113 Monitoring of Pipah by the safety network is therefore a key part of the Farnells being able to demonstrate to DCP that Pipah is safe with them. The current members of the safety network are:

- Mrs Farnell;
- Mrs Farnell Senior;
- Mr Farnell's three adult children;
- Ms C and her husband;[16] and
- Father D.[17]

114 Although she is not a member of the network, the Farnells receive support from [Ms E], who met Mr Farnell through her work as a prison officer. Ms E is now also a friend of Mrs Farnell.

115 The minutes of many meetings facilitated by Resolutions Consultancy with the Farnell family and the safety network from August 2014 to September 2015 demonstrate a high degree of cooperation with DCP, and an understanding on the part of the Farnells of why DCP insists on compliance with a strong safety plan. It appears that the Farnells have never missed a meeting with DCP, notwithstanding there has been a very large number of them. The discussions recorded in the minutes show attention to the smallest of details relating to compliance with the requirements that Mr Farnell not be left alone with Pipah and not be involved in her intimate care.

116 The discussions at the meetings have dealt with how Mrs Farnell would schedule play dates for Pipah at their home when Mr Farnell is away working, or at the homes of other children where Mr Farnell will not be present. The discussions also identified protective measures that the Farnells claimed to have put in place even prior to DCP becoming involved; for example, how they explained to third parties why Mr Farnell did not change Pipah's nappy and how he was never involved in her intimate care. I accept that this was their practice and I also accept that, since his release from prison, Mr Farnell has avoided ever being alone with children.

117 The minutes of the meetings demonstrate that the Farnells and members of the safety network have, at times, questioned the need for some of the strict conditions that have been imposed. They felt that Mr Farnell's efforts over many years to reform himself had not been acknowledged. For example, the Farnells challenged the necessity for Mr Farnell to leave home for six weeks when Mrs Farnell was still grieving the recent death of her mother (and in light of the fact that Mr Farnell's office and workshop were at the home). The Farnells expressed particular concern about the indefinite requirement for Mr Farnell never to be alone with Pipah, even to walk her to the shop. In my view, there was nothing untoward in this robust exchange of views in the meetings, which appear to have been conducted in a respectful fashion.

118 Counsel for Mrs Chanbua drew attention to the fact that members of the safety network do not accept that Mr Farnell will abuse Pipah, and suggested that they will

[16] Ms C is Mrs Farnell's English teacher. She and her husband were described by Jane Farnell as the Farnells' best friends. They attend the same church, and it is proposed that they be Pipah's godparents.
[17] Father D met Mr Farnell in his capacity as a prison chaplain and has become a friend of the family.

therefore not be vigilant. However, I accept the advice of Resolutions Consultancy that "members of the network do not have to agree with the level of danger [DCP] might see but they must commit to taking the Department's concerns seriously". I accept that the safety network members take concerns about Pipah seriously.

119 Jane Farnell, who seems to be her father's most ardent supporter, is likely to be a key member of the network. She volunteered that "nobody can ever eliminate the possibility of a risk", and said that she took her obligations under the safety plan very seriously. She was particularly convincing when she emphatically said:

> I would never forgive myself if something ever happens to Pipah. If she ever came to me in 10 years' time and said something, I would never forgive myself. So I am doing it for her. I am not doing it because DCP told me to.

120 As I have mentioned, Mrs Farnell Senior is also a member of the safety network. Ms B gave this evidence about Mrs Farnell Senior at my request.

> HIS HONOUR: ... [Mrs Farnell Senior] is not a witness in these proceedings. Can you just give me a brief, verbal picture of her?---Yes. She's very loving, very caring of Pipah. Most times that I have been involved in meetings or visits to the home, [Mrs Farnell Senior] has Pipah in her arms, usually if – asleep. When she has her afternoon sleep, [Mrs Farnell Senior] actually physically holds her for the whole time. And when we have had meetings and Pipah has become a bit restless and wanted to go out of the room, [Mrs Farnell Senior] will take her out to play. She's very devoted to Pipah. Yes.
>
> Do you have any concerns about her of any sort?---No. I mean, I – I don't know that she's as willing to entertain the idea that [Mr Farnell] might be a risk but, you know, she's his mum and we're not relying on her in – in entirety…

121 Ms C has been identified as a likely leader of the network. Although she did not give evidence, no adverse inference can be drawn from that. Ms B explained why Ms C was considered "a natural lead in this safety network":

> I think it's because of her – well, her profession as a teacher, her awareness of protective behaviours for children, but she – just her personality and her nature. She's a friend of Mum's and very obviously, from the meetings that I've been involved, very invested in Pipah and, I believe, would act in Pipah's interests over [Mr Farnell's] in a heartbeat.

122 I also consider that Mrs Farnell herself, after all of her counselling and instruction, will be an effective member of the network. It is my firm impression that Mrs Farnell has developed increasing confidence and assertiveness as she has faced the many tribulations that have come her way. I therefore noted with interest the Safety Planning Meeting Minutes of 29 June 2015, which recorded the consensus that:

> Before David was more [the] boss. Now Wendy is more [the] boss – whatever Wendy says goes.

123 Mrs Farnell is not isolated from her community by barriers of language or culture. She speaks English adequately, and does not require an interpreter to conduct her daily life. She has shown a capacity to make friends independently of Mr Farnell. While she is not prepared to accept openly that Mr Farnell would ever harm Pipah, she now knows she has to be vigilant, and that Pipah will require her assistance in learning protective behaviours. This is demonstrated in the following cross-examination:

> THATCHER, MS: So what I'm asking you is: do you recognise there is a possibility that Mr Farnell may sexually abuse Pipah.
>
> THE WITNESS: No.
>
> THATCHER, MS: My next question is: do you accept that you need to recognise that possibility in order to protect Pipah.
>
> THE WITNESS: Yes.
>
> THATCHER, MS: Do you accept that to protect Pipah you need to be able to stand up to Mr Farnell.
>
> THE WITNESS: Yes.
>
> THATCHER, MS: But you can't do that if you fully support him.
>
> INTERPRETER: Feel it's not contradicting each other, protecting her daughter and fully support [Mr Farnell]. That doesn't contradict into each other.
>
> ...
>
> THE WITNESS: I will teach Pipah no about how to – when she grow – understand more things, I teach her more how to protect herself.
>
> THATCHER, MS: What sort of age do you think Pipah will be when you will be happy for her to be alone with Mr Farnell.
>
> THE WITNESS: What sort of age – about six when she understand more.
>
> THATCHER, MS: About six is about the age of Mr Farnell's other victims. Do you know that.
>
> THE WITNESS: Yes. I know that.
>
> THATCHER, MS: And that's the age that you would let them be alone. Is that correct.
>
> THE WITNESS: But Pipah is his daughter.
>
> THATCHER, MS: That's your answer. Pipah - - -

> THE WITNESS: She can – she can – she have a – maybe have another daughter, Jane Farnell. Yes. So I thinking Jane – Jane didn't – doesn't have any risk from [Mr Farnell] from any age but I prefer Pipah about six understand more, I teach her more things, how to protect herself.

124 There are aspects of these responses that will require consideration when I come to discuss whether it is necessary that Pipah never be left alone with Mr Farnell.

**The Single Expert's report**

125 On 25 June 2015, at the request of all parties, I made an order for the appointment of Mr Darin Cairns as the Single Expert to provide an expert report.

126 Mr Cairns is an experienced psychologist. He holds the degrees of Bachelor of Arts, Bachelor of Science (Hons) and Masters of Applied Psychology. He has been invited to speak on his areas of expertise at many professional conferences. He is the Clinical Director of a busy psychology practice, in which he provides assessments, counselling and specialist reports, including many for this court.

127 Mr Cairns met with the Farnells and Pipah three times in September and October 2015. He also read reports by DCP's workers; spoke with Mr A; and inspected relevant documents. His report, published in October 2015, recorded his very favourable opinion of the Farnells' parenting capacities, and noted Pipah's secure attachment with them.

128 In responding to the term of reference about the effect on Pipah of changing her current care arrangements, Mr Cairns concluded that, even if Mrs Chanbua had a stable environment for Pipah, he would have "significant concerns" about Pipah being removed from the Farnells' care. He stated:

> To break such an effective and healthy bond could easily traumatize Pipah and it would require a great deal of skill of the new caregiver to address her anxiety and confusion. Furthermore, given Pipah's age she is extremely sensitive and requiring of parental feedback and attachment cues. As such, any variation on the parenting practices of the new caregiver would be experienced as very distressing and lead to withdrawal and/or emotional volatility. Consequently, even if Pipah's developmental experiences could be addressed, she would have lost significant developmental experiences and it could take a long time for her to develop trust again.
>
> If the changes in context led to a move to Thailand then cultural factors would play a significant part. Her communication and social development indicate a clear awareness of her current culture and language. To lose these norms and significant capacities for development (i.e. the role of language and communication) in such a dramatic way would be harmful. The cultural change, then, would enhance the risk of trauma as outlined above.

> It is also readily apparent that she is involved with the family at large so has developed a number of attachments that have formed her concept of parenting, family and care. If she was to be removed from [the Farnells'] care then this represents extra levels of attachment that would be broken. This is another factor to consider in seeking to remove Pipah from her current care arrangement.
>
> To significantly alter such functional parent-child bonds at a stage of development where a child is becoming aware of self and other to such a significant extent would almost certainly be extremely disruptive to development. Furthermore, if this change was to involve cultural and language changes then the impact could, and likely would, be traumatizing with lasting negative developmental effects.

129 When asked whether there were other matters he considered relevant, that had not been covered by his terms of reference, the Single Expert said:

> The most obvious concern that has presented itself throughout this case is the many external interests that appear to be involved. I have worked with families associated with DCPFS and various other agencies, and have seen many families functionally conceal information from their children based on past indiscretions. This has ranged from crimes such as Mr Farnell's through to crimes involving drugs and secrets about conception. Whilst I am not suggesting I was always supportive of such concealment, I would note that none of those families were placed under such close examination and assessment as this one. Furthermore, none of the families that I can think of function as well as this one seems to, even under the enormous pressure they have been under.
>
> …
>
> The parents in question in this assessment have presented as very capable and loving parents who have sustained and developed a healthy attachment and healthy child. I am not reporting much differently to DCPFS in this regard. The fact they have managed to achieve this under significant pressure and disruption reflects even more positively on them. If further assessment and intervention were to occur, in spite of the positive assessments and the lack of evidence to support such action, the pressure and stress on the family would build due to ongoing anxiety and an increasing sense of powerlessness.
>
> Furthermore, if this escalating stress and investigation were to continue in such an unpredictable way, then the family could become withdrawn and the parenting practices become shaped by outside influences as opposed to being responsive to Pipah's needs. As a worst case scenario, one that I have seen in other cases, parents' relationships have broken down under this pressure and a developmentally healthy context has been lost for children in question.

> In summary, I am seeking to highlight that I agree that Pipah's safety in regards to potential sexual abuse is a genuine and valid concern. However, to focus only on this aspect of her care is ignoring the vast array of developmental needs she has on a daily basis across her lifespan. To ignore these other aspects due to the focus on the single, although important, concern is to place her psychological development at risk. Consequently, steps should now be taken to minimize the pressure on this family, balanced against the assessed need for safety. With this point in mind I would highlight the family retained fear of the impact of media and the actions they may take, depending on what information is given to them by the other party or other agencies. If it is at all possible for the court to minimize this risk, whilst providing the family and community with a reasonable developmentally considered safety plan, I would strongly urge it.

130 I accept that Mr Cairns' opinion was given after assessing only one of the family constellations. However, he explained that even if it had been possible to do so, he could not assess Mrs Chanbua's family because of language and cultural issues.

131 Were it not for the logistical problems, a report would no doubt have also been obtained from an expert who was able to observe Mrs Chanbua in her home.[18] However, the circumstances were unusual in that Pipah has only been in the same room as Mrs Chanbua on a handful of occasions when she was a baby. She has never spent any time in Mrs Chanbua's home. In these circumstances, it was legitimate for Mr Cairns to offer an opinion based on his observation of only one of the households, especially as he recognised the limitations of his terms of engagement and proceeded on an assumption that Mrs Chanbua was able to provide a stable environment.

132 Counsel for Mrs Chanbua and counsel for the Human Rights Commission were both strongly critical of this statement made by Mr Cairns in his oral testimony:

> When we take a child from one home place to another, it is always – it is always, essentially, a very simple equation. Will the child be guaranteed to be better off?

133 Counsel for Mrs Chanbua submitted that:

> The test set for himself by Mr Cairns, namely whether there is a guarantee of a child being better off if moved from one environment to another, misstates the test in the same way that the Court did in *AMS v AIF*. The proper test is for the Court to weigh which set of circumstances proposed by either party is seen to be in the child's best long term interests.

134 I consider both counsel have set up a straw man. The Single Expert's evidence on this topic was far more nuanced than this tiny extract might suggest. In fact, the remark that was criticised did not at all represent the Single Expert's view about the

[18] DCP has no casework assistance protocols with countries other than New Zealand. Accordingly, although enquiry was made, DCP was unable to complete an assessment of Mrs Chanbua's home environment.

appropriate test in this case, but rather his understanding of the approach taken by DCP when deciding whether to remove a child from a home.

135 The Single Expert's evidence on this point is worth reciting in full, as it not only debunks the criticism, but contains the gravamen of his reasoning:

> [BERRY, MR] If it was the case that the proposed caregiver for Pipah in Thailand acknowledged that she didn't have access to a professional support base or relevant health care professionals that she could access - - -?---Mmm.
>
> Would that elevate your concern about any move to Thailand for the child?---Yes, it would. I would question the ethics.
>
> HIS HONOUR: Question the ethics of what?---I would question the ethics of any decision where – look at DCPs logic. When we take a child from one home place to another, it is always – it is always, essentially, a very simple equation. Will the child be guaranteed to be better off? Not even a little bit. We have to be certain they will be better off. Even – let's be honest. Some of the foster placements we put these kids in are still, by no means, adequate in terms of what the mainstream society is getting. But it's better off than the family or the other environment they're currently in. We've got an established, functional family, and we're about to take this child into what is, guaranteed, going to create some stress, if not a significant amount of stress, at a pivotal area – stage of development – for a mother that is unsupported to engage in quite a specialised activity, which is to acculturate this girl, assimilate her to the cultural norms, and help her with what is a very unusual developmental trajectory, which is counter to the developmental trajectory she has of her other children. That is an enormous undertaking. And we have lots of reasons to say would the child really be better off, when you've actually got a family functioning very well. This is not functioning – not doing well. They're functioning very well. And we're going to risk that. I would question the ethical wisdom in gambling like that, your Honour, because to me that's a gamble.

136 Counsel for Mrs Chanbua also submitted that the Single Expert's assessment that the removal of Pipah from the Farnells would be "unethical" was based on a view that was "admittedly narrow and his examples and opinions not balanced". Counsel also said that the Single Expert's assessment was in part based on his "positive and empathetic view of the [Farnells] on the basis of his acceptance of their historical and personal 'narrative'".

137 I reject these criticisms. It is true that the Single Expert was constrained by the terms of reference and his inability to assess Mrs Chanbua. However, he was entitled to form his "positive and empathetic" view of the Farnells because he met with them on three separate occasions. Furthermore, his view is consistent with the views of other professionals who have met them far more often. It also largely accords with my own observations, notwithstanding my loathing of Mr Farnell's sexual offending.

138 Counsel for Mrs Chanbua submitted that while the Single Expert "may be able to give evidence about his observations of the existence of attachment", he should not be "seen as an expert who can give evidence or support the evidence that he gave as to the consequences of removal of Pipah from the care of [the Farnells]". He also submitted that:

> Mr Cairns expressed his expertise is limited to reading some articles about attachment and broken attachments and he accepts that all of the ills that he says may befall a child whose primary attachments are interrupted, are matters where those adverse outcomes may only be statistically elevated as to likelihood when compared to the general population.

139 Counsel further submitted that Mr Cairns:

> is unable to comment on the future effect of Pipah living separately from her twin or the likely effect on Pipah of growing up in a situation where there is expressed reservation or fear as to her relationships and interactions with her father or the public adverse scrutiny she may gain from it.

140 I also reject these criticisms. As an experienced, well-qualified psychologist, whose appointment was supported by all parties, Mr Cairns was qualified to comment on the likely impact on a young child of being removed from all of her attachment figures. I did not understand Mr Cairns to be claiming particular expertise in relation to the issue of separation of twins, but I consider the responses he gave on the topic were within the range of his expertise. They also seemed to accord with common sense in highlighting the importance of recognising the difference that may exist between twins separated at birth and twins separated later in life.

141 I also consider the comment of Mrs Chanbua's counsel about outcomes that "may only be statistically elevated as to likelihood when compared to the general population" to be little more than a debating point. The same argument might be made about any number of well-established propositions since, when dealing with humans, there will always be exceptions; each case will be different; and the impact of a particular kind of trauma will fall at different points of the spectrum. As Mr Cairns said, some smokers live to 110, but that is no reason to take up smoking.

142 Counsel for Mrs Chanbua also submitted that:

> Mr Cairns' evidence concerning the exposure of women in Australia to unreported sexual abuse was, [Mrs Chanbua] respectfully says, an attempt to mislead the Court on a critical point and does him no merit and should cause the Court to be circumspect about accepting his opinions in other areas.

143 This criticism falls wide of the mark. It is a serious matter to contend that an expert has attempted to "mislead the Court on a critical point". I will therefore set out the relevant part of the evidence (minor transcription errors have been corrected):

[HOOPER, MR] And if I then turn to children who have been sexually assaulted by a trusted adult as a young child, is it fair to say that such children have a very higher statistical level of potential poor outcomes as adults: their ability to form relationships, their inability to self-regulate, their substance abuse, all of that sort of stuff?--- Well, yes. Yes.

And it would be fair to say that the child who has suffered - - -

HIS HONOUR: Your question actually was not necessarily grammatically correct: very higher.

HOOPER, MR: Yes.

HIS HONOUR: Is that how you heard it, or "very high", because you're trying to put a hierarchy on this, I think.

HOOPER, MR: Well, I'm about to go there. If your Honour - - -

HIS HONOUR: Okay.

THE WITNESS: That's one comparison.

HIS HONOUR: I just want to make sure you heard the question the same way I did: very - - -?---But - - -

HOOPER, MR: What I'm about to suggest directly, Mr Cairns, is that a child who may have suffered child sexual abuse is really at a greater risk as an adult than a child who has had a disrupted attachment?---Actually, no.

No?---No.

Okay?---Because disrupted attachment manifests in so many ways and it's much harder to see and address. If it's a specific trauma – and I'm by no means not showing genuine compassion and empathy for those traumatised, but a specific trauma sometimes is easier to learn about and adapt away from than something as subtle as long-term, maladaptive attachment.

So how do we explain adults that carry around memories of abuse from 30 years ago?---Well, I – I didn't – didn't say it didn't traumatise you. You asked me to compare the two.

And you're telling us, are you, that a disrupted attachment is more likely to lead than those adverse outcomes than the experience of actual sexual abuse? Is that your evidence, sir?---My evidence is disrupted attachment can be harder to – can be harder to treat. You're asking for a direct comparison.

I didn't ask about treating it, sir?---Okay.

I asked about - - -?---It can have a worse effect.

I didn't ask about treatment; I haven't gone there yet?---Okay.

I will get there?---Well, we will go to that next.

But - - -?---You can do a comparison. You're asking me to compare sexual trauma – an incident of sexual abuse versus maladaptive, disordered attachment. Disordered attachment can have a longer-term and more pervasive effect.

And is every child whose attachment is, as a matter of fact, broken – suffer from disordered attachment?---No.

No, but every child who has been sexually abused has suffered from sexual abuse, haven't they?---Yes.

HIS HONOUR: Well, "suffered from". Are you distinguishing that from "experienced"?

HOOPER, MR: Well, sorry, your Honour. I might be being – I didn't realise there was a need to be so precise, but – yes.

HIS HONOUR: Well, it's a question of suffering and – we know what experience is but - - -

HOOPER, MR: Sorry, your Honour. Okay.

HIS HONOUR: - - - suffering has a range of meaning. And I think if you're wanting to make something of this, I would be helped by being precise.

[MR CAIRNS]: If I can address the word "suffering", your Honour, to that point. When I was at university studying sociology of deviant behaviour, we were taught – and I have not looked at any recent literature. We were taught that something in the order of one in six women in our Western society have been sexually abused and not reported it. Okay. One in six women are living their lives functionally with marriages and otherwise. Now, what level it has impacted them is up to another analysis, but they are living those – with those particular consequences in a functional way. That doesn't make it okay. I'm just trying to highlight that sexual abuse does not guarantee dysfunction.

[The transcript does not reveal it, but Mr Hooper SC's next question came only after he was prompted by counsel for the Human Rights Commission]

HOOPER, MR: But, sir, you give a statistic and I suggest to you, sir, that you give a statistic because you want this court to accept your point of view and you give a statistic, sir, I suggest to you is misleading because the figure of one in six women is not one in six women who suffered

> sexual abuse as a child, is it?---No. No. And as I said, that was just what I was taught.
>
> So it's quite misleading when we're talking about the effect on children in development for you to pull that statistic out, isn't it?---Okay. So – sure. Let's go to development…

144 This passage demonstrates Mrs Chanbua's counsel was right to observe that Mr Cairns had "pulled out" the statistic about the percentage of women who have been sexually abused. It was given entirely off-the-cuff, during a torrid cross-examination, in order to illustrate the point that the impact of abuse will vary from individual to individual, and that it was therefore quite wrong for counsel for Mrs Chanbua to say, as a general proposition, that "a child who … suffered child sexual abuse is really at a greater risk as an adult than a child who has had a disrupted attachment".[19]

145 I was greatly assisted by the Single Expert's evidence. In casting doubt on some of the proposals for Pipah's safety (in particular the Words and Pictures Story), Mr Cairns showed independence of thought by not succumbing to the temptation of deferring entirely to the views of DCP and its consultants. As he said in his report:

> I have concerns that the media attention and the role of the external agencies, through good intentions or otherwise, have placed this family under enormous pressure about their ability to care for Pipah. Pressure that, after many assessments, has proven to be unwarranted, assessments that I have not seen done with families that have shown significantly more risk and substantial dysfunction. The reality for this family is that media pressure and the context of Pipah's birth has likely played a large part in the actions taken by many agencies.
>
> I am not suggesting that assessment was not warranted but I am seeking to highlight that such a level of investigation is not the norm from my experience and there is good reason for this. The reason being there are potentially psychological and developmental consequences for the child when such action is taken. The more investigation and assessment that is done, the more pressure that is placed on the family … intervention and assessment can cause more harm than good if not balanced against the developmental needs of the child and current systems that the family function within.

146 In bringing a fresh mind to the topic, Mr Cairns has carried out the very role the court expects of its experts. Apart from the assistance his report provided to me, there were strong indications that DCP was willing to take on board some of his views. This is consistent with the way in which DCP has approached its work with the family. Indeed, it is a cornerstone of the Signs of Safety Framework that child protection workers must keep in mind the possibility that they might be wrong, as appears from the following extract from the Signs of Safety policy document:

[19] I note that it was not suggested that the statistic itself was incorrect.

> Eileen Munro, who is internationally recognized for her work in researching typical errors of practice and reasoning in child protection (Munro 1996: 1998), states:
>
> > The single most important factor in minimizing error (in child protection practice) is to admit that you may be wrong…
>
> Restraining an individual's natural urge to be definitive and to colonise one particular view of the truth is the constant challenge of the practice leader in the child protection field. Enacting Munro's maxim requires that all processes that support and inform practice, foster a questioning approach or a spirit of inquiry as the core professional stance of the child protection practitioner.

## Part 3: Credibility and impressions of witnesses

147 Credibility is not as important here as in other cases, since the outcome largely turns on matters other than who told the truth. This explains why the Independent Children's Lawyer initially declined to make submissions about whether Mrs Chanbua was asked to have an abortion, or whether the Farnells abandoned Gammy.

148 Nevertheless, an assessment of credibility is required, as this will impact on some issues. In approaching this task, I respectfully agree with Baroness Hale that "almost every witness … engages in a certain amount of (conscious or unconscious) manipulation of their recollection of past events to meet their present interests".[20] Working out whether, and how, a witness has manipulated their recollection is not easy. As Deane and Dawson JJ have said, "judges are increasingly aware of their own limitations and of the fact that, in a courtroom, the habitual liar may be confident and plausible and the conscientious truthful witness may be hesitant and uncertain".[21]

149 My limitations in assessing credibility were aggravated by the fact that a number of the witnesses not only gave evidence by video, but also depended on an interpreter. I am unfamiliar with the Thai language and customs, and must therefore acknowledge that I could not pick up verbal and non-verbal cues from those witnesses in the same way as I might try with others whose language and customs I share. Recognising these important limitations, I will now record my impressions of the witnesses.[22]

### The Farnells

150 My observations of the Farnells throughout the trial, and at the many directions hearings they attended, have led me to conclude that they have a loving and supportive relationship that has sustained them through an extremely stressful time.

151 Mrs Farnell appeared to be an intelligent, resilient and mature woman. Save for the areas discussed below, I found her to be credible. Mr Farnell also presented well

[20] *In re LC (Children)* [2014] AC 1038 at [67].
[21] *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 480.
[22] Antonio was not called to give evidence, his business having closed down in early 2014.

in the witness box. He was a calm, respectful and polite man, and appeared most of the time to be trying his best to recall events accurately. However, the credibility of both Mr and Mrs Farnell was badly damaged by a fairly innocent lie first told to members of their own family, but which grew in significance as time went on.

152 It will be recalled that, having been unable to have a child using their own gametes, the Farnells resorted to a surrogacy arrangement using Mr Farnell's sperm and eggs from an unknown donor. Mrs Farnell nevertheless wanted her family and the world to believe that she was genetically the mother of the children. In particular, she wanted the children to feel "normal" and therefore thought it would be better that they be brought up believing that they were genetically hers. It is unnecessary to dwell on the desirability of this from the children's perspective. It is sufficient to say that the Farnells felt that this deception would satisfy their needs and those of the children, and would do no harm.

153 In furtherance of their objective, the Farnells did not tell their friends or family that it was proposed to use the eggs of a donor. On any view, it was nobody else's business. However, the deception was taken further after the twins were born. In his email to Jane Farnell of 10 January 2014, Mr Farnell positively represented that the twins had been created using Mrs Farnell's eggs. As earlier stated, the email also led Jane (and other relatives that Mr Farnell wanted her to inform) to believe that Gammy had died. If I am right in thinking this was a cover story, then the fact Mr Farnell maintained it at trial provides further cause for concern about his credibility.

154 The Farnells kept up their deception when they returned home. They continued to allow their family to believe that Gammy had died, and it was only later that Mr Farnell told Jane that Mrs Farnell's eggs had not been used. However, the deception was taken to a new level when the Farnells decided to maintain the fiction when swearing their first affidavit. The lie went further than merely saying Mrs Farnell's eggs had been used. They claimed that the embryos were created in Perth and then transported to Thailand. In fact, what was sent was Mr Farnell's sperm.

155 There is nothing to suggest that the Farnells thought their deception about the origin of the eggs was something that would be influential in the court's decision. Rather, they thought it was something very important for Pipah. When asked why she lied in her first affidavit, Mrs Farnell said:

> I don't want Pipah thinking she is different than other child. I just want she thinking she is like normal child. It is [to] protect Pipah.

156 There was another aspect of the Farnells' first affidavit that although not untrue, was misleading. They deposed to the fact that "Thailand Surrogacy arranged for a surrogacy agreement to be signed by ourselves and by the gestational carrier". A copy of the agreement carrying the date 25 February 2013 was annexed to the affidavit. The Farnells failed to say that, although they had pestered Antonio for an agreement, one was not signed until **after** the twins were born, and it was then backdated.[23]

[23] The backdating was done on Antonio's advice.

157 An even more serious deficiency in the affidavit was the Farnells' failure to make mention of Gammy. It can be safely inferred that they recognised that if mention were made of him, their application would become far more complicated.

158 The Farnells also did not provide evidence of Mr Farnell's record. As they were asking the court to proceed ex parte, they were under an obligation to disclose all material facts. In my view, Mr Farnell's convictions were highly relevant, even if historic. In assessing their failure to make full disclosure, I recognise that the affidavit was drawn by the solicitor who had been involved in the criminal trial, and that the Farnells may have assumed he felt it was unnecessary to reveal this information.

159 The evidence supporting the request for the matter to be dealt with ex parte also requires consideration. This is especially important since, as Ryan J said in *Ellison & Karnchanit* [2012] 48 Fam LR 33 at [4], "for all the court knew, the children may have been victims of child trafficking for whom unidentified parents searched in vain".

160 The Farnells dealt with this issue in their affidavit as follows:

> It is not possible for us to contact the gestational carrier because she has moved away from the address that we have for her referred to on the birth certificate; this is what we were told by our contact at the fertility clinic, Superior ART. We have no idea where in Thailand the gestational carrier currently is and we have no one to help us find her. The firm we originally contracted with, Thailand Surrogacy, has been liquidated and no longer exists.

161 There was much, albeit confusing, evidence about where Mrs Chanbua lived prior to these proceedings. This left doubt as to where she was living following the birth of the twins, and the impression I gained is that she was not living at the address on Pipah's birth certificate (although the people who lived there may have known where she lived). While the Farnells were probably keen for Mrs Chanbua not to be served with their application, I am not convinced that their evidence concerning the difficulty in ascertaining an address for service of Mrs Chanbua was untrue.

162 The Magistrate before whom the application was first listed in Bunbury recognised that the matter should be heard by a judge. The hearing was therefore vacated in advance, and relisted before me in Perth on 3 September 2014. However, prior to the matter coming on, the media storm erupted, and "information" became public which, if true, would have established that the Farnells had misled the court.

163 The Farnells and their lawyer then parted company. On 1 September 2014, their new solicitors wrote to the court seeking to file a more comprehensive affidavit, which described the surrogacy arrangement more accurately, and gave details about Gammy and about Mr Farnell's sexual offending. The letter from the solicitors noted that they had been instructed that the original affidavit was "not accurate, or comprehensive". Their letter was accompanied by a minute of orders to be sought at the hearing, which included a request to uplift the first affidavit from the file. I refused the application for the affidavit to be uplifted, since it formed part of the court record and would clearly assume significance in the rest of the proceedings.

164 At trial, the Farnells acknowledged that they had made a deliberate decision not to tell the truth in the first affidavit about the makeup of the embryos. Mr Farnell's explanation was that they had wanted there to be "a genetic connection for [Mrs Farnell] for her family as well". However, as he said in his oral evidence, "a lie is a lie, no matter how you look at it". Mr Farnell was insistent that he should bear responsibility for the lie, and that if anyone was to go to prison for perjury, it should be him. Although a noble gesture, it does not sit well with the evidence that Mrs Farnell had pleaded with him for their affidavit to say that she provided the eggs.

165 Mr Farnell was also criticised for an inaccuracy in his second affidavit, in which he deposed that:

> In the late 1990s I was convicted of 22 child sex offences. I pleaded guilty to those charges and spent 12 months in jail as a result

166 Although Mr Farnell did plead "guilty" to the first tranche of charges, he pleaded "not guilty" to the second tranche with which he was charged **after** he went to prison. As a result of him denying the second lot of charges, the victim was required to testify. Mr Farnell now admits that he was guilty of the second set of charges. He could not offer an explanation for saying that he had pleaded guilty to **all** charges, and he was not asked why he said he went to jail for only 12 months when he actually spent two years in jail. However, I accept that at the time of swearing the affidavit, it did not occur to Mr Farnell that it was of any significance whether he had pleaded guilty or was found guilty, or how long he was in jail.

167 I was also not persuaded that the Farnells told the truth in their second affidavit when they claimed to have remained in contact with Joy after they returned to Australia and that Joy had provided them with "a number of updates" on Gammy. Joy's evidence was that she had no recollection of having contact with the Farnells after they spoke in the latter half of February 2014, when they arranged to send more money to Mrs Chanbua for Gammy.[24]

168 The fact that the Farnells were prepared to lie under oath, especially about Pipah's genetic makeup, means that their evidence must be considered with even more than usual scepticism. This does not mean, however, that all of their evidence was false. On the contrary, I accept that their evidence on some of the most important matters was accurate, in particular relating to the arrangements surrounding the care of Pipah and the way in which Mr Farnell has avoided being left in the unsupervised company of children since leaving jail. I have also accepted their evidence about the circumstances in which Gammy was left behind.

169 One matter that is relevant in determining whether the Farnells ever wanted Mrs Chanbua to have an abortion, and whether they intended to abandon Gammy, was their refusal to agree to the suggestion of counsel for Mrs Chanbua that they provide unrestricted access to their email account to their own solicitors, in order for the court

[24] It seems they next spoke after the story appeared in the media in August 2014.

to be satisfied that they had made a full disclosure of their communications with Antonio after it became known that one of the twins may have Down syndrome.[25]

170 The Farnells' refusal to agree to their solicitors having access to their email account stands in contrast with the approach adopted by Jane Farnell, who was prepared, subject to safeguards, to allow access to hers. While I understand the Farnells' reluctance, especially in light of the publicity and the leaking of information, to agree to further invasion of their privacy, I was left with a sense of unease that there may have been some communications they wished to keep from the court.[26] This is one of the reasons I am not prepared, for example, to discount altogether the possibility that, for a very short time, the Farnells did want Mrs Chanbua to have an abortion, or were contemplating pulling out of the arrangement altogether.

**Mrs Chanbua**

171 Mrs Chanbua speaks no English and therefore required the assistance of interpreters. While seemingly quite bright, she appeared somewhat unsophisticated, which is unsurprising since she has had limited formal education and has lived in quite humble circumstances. Ultimately, I had no reason to doubt the accuracy of her testimony on any major issue, save for matters associated with the Farnells allegedly abandoning Gammy and wanting her to have an abortion. If those parts of her testimony were incorrect, I consider that would be attributable not to dishonesty but to faulty recall and/or her being a young, unsophisticated person, who misunderstood what she had been told.

172 It is worth noting that Mrs Chanbua was definite in saying that she had been told that the home in which she is living will become Gammy's when he turns 20. This information was allegedly given to her in about October 2014 by someone associated with Hands Across the Water, whereas Mr Peter Baines, the chairperson of the charity, denied that there was ever any such intention. In my view, this highlights the way in which misunderstandings can arise when complex information is being conveyed via intermediaries.

173 Mrs Chanbua also denied in her oral evidence that she ever told the Embassy that Mr Farnell's name was left off the birth certificate because Pipah had been born prematurely and the "biological parents" were not present. However, the record made by the Embassy says, "surrogate mother also explained her family name on ... birth certificate due to pre-mature birth and biological parents not present".

174 Mrs Chanbua said that she had not included Mr Farnell's name on Pipah's birth certificate because Mr Farnell told her not to do so, as otherwise she would have had to "put both of them down" – i.e. record Mr Farnell as the father of both children.[27]

[25] Counsel for Mrs Chanbua also asked me to be suspicious about the provenance of one email, which he submitted was provided in a different format to others. However, inspection of all the emails confirms that some other emails, the provenance of which was not in doubt, were in a similarly different format.

[26] Mr Farnell protested about the suggestion saying, "that's my whole life on that – my business, my personal emails". There was also some confusing evidence about the loss of emails when the Farnells changed computers. When Mr Farnell was challenged on the point he said, "I'm not very computer illiterate [sic]".

[27] It was not suggested at trial that what might have been discussed was putting not only Mr Farnell's name but also Mrs Farnell's name on Pipah's birth certificate. This is what the Farnells had been led to believe by

I am doubtful her recollection is accurate, and I was inclined to accept that Mr Farnell particularly wanted to have his name on the certificate because he thought this would, inter alia, assist in obtaining the necessary documents from the Embassy.

175 Mrs Chanbua also said that Joy told her not to include Mr Farnell's name on the certificate because it was likely to create a "hassle" when they went to the Embassy. I cannot be sure what anybody said, but it seems feasible that Joy told Mrs Chanbua not to put Mr Farnell's name on Pipah's certificate, because she would then have been required to put his name on Gammy's. That would not have been desirable since, by this time, Joy expected that Gammy would be staying with Mr and Mrs Chanbua.

**Mr Chanbua**

176 Mr Chanbua initially did not swear an affidavit; however, when I noted my concern about this just before trial, an affidavit was forthcoming. Mr Chanbua was cross-examined by videolink with the aid of an interpreter.

177 Although I formed a favourable impression of the maternal instinct and warmth of Mrs Chanbua, I formed a less favourable opinion of her husband. While acknowledging my ignorance of Thai customs, I found Mr Chanbua's demeanour to be surprisingly laconic. However, it was not his conduct as a witness that caused me concern, but rather my impression that he might not possess the qualities of patience and empathy that would be required to support Pipah if she came to live in his home.

178 The Single Expert explained the difficulties that would arise if Pipah had to move to live with Mr and Mrs Chanbua. I accept that those looking after Pipah in such circumstances would need great personal skills, including patience and empathy. While I accept that it may be seen as unrealistic and unfair to record my impression of Mr Chanbua's qualities from the short time I had to observe him, I nevertheless think it important I do so, since there was no other evidence to assist me in understanding his personality, background and character. That said, the result of the proceedings would have been the same even had I formed a more favourable opinion of him.

**Jane Farnell**

179 Jane Farnell was an impressive witness. I was inclined to accept most of her testimony, notwithstanding her very close alignment with her father.

**Kamonthip Musikawong ("Joy")**

180 Joy gave her evidence from Thailand by a videolink which, initially at least, had some technological issues. Her command of English was fairly good, although she required the assistance of the interpreter occasionally. She presented as an intelligent, personable and empathetic young woman, who appeared to have a genuine concern for all involved. Notwithstanding the commercial nature of the arrangement, I find that

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Antonio was going to happen, but this would not have been feasible if Mrs Chanbua intended to keep one of the twins. I consider that what was perhaps said was that if Mrs Farnell's name was to be stated on one certificate, then her name would have to be put on the other.

Joy tried to deal sensitively with the traumatic situation relating to the birth and separation of the twins. I find that her evidence was largely truthful, although she could not accurately recall all of the chronology. If she was mistaken about having never told Mrs Chanbua that the Farnells wanted her to have an abortion, I consider this was not due to any intention to mislead the court but because her memory was faulty, having been influenced by her recollection of how much the Farnells wanted to keep Gammy after he was born.

181 I do not accept the criticism directed at Joy by Mrs Chanbua's counsel for asking Dr Visut sign the form by which he certified that the "surrogate/birth mother has willingly indicated her consent or otherwise[28] to the named Australian citizen child travelling internationally". In my view, the form is confusing, even to a person fluent in English. The form does not make clear whether the "witness" is witnessing the birth mother's signature, or whether they are simply bearing witness to the fact that the birth mother has consented to the child travelling internationally.[29] It is not disputed that Mrs Chanbua did, in fact, sign the document, and I do not accept the proposition put to Joy that the form was blank when she did so. While Dr Visut had not seen Mrs Chanbua since before the babies were born, he knew she was agreeable to the children travelling to Australia, because that was the entire point of the exercise.

**Peter Baines**

182 Mr Peter Baines is the founder and chairperson of Hands Across the Water. He gave his evidence by telephone from New South Wales.

183 Mr Baines was an impressive witness, who considered questions very carefully, and was clear and precise in giving responses. My only concern about him was the fact that he spoke with the press and issued a media statement about his belief that the Farnells were making an application to access Gammy's funds in circumstance where he had previously been advised by Mrs Chanbua's solicitors not to speak with the media. I appreciate, however, that Mr Baines thought that the story would be published whether he spoke to the media or not. I also recognise that he was greatly perturbed about information he had been given by Mrs Chanbua's solicitor on this topic, which in my view was inaccurate and inflammatory.

**Piyasiri Lambert**

184 The evidence of Piyasiri Lambert was of no relevance.

**Dr Visut Suvithayasiri**

185 Dr Visut was not available for cross-examination on his affidavit. Save to the extent that its content was corroborated by other unchallenged evidence, I have given it no weight.

[28] This very odd expression appears in the official Department of Immigration form.
[29] The accompanying notes to the form indicate that the surrogate mother's "**consent** must be witnessed", not that her "**signature** must be witnessed".

### The Single Expert

186 Darin Cairns provided his report in a commendably short timeframe. He successfully withstood a strong cross-examination. I was impressed by his report and by his capacity to defend it. I found his evidence to be thoughtful and helpful.

### The DCP witnesses

187 All of the other witnesses were either DCP officers, or had been handpicked by DCP to assist because of their expertise and/or earlier involvement with Mr Farnell. Collectively, they were an impressive set of witnesses, all of whom had a strong command of their part of the brief, and all of whom had thought deeply about the issues. I accepted their evidence.

## Part 4: The legislative framework

188 There is a plethora of relevant statutory provisions, the most important of which are collated in Appendix 1. The interpretation of some is controversial, and their interrelationship is, initially, difficult to fathom. In addressing the interpretation issues that arise, I recognise that most are not only arcane but also arid, since the result of the main dispute would be the same regardless of how they are resolved.

189 In my discussion, I will refer to the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA) as "the federal Act" and "the State Act" respectively. Some of the other relevant statutes will be referred to by the descriptor in the table below.[30]

| Laws of the Commonwealth | |
|---|---|
| *Acts Interpretation Act 1901* | Acts Interpretation Act |
| *Australian Citizenship Act 2007* | Citizenship Act |
| *Australian Constitution* | Constitution |
| *Judiciary Act 1903* | Judiciary Act |
| *Marriage Act 1961* | Marriage Act |
| Laws of Western Australia | |
| *Adoption Act 1994* | Adoption Act |
| *Artificial Conception Act 1985* | Artificial Conception Act |
| *Births, Deaths and Marriages Registration Act 1988* | Births, Deaths and Marriages Act |

[30] Not all of the relevant provisions of the State Act have been included in Appendix 1, but the full Act can be accessed on the State Law Publisher website: www.slp.wa.gov.au. Appendix 1 can be viewed, along with these reasons, on the Family Court of Western Australia website: www.familycourt.wa.gov.au.

| | |
|---|---|
| *Children and Community Services Act 2004* | CCS Act |
| *Child Welfare Act 1947* | The 1947 Child Welfare Act |
| *Criminal Code Act Compilation Act 1913,* Schedule | Criminal Code |
| *Human Reproductive Technology Act 1991* | Human Reproductive Technology Act |
| *Interpretation Act 1984* | Interpretation Act |
| *Surrogacy Act 2008* | Surrogacy Act |

190 In order to provide context for my discussion of these provisions, I should first explain why these proceedings are being heard in the Family Court of Western Australia and say something about the Australian federal system.

**The Family Court of Western Australia and its powers**

191 The Family Court of Western Australia ("the FCWA") is unique in the Australian legal system in that it is the only State Family Court. It has federal jurisdiction in respect to matters under the federal Act and the non-federal jurisdictions conferred by the State Act.[31] While the provisions of the two Acts are largely identical, the modest variations have potential importance in resolving at least one minor part of the dispute.[32]

192 As a court created by statute, the jurisdiction and powers of the FCWA are those conferred expressly (or by implication) by statute, and such other powers as are incidental and necessary to the exercise of the jurisdiction and powers so conferred: *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [64]. This proposition was recently restated in *Teo & Guan* (2015) FLC 93-653, in which the Full Court of the Family Court of Australia held at [81] (emphasis added):

> Construing the subject matter, scope and purpose of the State and federal Acts, we find a clear intention that a State Family Court should have precisely the same powers in the exercise of **federal jurisdiction** as the Family Court of Australia.

193 Notwithstanding the similarity between the State and federal laws, it is nevertheless always essential to ascertain whether a matter falls within State or federal jurisdiction. This is necessary not only because of some very modest differences between the two regimes, but also because the avenues of appeal are different.

[31] Further details relating to the FCWA and the legislative framework within which it operates can be found in my judgment in *Vodicka v Vodicka* (2005) 194 FLR 246 at [25] to [33].
[32] It should also be noted that, save for some irrelevant exceptions, the *Evidence Act 1995* (Cth) does not apply in proceedings in the FCWA. Instead, the *Evidence Act 1906* (WA) applies.

194 While there is a dispute as to whether the primary issue in this matter should be determined under State or federal law, there is no doubt that the relief sought by DCP falls in the court's non-federal jurisdiction. Fortunately, because the FCWA exercises both State and federal jurisdiction, there is also no doubt that I can deal with the entirety of the dispute.

**The legislative powers of the Commonwealth and the States**

195 Under the Australian federal system, legislative power is divided between the Commonwealth Parliament and the Parliaments of each state.[33] Section 51 of the Constitution defines the powers of the Commonwealth. Matters falling outside the ambit of s 51 come under the control of the states; however, s 51(xxxvii) authorises the Commonwealth to make laws on subject matters referred to it by the Parliaments of one or more of the states.

196 Broadly speaking, the Commonwealth originally had power to legislate only in relation to children of a marriage, and the states had power to legislate in relation to ex-nuptial children.[34] After an unsuccessful attempt by the Commonwealth to extend the reach of its legislative powers, all states other than Western Australia referred their powers in respect of ex-nuptial children to the Commonwealth (except for children who come within the ambit of state child protection laws).[35]

197 Writing extra-curially, Chief Justice French has explained why Western Australia did not refer its powers to the Commonwealth:

> All States other than Western Australia referred to the Commonwealth the power to make laws in respect of child custody, guardianship, access and maintenance with a view to overcoming the artificiality of constitutionally derived distinctions based upon the reservation of powers about those matters to State Parliaments. Western Australia, with a State-based Family Court capable of exercising federal jurisdiction, does not have the problem of jurisdictional divides that exist in the other States and required the referral.[36]

198 The power to legislate in relation to artificial conception procedures generally, and surrogacy in particular, continues to be exercised by the states. State laws dealing with these topics are not entirely uniform, but they share one common feature – commercial surrogacy is illegal in every state of Australia.

199 The relevant provision in Western Australia is s 8 of the Surrogacy Act, which provides that "a person who enters into a surrogacy arrangement that is for reward commits an offence". The Surrogacy Act itself does not purport to have effect outside

[33] It is unnecessary to consider the special position of the self-governing territories of the Commonwealth.
[34] Section 51 of the Constitution provides that the Commonwealth has power to make laws with respect to "marriage" and "divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants". However, only the marriage power has relevance in this matter.
[35] The states also retained the power to regulate the adoption of children. For a more detailed discussion, see Anthony Dickey, *Family Law* (Thomson Reuters Australia, 6th ed, 2014) ch 2.
[36] Chief Justice French, 'Co-operative Federalism – A constitutional reality or a political slogan' (2004) *eLaw Journal: Federal Judicial Scholarship* 21 <http://www.austlii.edu.au/au/journals/FedJSchol/2004/21.html>.

Western Australia; however, by operation of s 12 of the Criminal Code, an offence is committed if an act that makes up an element of the offence occurred in Western Australia.

**The symbiotic interaction between State and federal law**

200 In proceedings about a child living in Western Australia, it is normally essential to decide whether the child is a "child of a marriage" within the meaning of the federal Act. Subject to some irrelevant exceptions, the answer to this question will determine whether the State Act or the federal Act applies. Ordinarily there is no room for dispute; however, doubts can arise when the child has been born as a result of an artificial conception procedure.

201 There are three provisions of the federal Act which are of critical importance in determining whether a child is a "child of a marriage". These, in turn, pick up state laws relating to artificial conception procedures and surrogacy. I will now outline the three crucial provisions, which will be discussed in greater detail later.

***Subsection 60F(1) of the federal Act***

202 The federal Act recognises that a child born as the result of an artificial conception procedure may be a "child of a marriage". In doing so, it creates a symbiotic connection between the federal Act and the various state laws relating to artificial conception procedures and surrogacy. This is achieved by s 60F(1), which gives an extended meaning to the expression "child of a marriage" by including not only adopted children, but also some (but not all) children born as a result of an artificial conception procedure, and some (but not all) children who are born as the result of a surrogacy arrangement.

203 This can be seen from the text of s 60F(1) and the other provisions in the federal Act to which it refers.

> **60F Certain children are children of marriage etc.**
>
> (1) A reference in this Act to a child of a marriage includes … a reference to each of the following children:
>
> (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
>
> (b) a child of the husband and wife born before the marriage;
>
> (c) a child who is, under subsection 60H(1) or section 60HB, the child of the husband and wife.

204 Subsection 60H(1) and s 60HB deal with children born as a result of an artificial conception procedure and children born under a surrogacy arrangement. Both of these need to be read with s 60HA, which deals with children of de facto partners.

***Section 60H of the federal Act***

205 Subsection 60H(1), when read with s 60F(1)(c), determines which children born as the result of an artificial conception procedure will be regarded as a "child of a marriage". The effect of s 60H(1)(b)(i) is that some children born as the result of an artificial conception procedure can be classified as being a "child of a marriage" without any reference to other legislation. However, the effect of s 60H(1)(b)(ii) is that other children born as a result of such a procedure can only be recognised as a "child of a marriage" if they fall within a class that can be identified by reference to prescribed legislation. In both instances, in order for a child to become a "child of a marriage", the birth mother must be married at the time of the procedure or be in a de facto relationship and subsequently marry her partner. In determining whether, for the purposes of s 60H, the birth mother is in a de facto relationship, the definition of "de facto partner" under the federal Act applies.[37]

206 Subsections 60H(2) and (3) should also be noted because, arguably at least, they determine who, for the purposes of the federal Act, is to be regarded as the mother and father of a child born as a result of an artificial conception procedure. Subsection 60H(2) picks up prescribed laws dealing with the **maternity** of a child born as a result of an artificial conception procedure. Subsection 60H(3) picks up any prescribed laws dealing with the **paternity** of a child born as a result of such a procedure, but no laws have yet been prescribed.[38]

207 Section 60H relevantly provides as follows:

> **60H Children born as a result of artificial conception procedures**
>
> (1) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the ***other intended parent***); and
>
> (b) either:
>
> (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
>
> (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

[37] See ss 4AA and 60EA of the federal Act.

[38] Counsel for the Farnells suggested that this omission "is probably a legislative oversight (because it is plainly discriminatory)". I am not persuaded this is so, but it is of no significance in Western Australia given that the scope of the Artificial Conception Act is no wider than s 60H(1) in determining who is the father of a child.

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and

(d) if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person.

(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

…

***Section 60HB of the federal Act***

208 Section 60HB, when read with s 60F(1)(c), determines which children born under a surrogacy arrangement will be regarded as a "child of a marriage". The class of children coming within its ambit can be identified only by reference to court orders made under prescribed laws of the states.

209 I will discuss later whether the Commonwealth Parliament intended that s 60HB should cover the field in identifying which children born under a surrogacy arrangement are to be treated as a "child of a marriage", or whether it was intended that such children could be identified as a "child of a marriage" by operation of

s 60H(1) (which might, at first glance seem possible, since they are usually born as a result of an artificial conception procedure).

210 Section 60HB relevantly provides as follows:

> **60HB Children born under surrogacy arrangements**
>
> (1) If a court has made an order under a prescribed law of a State or Territory to the effect that:
>
> (a) a child is the child of one or more persons; or
>
> (b) each of one or more persons is a parent of a child;
>
> then, for the purposes of this Act, the child is the child of each of those persons.
>
> …

***The position of children falling outside s 60H and 60HB***

211 There is nothing in ss 60H or 60HB to suggest they do not apply to children born overseas, provided that the conditions laid down by each of the provisions have been met. However, these two sections do not make express provision for the status of **all** children born as a result of an artificial conception procedure or surrogacy arrangement. Given the divergence of judicial opinion on the significance of this "omission" when seeking to determine the status of children who do not come within the scope of ss 60H and 60HB, it is fortunate that I do not need to touch on the issue. The reason why will emerge later in these reasons, when I discuss whether State or federal law applies.

**The Western Australian laws**

212 Before returning to explain how ss 60F(1), 60H and 60HB provide a coherent statutory scheme, it is necessary to consider the Western Australian laws which comprise an integral part of the scheme.

213 There are two laws of Western Australia which form part of the statutory scheme, and a third which has relevance to this dispute. It is essential to understand the effect of these laws in determining Pipah's status under both State and federal law.

***Artificial Conception Act***

214 The Artificial Conception Act is the prescribed Western Australian law for the purposes of ss 60H(1)(b)(ii) and 60H(2)(b) of the federal Act.[39]

215 The Artificial Conception Act lays down rules to determine the identity of the mother and father of a child born as a result of an "artificial fertilisation procedure".[40]

[39] Family Law Regulations 1984 (Cth), regs 12C and 12CA.

The rules apply "for the purposes of the law of the State" to children wherever they are born, and cannot be rebutted.[41] For reasons I will later explain, the parentage rules in the Artificial Conception Act also apply to children born as a result of a surrogacy arrangement (subject to the parentage transfer process laid down by the Surrogacy Act).

216 The implantation of the embryos in Mrs Chanbua was an "artificial fertilisation procedure" within the meaning of the Human Reproductive Technology Act, and hence for the purposes of the Artificial Conception Act.[42] Mr and Mrs Chanbua were in a de facto relationship at the time, and Mr Chanbua consented to the procedure. Therefore, for the purposes of the law of Western Australia, they are Pipah's father and mother by operation of ss 3, 5 and 6 of the Artificial Conception Act. Furthermore, by virtue of ss 7(1) and (2), the egg donor is not Pipah's mother, and Mr Farnell, as the sperm donor, is "conclusively presumed not to have caused the pregnancy" and is expressly declared not to be the father.

217 As counsel for the Farnells pointed out, s 118 of the Constitution provides that "full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State". Counsel therefore submitted that the maternity and paternity of a Western Australian child, as determined by the Artificial Conception Act, will be recognised throughout Australia. In my view, consideration of the scope of s 118 extends well beyond what is required in these reasons. I consider it sufficient to say that there is nothing in s 118 which prevents the Commonwealth or the other states from legislating in whatever way they deem fit to determine the status of children for the purposes of their own written laws.

***Surrogacy Act***

218 Section 21 of the Surrogacy Act is the prescribed Western Australian law for the purposes of s 60HB of the federal Act.[43]

219 A parentage order made pursuant to s 21 of the Surrogacy Act can modify the effect of the rules of maternity and paternity laid down in the Artificial Conception Act. Section 21 authorises the FCWA to make an order transferring parentage of a child born as a result of a surrogacy arrangement from "the birth parents" to an "eligible couple" who meet the strict requirements laid down by the Surrogacy Act.[44]

220 The Surrogacy Act defines "birth parents" as meaning:

> (a) the persons who are recognised by the law as being, when the child is born, the parents of the child; or
>
> (b) if only one person fits the description in paragraph (a), that person;

---

[40] The Act also determines the status of a same-sex partner of the birth mother.
[41] Sections 4–7; *Re Birth, Deaths and Marriages Registration Act 1997* (2000) FLC 93-021. The only rebuttable presumptions are the presumptions of consent in ss 6(2) and 6A(2).
[42] Artificial Conception Act, s 3(3).
[43] Family Law Regulations 1984 (Cth), reg 12CAA.
[44] The Act provides power to the court to dispense with some of the requirements, but these do not affect the prohibition against commercial surrogacy.

221 As the Artificial Conception Act lays down the rules of maternity and paternity for the purposes of Western Australian law, "the law" referred to in the Surrogacy Act definition of "birth parents" is the Artificial Conception Act. Accordingly, any person identified by the Artificial Conception Act as the mother or father of the child continues to be regarded by the law of Western Australia as the mother or father unless the child is legally adopted or an order is made pursuant to s 21 of the Surrogacy Act.

222 It is common ground that the Farnells are not eligible to obtain an order transferring parentage of Pipah to them pursuant to the Surrogacy Act.[45]

***Adoption Act***

223 The Adoption Act is the only law, other than the Surrogacy Act, by which parentage of a child in Western Australia can be transferred from the birth parent(s) to somebody else. Its provisions are important for a number of reasons, but for present purposes the Adoption Act demonstrates how the Western Australian Parliament proceeds when it wishes to incorporate presumptions of parentage from the State Act into another written law.[46] The Adoption Act also demonstrates the formality surrounding the creation of the status of "parent" for a person who is not the parent of a child at law, and further demonstrates that a birth parent retains the status of "parent" unless an adoption order is made.

224 Section 4A of the Adoption Act provides:

> **4A. Presumptions of parentage in Family Court Act 1997, when applicable**
>
> The presumptions of parentage set out in Part 5 Division 11 Subdivision 3 of the *Family Court Act 1997* apply when considering, for the purposes of this Act, who is —
>
> (a) a parent of a person who is a prospective adoptee; or
>
> (b) a birth parent of a person who is an adoptee.

225 Section 75 of the Adoption Act relevantly provides:

> **75. Effect of adoption order**
>
> (1) Where an adoption order is made, for the purposes of the law of this State —
>
> (a) the relationship between the adoptee and the adoptive parent is to be treated as being that of child and parent; and

[45] Apart from all the other factors disqualifying the Farnells, s 24 of the Surrogacy Act prohibits making a parentage order about a child who has a twin unless an order is also made transferring the parentage of the twin.
[46] For a further example, see s 4 of the CCS Act.

(b) the relationship between the adoptee and —

(i) the adoptee's birth parents; or

(ii) if the adoptee was previously adopted, the previous adoptive parent,

is to be treated as not being that of child and parent; and

…

(d) the relationships of all persons to the adoptee, the adoptive parent and the birth parent or previous adoptive parent are to be determined in accordance with this section.

226 The expression "birth parent" is defined by s 4(1) of the Adoption Act to mean:

(a) the mother[47] of the child or adoptee; and

(b) the father, or a parent under the *Artificial Conception Act 1985* section 6A, of the child or adoptee;

227 I will return to the Adoption Act when considering one of the arguments relating to a decision made under that Act which is said to have important application in this case.

**The presumptions of parentage in the State and federal Acts**

228 Both the State and federal Acts contain presumptions of parentage; however, it is unnecessary at this point to discuss the presumptions in the State Act, since they could have no application if I decide that the dispute falls for consideration under federal law.

229 The parentage presumptions in the federal Act appear in Subdivision D of Division 12 of Part VII. These are employed in determining whether a child is a child of a particular man or woman, and in deciding whether certain people are the "parent" of a particular child.

230 By operation of s 69U, the parentage presumptions in the federal Act are "rebuttable by proof on a balance of probabilities". If presumptions conflict, the one considered to be the most likely will prevail.[48] It has been suggested that it may be "useful" for s 69U to be amended to make clear that the presumptions can be rebutted by other parts of the Act.[49] In my view, such an amendment is unnecessary since a rebuttable evidentiary presumption in a statute may be rebutted not only by proof of

[47] "Mother" is defined as meaning "the woman who gave birth to the child or adoptee". "Father" does not have its own definition.
[48] It is unnecessary to consider the effect of the presumption in s 69S, which is the only one described as being "conclusive", since it clearly would have no application to the present matter.
[49] *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694 at [71].

facts to the contrary, but also by implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless.[50]

231 Sections 60H and 60HB, at least to the extent that they expressly determine the status of children coming within their ambit, would be rendered meaningless if they were not interpreted to displace the presumptions in Division 12. It should also be noted that ss 60H and 60HB appear in Subdivision D of Division 1 of Part VII, which is entitled "Interpretation – how this Act applies to certain children".[51] I conclude that while the rules of maternity and paternity in ss 60H and 60HB are not expressed as non-rebuttable presumptions, in effect they are, and they therefore trump the rebuttable Division 12 presumptions.

## Part 5: Does State or federal law apply?

232 The Farnells contended that the federal Act applies, whereas everyone else contended that the State Act applies.[52] Counsel for Mrs Chanbua submitted that it was "largely immaterial" which Act applied because the court had jurisdiction either way. He nevertheless asserted that the State Act applied, without providing argument to support the proposition.

233 Because Western Australia has not referred its powers over ex-nuptial children to the Commonwealth, the federal Act applies in a different way in Western Australia than in other States. By operation of 69ZH(4), the provisions of the federal Act which are of primary relevance in this dispute, namely ss 60F, 60H, 60HA and 60HB, have effect in Western Australia "according to their tenor". In other words, they do not come within the ambit of the instruction in s 60ZH(2), which requires all references to "a child" to be read in Western Australia as being confined to "a child of a marriage", and all references to "the parents" to be read as being confined to "the parties to the marriage".

234 In the course of the closing arguments, I became concerned that I might be required to rule on submissions concerning the limits of Commonwealth power under s 51 of the Constitution. Accordingly, I asked counsel whether notice should be given to all the Attorneys-General pursuant to the Judiciary Act. Counsel for the Attorney General said the matter had been the subject of discussion with other counsel, but she submitted that the issue did not constitute "a matter arising under the Constitution or involving its interpretation", and accordingly notice did not have to be given. No contrary view was expressed.

235 At the time, I considered that the submission of counsel for the Attorney General was correct (and I recognised that giving the required notices would have delayed finalisation of the matter). As it has turned out, I have deemed it necessary to discuss the breadth of the marriage power under the Constitution, but have ultimately

[50] *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v R* (1994) 179 CLR 427; *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694 at [51].
[51] Paragraph s 60A(c) of the federal Act states that Subdivision D contains the "provisions relevant to how this Act applies to certain children".
[52] Although the Human Rights Commission's opening written submissions said it was "unclear" which Act applied, the Commission's closing submissions made reference only to the State Act.

concluded that the matter can be resolved without reaching a concluded view on that topic.

**The statutory provisions relevant to whether a child is a "child of a marriage"**

236 It is because of the combined effect of ss 69ZE(2), 69ZH(2) and 69ZH(3) of the federal Act that the issue of whether the State Act or the federal Act applies turns on the question of whether Pipah is a "child of a marriage". But what does that term mean?

237 Section 4(1) of the federal Act provides a non-exhaustive definition:

> ***child of a marriage*** includes a child who is, under subsection 60F(1) or (2), a child of a marriage…

238 Subsection 60F(2) is not relevant because it deals with a child of a marriage that has ended in divorce, annulment or death. However, s 60F(1) is of central importance because it provides a further, albeit non-exhaustive, statement of the meaning of "a child of a marriage".[53] I have already set out s 60F(1), but for ease of reference I do so again:

> **60F Certain children are children of marriage etc.**
>
> (1) A reference in this Act to a child of a marriage includes … a reference to each of the following children:
>
> (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
>
> (b) a child of the husband and wife born before the marriage;
>
> (c) a child who is, under subsection 60H(1) or section 60HB, the child of the husband and wife.

239 Importantly, s 60F(4A) goes on to provide:

> (4A) To avoid doubt, for the purposes of this Act, a child of a marriage is a child of the husband and of the wife in the marriage.

240 Paragraph 60F(1)(a) can be ignored since Pipah has not been adopted. The remaining paragraphs, 60F(1)(b) and 60F(1)(c), have a common requirement, namely that for Pipah to come within their scope she must be a "child of the husband and of the wife". The definition of "child" in the Act is helpful in determining whether she meets that description.

241 The word "child", uniquely in the federal Act, has two entries in s 4(1).

[53] Subsections 4(1) and 60F(1) are not exhaustive by their terms, since the expression "child of a marriage" clearly includes a child of a husband and wife born during their marriage.

242 The first provides that for the purposes of Part VII of the Act, "child" is taken to include an adopted child and a stillborn child. This, of course, takes the discussion no further. However, the second is of real importance, as it provides:

> ***child:*** Subdivision D of Division 1 of Part VII affects the situation in which a child is a child of a person or is a child of a marriage or other relationship.

243 This second limb of the definition is accompanied by a note which states:

> In determining if a child is the child of a person within the meaning of this Act, it is to be assumed that Part VII extends to all States and Territories.

244 The second limb and the note were inserted by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). This is a critically important instrument for the purposes of this discussion. For convenience, I will refer to the amendments introduced by this Act as "the 2008 amendments".

245 The Revised Supplementary Explanatory Memorandum to the 2008 amendments explained the purpose of the second limb and the note in these terms:

> 70. This item amends the definition of 'child' in subsection 4(1). It expands the definition of child to reflect new provisions in Subdivision D of Division 1 of Part VII dealing with the parentage of children born as the result of artificial conception procedures while the woman who gave birth to the child was married to, or a de facto partner of another person. It will also[54] expand the definition of child to include a child born under surrogacy arrangements as set out in a new section 60HB.
>
> 71. A note has been included to indicate that Part VII of the Act is to be assumed as extending to all States and Territories for the purpose of working out if a person is a child within the meaning of the Act. The Government's intention is that all children who would fit within the meaning of child as detailed in subsection 4(1) will be covered by any other provisions which relate to this subsection. In particular, the Government wants to ensure West Australian children who are not covered by Part VII of the Act pursuant to subsection 69ZE(s) as they are not children of the marriage will be treated as though they are for the purpose of any legislation referring to a child 'within the meaning of the Family Law Act 1975', howsoever expressed.

246 The Human Rights Commission's submissions recited these paragraphs from the Revised Supplementary Explanatory Memorandum, but no submissions were made about the practical effect of the second limb of the definition of "child" and the accompanying note. However, I consider that their combined effect, at least for present purposes, is that a court must have regard to the provisions of ss 60H, 60HA

[54] The use of the word "also" is potentially significant in dealing with the argument, discussed later, as to whether s 60H was intended to deal with children born as a result of a surrogacy arrangement.

and 60HB when determining whether a child living in Western Australia is a "child of a marriage".

247 The Farnells and the Attorney General submitted that the extension of s 60H(1) to "a de facto partner" of the birth mother of a child born as a result of an artificial conception procedure is ineffective in Western Australia. They argued that to preserve its validity the provision must be read down to cover only a husband of the birth mother.

248 The Farnells' argument on this point was based on the assertion that the 2008 amendments were enacted in reliance on the referral of powers by some states, and that as Western Australia had not referred its powers, the extension of s 60H(1) to the de facto partner of the birth mother could not apply in this State.[55] Counsel for the Attorney General observed that Part VII "cannot apply in Western Australia without qualification or many of its provisions would be unconstitutional". This is true, and as counsel for the Attorney recognised, this is why Subdivision F of Division 12 of Part VII, and especially s 69ZH, make clear the way in which the Act is to be applied in states that have not referred powers.

249 The argument that s 60H(1) is not fully effective in Western Australia was supported by reference to *W and C* [2009] FCWA 61, where Crisford J said at [31]:

> However, as Western Australia is a non-referring state, s 60H of the *Family Law Act* does not apply to ex-nuptial children born as a result of artificial insemination procedures in Western Australia.

250 Her Honour's finding does not support the argument being advanced. All that her Honour was saying was that if a child is an ex-nuptial child, then the provisions of the federal Act have no application in Western Australia, since the child is not a child of a marriage. This is quite different from saying that s 60H(1) does not apply in determining whether a child is a "child of a marriage". If, by operation of s 60H(1), a child is the child of the birth mother and her de facto partner, and they subsequently marry, then the child becomes a child of their marriage in the same way as an ex-nuptial child does if her parents marry after her birth.

251 Given it is within the power of the Commonwealth to declare that an ex-nuptial child becomes a "child of a marriage" upon the marriage of her parents, then it must also be within the power of the Commonwealth to declare that a child born as the result of an artificial conception procedure becomes a "child of a marriage" if the man and woman who are deemed by law to be her mother and father subsequently marry. There is a clear connection to the marriage power in the Constitution.[56] Accordingly, ss 60H(1) and 60HA have precisely the same application in Western Australia as they do in other states. (The note accompanying the second limb of the definition of "child" strongly supports this view.)

252 Having found that ss 60F, 60H, 60HA and 60HB apply with full force and effect in Western Australia, it becomes necessary to deal with the submissions about the

[55] I accept that a large proportion of the 2008 amendments **did** rely on the referral of powers by some states.
[56] Cf. *In the marriage of Cormick; Salmon* (1984) 156 CLR 170.

meaning of each section, and the way in which they interact. In doing so, it will be important to appreciate that while the main thrust of the changes made in 2008 was to "give separating de facto couples the same rights as divorcing couples", other objectives were also achieved.[57]

253 Prior to the 2008 amendments, ss 60F(1) and 60H(1) were in the following form:

> **60F Certain children are children of marriage etc.**
>
> (1) A reference in this Act to a child of a marriage includes, subject to subsection (3), a reference to each of the following children:
>
> (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
>
> (b) a child of the husband and wife born before the marriage;
>
> (c) a child who is, under subsection 60H(1), the child of the husband and wife.
>
> …
>
> **60H Children born as a result of artificial conception procedures**
>
> (1) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to a man; and
>
> (b) either of the following paragraphs apply:
>
> (i) the procedure was carried out with their consent;
>
> (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the man;
>
> then, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.
>
> ...

254 Prior to the amendments, the Act did not contain a separate section equivalent to the current s 60HA. Instead, s 60H(4) dealt with unmarried couples by providing that:

> (4) If a person lives with another person as the husband or wife of the first-mentioned person on a genuine domestic basis although not

[57] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, 5825 (Robert McClelland).

> legally married to that person, subsection (1) applies in relation to them as if:
>
> (a) they were married each other; and
>
> (b) neither person were married to any other person.

255 There was also no provision equivalent to s 60HB since the Act made no reference to surrogacy until the 2008 amendments.

256 I will later explain why the way the amendments were made assists in understanding whether it was intended that a child born as a result of a surrogacy arrangement could be a "child of a marriage" other than by reliance on s 60HB.

**Is Pipah a "child of a marriage"?**

257 Counsel for the Farnells acknowledged that Pipah could not be a child of the Farnell marriage,[58] but he submitted that she was a child of the Chanbua marriage.

258 Paragraph (a) of 60F(1) of the federal Act does not apply, and counsel for the Farnells conceded that paragraph (c) could not apply because of what I have found to be his erroneous view of the constitutional limits.[59] Thus, his argument depended on Pipah being a "child of a marriage" within the meaning of paragraph (b) – i.e. that she was a child of both Mr and Mrs Chanbua born before their marriage.

259 Counsel's argument can be summarised as follows:

- Mr and Mrs Chanbua were in a de facto relationship at the time of the artificial conception procedure, and Mr Chanbua consented to the procedure.
- By operation of the Artificial Conception Act, Mr and Mrs Chanbua are therefore Pipah's father and mother respectively, and hence are her "parents".
- Mr and Mrs Chanbua married after Pipah's birth and, by operation of s 90 of the Marriage Act, Pipah is now their legitimate child, noting that s 93 of the Marriage Act preserves the effects of state laws about artificial conception procedures.
- Sections 60H and 60HB recognise that people who have a child other than "naturally" may be regarded as the child's parents, and that a child other than a "natural" child of a married couple can be a child of their marriage.
- Since Mr and Mrs Chanbua are now married, Pipah is a child of their marriage for the purposes of paragraph (b) of s 60F(1).

260 The argument of counsel for the Farnells recognised the necessity for s 60F(1)(b) to be interpreted in a way that does not offend the Constitution. Using the

[58] Mrs Farnell is not the birth mother; her eggs were not used in the artificial conception procedure; and she is not deemed to be the mother by application of any law. To be a "child of a marriage", Pipah must be "a child of the husband **and** of the wife in the marriage": see s 60F(4A).

[59] Counsel for the Farnells said s 60H(1)(c) would otherwise have been "potentially promising" in establishing that Pipah was a "child of a marriage".

words of Gibbs CJ in *In the marriage of Cormick; Salmon* (1984) 156 CLR 170, counsel conceded that "Parliament cannot bring a case within s 51(xxi) of the Constitution by deeming a child to be 'a child of the marriage if the necessary connexion between the child and the marriage does not, in truth, exist'". However, he submitted that as Mr and Mrs Chanbua are recognised by Western Australian law as the mother and father of Gammy and Pipah, "the children have the necessary connection with their marriage".

261 Counsel for the Attorney General and the Human Rights Commission submitted that Pipah could not be a child of the Chanbua marriage. In support of this argument, counsel for the Attorney General referred to authorities which demonstrate that the High Court has taken a restrictive view of the meaning of "child of a marriage". Counsel referred in particular to Brennan J's statement in *Dougherty v Dougherty* (1987) 163 CLR 278 at 294 that a child's status as a "child of the marriage" is "acquired by having been born of the union of husband and wife or by having been born of parents who subsequently marry or by having been adopted by husband and wife".

262 In light of these authorities, s 60F(4A) of the federal Act seems to me to be nothing more than a statement of the existing law, directed at ensuring that the 2008 amendments are not interpreted in a way that would offend the Constitution.[60]

263 Counsel for the Farnells submitted that neither the Act itself, nor the authorities, supported the narrow construction urged by the Attorney General and the Human Rights Commission. He argued that Brennan J's remarks in *Dougherty* should be seen as "simply illustrating ways in which children might be children of a marriage" rather than laying down "an exclusive list".

264 The Farnells' counsel also relied on Murphy J's statement in *Cormick* at 181 that:

> No narrow view should be taken of Parliament's power to provide for children who become part of the family arising from the marriage, even if they are not strictly children of the marriage.

265 As counsel for the Attorney General pointed out, Murphy J was the sole dissentient in *Cormick*. Nevertheless, in my view, examination of the majority judgments in *Cormick* provides support for the argument that Brennan J's remarks in *Dougherty* ought not to be seen as laying down a closed list of ways a child can become a "child of a marriage". Children born as a result of artificial conception procedures, for example, must now be added to the list.

266 In considering the views of the majority in *Cormick*, it needs to be recalled that the case was decided in 1984. This was the year prior to the introduction of the

[60] *In the marriage of Cormick; Salmon* (1984) 156 CLR 170 at 177, 183; *R v Cook*; *Ex parte C* (1985) 156 CLR 249 at 255, 258; *Re F; Ex parte F* (1986) 161 CLR 376 at 399–400. 402, 406.

Artificial Conception Act,[61] and the year after the *Family Law Amendment Act 1983* (Cth) inserted s 5A into the federal Act, which provided:

> **5A. Certain children deemed to be children of mother's husband**
>
> (1) A child born to a woman as a result of the carrying out, during the period in which the woman was married to a man, of a medical procedure in relation to that woman, being a child who is not biologically the child of that man, shall, for the purposes of section 5, be deemed to be a child of that man if—
>
> (a) the medical procedure was carried out with the consent of that man; or
>
> (b) under an Act or under a law of a State or Territory the child is deemed to be the child of that man.
>
> …
>
> (3) In this section, 'medical procedure' means artificial insemination or the implantation of an embryo in the body of a woman.

267 Of all the judges in *Cormick*, only Murphy J noted this development, when he said:

> Parliament has also grappled with some of the problems created by medical technology, in particular artificial insemination or the implantation of an embryo in the body of a woman. Children born as a result of these procedures are in certain cases deemed to be children of the woman's husband (s 5A of the Act), and thus children of the marriage.

268 In order to appreciate the ratio of *Cormick*, it is necessary to recall that the question was whether s 5(1)(f) of the federal Act, as it stood at the time, was a valid exercise of Commonwealth legislative power with respect to marriage. Paragraph 5(1)(f) provided that "a child of the marriage" included "a child … who … was at the relevant time, treated by the husband and wife as a child of their family, if, at the relevant time, the child was ordinarily a member of the household of the husband and wife". The child involved in *Cormick* was an ex-nuptial child who had been reared by her grandmother and her grandmother's husband (who was unrelated to the child).

269 The High Court found in *Cormick* that there was insufficient connection between "marriage" and the extension of the law made by s 5(1)(f). In holding the provision to be invalid, Gibbs CJ (with whom Mason, Wilson, Deane and Dawson JJ agreed, and with whom Brennan J largely agreed) said at 175 et seq (footnotes omitted):

> It is now well settled that "marriage" in s 51 (xxi) includes the relationship or institution of marriage and, since the protection and nurture of the

[61] Most other states enacted similar legislation at around the same time. See Crisford J's discussion of this development in *W and C* [2009] FCWA 61, which I respectfully adopt, save for the second sentence of [30].

> children of the marriage is at the very heart of the relationship, that the power to make laws with respect to marriage enables the Parliament to define and enforce the rights of a party to the marriage with respect to the custody and guardianship of a child of the marriage. The rights and duties of the parties to a marriage, with respect to the children of the marriage, arise directly out of the marriage relationship, and a law defining, regulating or modifying the incidents of the marriage relationship is a law with respect to marriage. This is so, although the law defines the rights of the parties to the marriage to the custody and guardianship of a child of the marriage, not only as between themselves, or between them and the child, but also as against other persons. These principles have been fully discussed in the cases, particularly in *Dowal v Murray*; *Reg v Lambert; Ex parte Plummer*; *Vitzdamm-Jones v Vitzdamm-Jones*; and *Fountain v Alexander*.
>
> ...
>
> Of course, a child may become a child of the marriage although not born as such. Legitimation and adoption, when the persons who adopt the child are married, are examples. The case of legitimation was dealt with in *Attorney-General (Vict) v The Commonwealth*. In the case of adoption, the child is taken and treated by the adopting parents as their own, and, if the adopting parents are married, becomes a child of the marriage in law and in fact, so that a law regulating the rights of the adopting parents to the custody or guardianship of an adopted child would be a law with respect to marriage. It is unnecessary to inquire whether the same result might follow, for example, in the case of a de facto adoption not effected by legally recognized means. It is not suggested that the terms of s 5(1)(f) are confined, or could properly be read down to apply, to such a case.
>
> The Parliament cannot bring a case within s 51(xxi) by deeming a child to be a child of a marriage if the necessary connexion between the child and the marriage does not, in truth, exist. It would be a fundamental misconception of the operation of the Constitution to suppose that the Parliament itself could effectively declare that particular facts are sufficient to bring about the necessary connexion with a head of legislative power so as to justify an exercise of that power. It is for the courts, and not for the Parliament, to decide on the validity of legislation, and so it is for this Court to decide in the present case whether there is, in truth, a sufficient connexion between the institution of marriage and a law which treats as a child of the marriage a child who is not in fact the natural or adopted child of either party to the marriage, but who was, at a particular time, treated by the parties to the marriage as a member of their family and was, at that time, ordinarily a member of their household.

270 Although I accept that Gibbs CJ's observations should not be interpreted as if they were the text of a statute, they nevertheless provide a basis for considering that a law would exceed Commonwealth legislative power if it purported to deem a class of children to be children of a marriage in circumstances where their married parents (who are not the biological parents) not only did not intend to treat the children "as

their own" but instead had contracted to sell them to third parties. In my view, such a law would not be one "defining, regulating or modifying the incidents of the marriage relationship". Indeed, the prospect that Parliament could seek to treat such children as being children of the marriage of the relinquishing parents might seem to be the antithesis of a law with respect to marriage.

271 Brennan J said in *Cormick* that the power to legislate in respect of marriage "does not support a law which so regulates the incidents of marriage as to impair the essence of marriage ... nor does the power support a law regulating what is deemed to be, but what would not otherwise be, an incident of the marriage relationship". His Honour cited as authority for the first part of that proposition the judgment of Windeyer J in *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 (the 1962 Marriage Act case). Windeyer J's observations at 580 are illuminating in considering the validity of s 60F(1)(b) if it were to be interpreted in the way proposed by the Farnells:

> But, large though they are, the elements of capacity, consent and celebration, which constitute so much of the marriage law in its primary sense, do not, I think, exhaust the subject of the Commonwealth power. Commonwealth law can, in my opinion, extend at least to the personal relationships that are the consequences of marriage—cohabitation, conjugal society, all that is meant by consortium, the mutual society, help and comfort that the one ought to have of the other. These are of the very nature of marriage. So far as they can be regulated by law without impairing the essence of marriage, laws about them would, I consider, properly be called laws with respect to marriage ... And, I am inclined to think, the Commonwealth power would extend to matters concerning the support and care of children, duties that are commonly considered to be inherent in the institution of matrimony. The procreation and upbringing of children is set down in the Prayer Book first among the causes for which matrimony was ordained. If an authority of a different kind be preferred, Voltaire's *Dictionnaire Philosophique* (1764), in the article on canon law, said: *Le mariage dans l'ordre civil est une union légitime de l'homme et de la femme, pour avoir des enfans, pour les élever, et pour leur assurer les droits des proprietés, sous l'autorité de la loi*. And *Puffendorf* said that "the natural and regular end of marriage is the obtaining of children whom we may, with certainty, call our own": *Law of Nature & Nations* vi, I, 15.[62]

272 The exchange between Murphy J and Dawson J in arguendo in *Cormick* at 171 is also illuminating. Dawson J suggested to Murphy J that the reason that adopted children could be treated as a "child of a marriage" was because "they are placed by State law into the position of children of the marriage". In my view, the position of

[62] Dawson J took issue with this approach in *V v V* (1985) 156 CLR 228 at 237, when he said: "It is sometimes said that the protection and nurture of the children of a marriage is at the very heart of the relationship … If I may say so with respect, such a statement contains more rhetoric than meaning. The protection and nurture of children is basically a function of parenthood rather than marriage and, in any event, covers a much broader field than marriage. Whilst the marriage relationship and the regulation of that relationship may have an undeniable bearing upon the welfare of children of the marriage, the subject of children's welfare is different from the subject of marriage".

children born as a result of artificial conception procedures and surrogacy arrangements is analogous, since these procedures are regulated by state law. The laws dealing with these children, like the adoption laws, confer a legal status on the relevant adults that they would otherwise lack.

273 In my view, the constitutional question that potentially arises here is whether the relationship between a birth mother and her husband on the one hand, and the children who were the product of a surrogacy arrangement on the other, is such an incident of the marriage of the husband and wife as to be the subject of a valid law supported by the marriage power. If it were necessary to do so, I consider that the question should be answered in the negative.

274 Even Murphy J's formulation of the test in *Cormick* would seem to lead to the same answer. His Honour said at 181:

> The legislative provision is presumed to be valid, and that presumption should not be displaced except by the clearest demonstration that there is no rational connexion between the challenged law and the legislative power.

275 Even starting with the presumption of validity to which his Honour referred, I can see no rational connection between the Chanbua marriage and a law purporting to regulate rights and responsibilities in relation to a child who would never have been born were it not for the fact that there was an agreement for her to be sold to strangers. In arriving at this conclusion, I have not overlooked what was said in *V v V* (1985) 156 CLR 228 at 232 concerning the ability of the Commonwealth to make a law providing for "the adjudication of conflicting claims by a party to a marriage and a stranger to the custody of or access to a child of the marriage". But as Dawson J said in *V v V* at 237, when qualifying his earlier agreement with Gibbs CJ's judgment in *Cormick:*

> Custody, even of a child of a marriage, extends beyond marriage as a subject-matter and a law may be a law with respect to custody without being a law with respect to marriage.

276 Although I acknowledge that Dawson J was in dissent in *V v V*, his Honour cited *R v Lambert; Ex parte Plummer* (1980) 146 CLR 447 at 457 as authority for this proposition. In that case, Gibbs J (with whom Barwick CJ agreed) said (footnotes omitted):

> I adhere to the view that I expressed in *Reg v Demack; Ex parte Plummer*, that an enactment is not a law with respect to marriage simply because it has some operation with respect to the custody of a child of the marriage, or, I would add, with respect to married persons. In some circumstances – as the learned Solicitor-General for the Commonwealth rightly acknowledged – the connexion between the operation of the law and the relationship of marriage may be so tenuous that such a law cannot be said to be a law with respect to marriage…
>
> The question whether a law is one with respect to marriage is one of degree. The answer to it depends on the closeness of the connexion

> between the law and the marriage relationship. Sometimes – as in the present case – it is helpful to consider what sort of rights and duties flow from the relationship of marriage in the ordinary understanding of reasonable men. That is not to say that the Parliament cannot create new rights and duties of a kind not previously envisaged. But there comes a time when it is inaccurate to describe rights and duties, although created in respect of a child of a marriage, as rights and duties arising out of the marriage relationship...

277 In the same case, Aickin J said at 474:

> It is necessary to bear constantly in mind that the legislative power is one to make laws with respect to marriage and not one to make laws with respect to the children of marriages. Some laws which affect children of marriages have been held to be laws with respect to marriage but many laws which affect children (including children of marriages) cannot be so classified. It remains the fact that most children are children of a marriage and there are many laws which deal exclusively with children generally. An obvious example is provided by State laws dealing with compulsory education of children. They do not differentiate between the children of a marriage and other children. Notwithstanding that they are concerned with the welfare and development of children and impose duties on parents in their relation to their children, they do not touch the marriage relationship at all.[63]

278 These authorities suggest to me that s 60F(1)(b) would be beyond the power of the Commonwealth if it were interpreted in the way the Farnells propose. If it were necessary to do so to dispose of the dispute, I would be obliged by s 15A of the Acts Interpretation Act to construe the provision so as to exclude children such as Pipah from its operation.

279 Ultimately, however, for reasons that follow, I consider that s 60F(1)(b) does not apply to **any** children born as a result of an artificial conception procedure, including children born as a result of a surrogacy arrangement. The constitutional issue therefore does not arise.

## The proper construction of the federal statutory scheme

280 Two questions arise in working out how ss 60F(1), 60H(1) and 60HB are to be interpreted individually, and how they fit together as a whole. The first is whether a child born as a result of a surrogacy arrangement who does not meet the description of "child of a marriage" for the purposes of s 60F(1)(c) can nevertheless be a "child of a marriage" for the purposes of s 60F(1)(b). The second arises from the fact that **both** s 60H and s 60HB theoretically could apply to surrogacy, since surrogacy typically involves an artificial conception procedure. This gives rise to the question of whether s 60H might apply to a child born as a result of a surrogacy arrangement even if an order transferring parentage from the birth parents has not been made under a prescribed law as contemplated by s 60HB.

[63] To like effect, see Wilson J's judgment in *V v V*.

281 While the answer to these questions could potentially be divined from the text of each individual provision, the syntactical presumptions that are often used in statutory construction will provide guidance in understanding the connection between them. I propose to discuss the possible application of three of these presumptions, although I recognise that they are no more than aids to understanding and "can be readily discarded if there is any suggestion that a different meaning is intended".[64]

***Generalia specialibus non derogant***

282 Counsel for the Attorney General submitted that the *generalia specialibus non derogant* presumption would answer both of the questions I have posed. The effect of this presumption is that specific provisions in a statute prevail over general ones to the extent of any conflict.[65]

283 The Attorney General's submission can be reframed in this way:

- If a child born of a surrogacy arrangement cannot be treated as a "child of a marriage" by reliance on s 60HB, the child cannot become a "child of a marriage" by reliance on s 60H(1), since the former provision is specifically directed at surrogacy, whereas the latter is a more general provision.
- If a child born of a surrogacy arrangement cannot be treated as a "child of a marriage" by reliance on s 60F(1)(c), the child cannot become a "child of a marriage" by reliance on s 60F(1)(b), since the former provision is specifically directed at artificial conception procedures and surrogacy, whereas the latter is a more general provision.

284 While I accept that s 60H(1) deals with the status of children born as a result of artificial conception procedures, and s 60HB deals with the status of children in a narrower class, I am not convinced that there is any conflict between those provisions. Nor does there appear to be conflict between s 60F(1)(b) and s 60F(1)(c), since s 60F(1) merely provides for three categories of children to come within the meaning of the term "child of a marriage". On their face, none of the provisions seeks to limit the operation of the others, and none is dependent upon the others. As there is no conflict, there is no place for the application of the *generalia specialibus non derogant* rule. That, however, is not the end of the matter.

***Expressio unius est exclusio alterius***

285 There is a different presumption which, if applied, would exclude the possibility that a child born as a result of an artificial conception procedure, but who does not satisfy the requirements of s 60F(1)(c), might nevertheless be a "child of a marriage" by reliance on s 60F(1)(b). This maxim, *expressio unius est exclusio alterius*,[66] may also be useful in deciding whether s 60H can apply to a child born as a result of a surrogacy arrangement even if an order transferring parentage has not been made as contemplated by s 60HB.

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[64] Dennis Pearce & Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014) 169.
[65] *Goodwin v Phillips* (1908) 7 CLR 1 at 14.
[66] Translates roughly as "the express mention of one thing excludes all others".

286 In considering this maxim, I am mindful of what the High Court said in *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94:

> The maxim expressio unius ... must always be applied with care, for it is not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument ... It is "a valuable servant, but a dangerous master"...

287 As I understand its effect in statutory construction, the maxim means that when one or more things of a particular class are expressly mentioned in a statute, others of the same class are taken to be excluded. Caution must be exercised, however, because it may simply be that there is an overlap between the component parts of the statute – in this case, an overlap in the paragraphs of s 60F(1) itself and an overlap between s 60H(1) and s 60HB.

288 The authorities state that application of the *expressio unius* maxim is largely a matter of impression. Factors to be taken into account in forming that impression include:

- the precision in the drafting;
- the similarity of the subject matter in the provisions being considered; and
- the extent to which the Act has been amended, since extensive alteration of the statute increases the risk of provisions being inconsistent unintentionally.[67]

289 Careful study of this often amended, and precisely drafted, statute has led me to form the clear impression that Parliament must have intended that a child born as a result of an artificial conception procedure who does not come within the carefully defined provisions of either s 60H(1) or s 60HB would not be treated as a "child of a marriage" within the meaning of s 60F(1)(b). This impression is strongly reinforced by reflection on the confined construction historically given by the High Court to the term "child of a marriage".

290 Furthermore, s 60H(1) and s 60HB display clear public policy considerations. In s 60H, there is recognition of the importance of consent in artificial conception procedures; and in s 60HB, there is recognition of the importance of courts overseeing the transfer of parentage in surrogacy arrangements. It is improbable that Parliament would have laid down these strict requirements as a gateway to s 60F(1)(c), but then left the gate to s 60F(1)(b) wide open.

***Expressum facit cessare tacitum***

291 There is a third maxim which also has potential application. This maxim, *expressum facit cessare tacitum*,[68] is sometimes equated with the *expressio unius* maxim, but I consider it may have separate application here.

[67] Dennis Pearce & Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014) 179.
[68] Translates roughly as "what is expressed makes what is implied silent".

292 In *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7, Gavan Duffy CJ and Dixon J said:

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.[69]

293 In *R v Wallis* (1949) 78 CLR 529 at 550, Dixon J said:

> But upon some matters the Act does speak with more particularity. If it confers a specific power with respect to a limited subject or specifies a manner of dealing with it or otherwise provides what the duty or authority of the arbitrator shall be, then upon ordinary principles of interpretation the provision in which that is done should be treated as the source of his authority over the matter, notwithstanding that otherwise the same or a wider power over the same matter might have been implied in or covered by the general authority given by s 38. This accords with the general principles of interpretation embodied in the maxim *expressum facit cessare tacitum* and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.

294 French CJ has explained that the *expressum facit cessare tacitum* maxim "must be applied subject to the particular text, context and purpose of the statute to be construed".[70] In looking for the "purpose" of ss 60H(1) and 60HB, it is clear that the Commonwealth Parliament made a conscious decision to achieve harmony with state laws in the area of artificial conception procedures generally, and surrogacy arrangements in particular. In my view, had Parliament intended that s 60F(1)(b) be read to water down the effect of these harmonising provisions, it would have said so.

295 By the same reasoning, I accept the Attorney General's submission that s 60H(1) should be interpreted to exclude surrogacy arrangements from its ambit. This conclusion is reinforced by the way in which s 60H was redrawn in 2008. The substituted provision introduced a new expression, describing the husband or partner of the birth mother as "the other intended parent". I accept the Attorney General's submission that:

> In surrogacy situations, the partner of the surrogate mother is not "the other intended parent" and the provisions of section 60H are clearly not intended to apply (and are not easy to read in relation to) a surrogacy situation.

296 I recognise that the expression "intended parent" is only used in s 60H(1) as a shorthand expression of convenience, but in my view it provides a clear indication

[69] See also McTiernan J to like effect at 20.
[70] *Plaintiff M70/2011* (2011) 244 CLR 144 at 117.

that the section is directed at conventional artificial conception arrangements, where the birth mother and her partner intend to be responsible for the nurture and support of the resulting child.[71]

***Parliament's intention revealed in the debate on the 2008 amendments***

297 Examination of Hansard reveals that the question of whether the words "intended parent" should be used at all in the substituted s 60H(1) was a matter of real controversy.

298 During the debate, the Opposition in the Senate moved to amend the proposed s 60H(1) with a view to replacing the words "the child is the child of the woman and of the other intended parent" with the words "the child is the child of the woman and of her husband" (in the case of a married couple) and "the child is the child of the woman, and is deemed to be the child of the other person in the relationship" (in the case of a de facto couple).[72]

299 The record of the debate in the Senate is instructive in revealing that Parliament did not intend for s 60H to apply to children born as a result of a surrogacy arrangement.

300 In rejecting the amendment proposed by the Opposition, Senator Ludwig said:

> I know that children will regard them as parents, not as 'deemed heterosexual or same-sex de facto parents' ... it is a simple statement about whether these people are parents. What the opposition is proposing with this amendment is to remove the word 'parent' from a section that confers parental rights and responsibilities...[73]

301 It is obvious that the Parliament would not have intended to confer parental rights on a birth mother in a surrogacy arrangement when the entire purpose of such an arrangement is for the birth mother to deliver the child into the care of others, and thereafter exercise none of the rights, and bear none of the responsibilities, of a parent.

302 It is important also to observe that s 60HB was not in the Bill when it was first introduced into the Parliament. It only found its way in during the Committee stage in the Senate. Significantly, the second part of the definition of "child" also found its way into the Bill at the same time. The Explanatory Memorandum therefore did not deal with the purpose of s 60HB, and the way it was intended to fit into the architecture of the Act.

303 Although there were only a few references to s 60HB in the debate after it was introduced in the Senate, on my reading of Hansard it was seen as a standalone provision dealing with surrogacy, since the substituted s 60H was clearly understood

[71] This conclusion is in accordance with the submission of the Human Rights Commission that when the provision equivalent to s 60H was first introduced into the federal Act in 1983, it was not intended to cover children born through a surrogacy arrangement, and that Parliament's intention has not changed in relation to the subsequent iterations of that provision, which ultimately became s 60H in 1995.
[72] Commonwealth, *Parliamentary Debates*, Senate, 16 October 2008, 6257 (George Brandis).
[73] Commonwealth, *Parliamentary Debates*, Senate, 16 October 2008, 6262 (Joseph Ludwig).

to be directed specifically at children who would remain in the care of the birth mother. I refer in particular to the remarks of Senators Barnett, Boswell, Brandis, Hanson-Young and Pratt.[74] See also the contemporaneous report of the Standing Committee on Legal and Constitutional Affairs, the tenor of which was that reform in the area of surrogacy would initially need to be undertaken by the states.[75]

304 Senator Ludwig, speaking in support of s 60HB, said that the proposed new section recognised

> the reality that courts can and do transfer legal parentage as a result of a surrogacy arrangement—and it will be difficult to deny that this happens. Failure to recognise these orders would perpetuate inappropriate inconsistencies between state and federal laws and continue confusion and discriminatory treatment for families.[76]

305 If s 60H standing alone was thought to have been sufficient to deal with children born as a result of surrogacy arrangements, there would have been no "confusion and discriminatory treatment for families" in the Bill in its original form.

306 Senator Ludwig, having gone on to discuss the proposed changes to s 60H, which expressly dealt with artificial conception procedures, then said (emphasis added):

> **Turning to** the issue of children born under surrogacy arrangements, new section 60HB is proposed to deal with children born under surrogacy arrangements regulated by state and territory laws.[77]

307 Senator Ludwig's choice of words carries the implication that the "issue of children born under surrogacy arrangements" was unrelated to the topic he had just finished discussing, namely children born as a result of artificial conception procedures. In any event, the Honourable Senator then went on to say (emphasis added):

> Where a surrogacy arrangement is involved, opposite-sex married or de facto couples and female or male same-sex de facto couples will be recognised as the parents of a child **if there is a state or territory court order transferring parentage to them**.[78]

308 Hansard provides no support for the proposition that Parliament countenanced the possibility that a man and a woman who commissioned the birth of a child, whether in Australia or overseas, would be afforded the status of a parent of that child without a court order made under state surrogacy laws. It is equally untenable to

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[74] Commonwealth, *Parliamentary Debates*, Senate, 14 October 2008, 47 (Guy Barnett); Commonwealth, *Parliamentary Debates*, Senate, 16 October 2008, 6242 (Ronald Boswell), 6245–6247 (Louise Pratt), 6247 (Joseph Ludwig), 6259 (George Brandis), 6260–6261 (George Brandis), 6264 (Sarah Hanson-Young), 6264–5 (George Brandis).

[75] Standing Committee on Legal and Constitutional Affairs, Senate, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]* (2008).

[76] Commonwealth, *Parliamentary Debates*, Senate, 16 October 2008, 6247 (Joseph Ludwig).

[77] Commonwealth, *Parliamentary Debates*, Senate, 16 October 2008, 6256 (Joseph Ludwig).

[78] Commonwealth, *Parliamentary Debates*, Senate, 16 October 2008, 6256 (Joseph Ludwig).

suggest that Parliament, in referring to "intended parent" in s 60H(1), had in mind the husband or partner of a woman who had agreed to be a surrogate mother.

### Conclusion – Pipah is not a "child of a marriage" and the State law applies

309 For these reasons, I conclude that s 60H(1) has no application to children born as a result of a surrogacy arrangement, and that s 60F(1)(b) similarly has no application. Pipah is therefore not a "child of a marriage", and the State Act applies.

## Part 6: Jurisdictional and procedural issues

310 Having determined that the State Act applies, there are some jurisdictional and procedural matters that require consideration.

### Does the court have jurisdiction?

311 The jurisdiction of the FCWA to determine the dispute is found in s 36 of the State Act. It is not contentious that I have jurisdiction to determine all the issues, since the Farnells are resident in Western Australia and Pipah is present in the State.

### Do the parties have standing?

312 By operation of ss 88 and 185 of the State Act, proceedings for parenting orders, or other proceedings in relation to a child, may be brought by, inter alia, the child's parents, or a person concerned with the child's care, welfare or development.

313 Mrs Chanbua has standing to bring her application, as it is not in dispute that she is Pipah's parent. The Farnells also have standing, even if they are not legally Pipah's "parents", as they are concerned with her care, welfare and development. DCP has standing for reasons I will later explain.

### Should Mr Chanbua be joined as a party?

314 At the last directions before trial, counsel for DCP raised whether Mr Chanbua should be joined as a party. The question of joinder and service on Mr Chanbua was left with counsel to consider. As was pointed out, the question was somewhat circular, as Mr Chanbua was not a necessary party unless he was Pipah's "parent", which was in issue at the time.

315 For reasons I will explain later, Mr Chanbua is legally a "parent" of Pipah. He should therefore be joined as a party to the proceedings under the State Act, unless I dispense with the requirements of r 6.02 of the Family Law Rules 2004 (Cth).[79] In addition, in light of my finding about his status as a parent, Mr Chanbua automatically becomes a party to the proceedings under the CCS Act by operation of s 147 of that Act.

[79] This rule applies in all proceedings under the State Act in the FCWA.

316 The purpose of r 6.02 and s 147 of the CCS Act is to ensure that all persons likely to be affected are able to participate in the proceedings to the extent that they wish. Mr Chanbua knew the proceedings were on foot, but there is no indication that he ever wanted to participate to any greater extent than he did. In my view, his interests have not been prejudiced by not having been named as a party earlier. Furthermore, the case that was presented on behalf of his wife, if successful, would have excluded him as the "parent" of Pipah, since it was denied they were in a de facto relationship at the relevant time.

317 Counsel for DCP ensured during her cross-examination that Mr Chanbua was aware of the orders sought by DCP, and Mr Chanbua gave evidence that if Pipah was to stay in Australia it would be "good" if DCP could "keep an eye on Mr Farnell's dealing with her". He also said he would agree with whatever his wife proposed about Pipah or Gammy.

318 I propose to join Mr Chanbua as a party, but I will dispense with any requirement for him to be served with any documents. If he is aggrieved by the outcome, he will have the same appeal rights as all other parties.

**Does s 202 of the State Act apply?**

319 Senior counsel for the Independent Children's Lawyer drew attention in his closing oral submissions to the provisions of s 202(1) of the State Act, which provides:

> **202. Child welfare laws not affected — FLA s. 69ZK**
>
> (1) A court must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the control or in the care (however described), of a person under a child welfare law unless —
>
> (a) the order is expressed to come into effect when the child ceases to be under that control or in that care; or
>
> (b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent has been obtained from a person who, under the relevant child welfare law, has responsibility for the control or care (however described) of the child.

320 This issue had not been raised earlier. Counsel for the ICL said he had not formed a view as to whether Pipah would be under the "control" or in the "care" of "a person under a child welfare law" if the court makes a "protection order (supervision)" pursuant to s 47 of the CCS Act, as requested by both DCP and the ICL. However, counsel suggested that "just in case" s 202 was invoked, it might be appropriate for me, after publishing my reasons, to allow the parties an opportunity to make submissions on "further steps" that might need to be taken with reference to s 202. Counsel for DCP went further and submitted that if a protection order (supervision) was made, DCP's consent would be required before I could make any orders under the State Act.

321 This issue, albeit raised very late, is vitally important, as it goes to my power to make the orders sought in the proceedings under the State Act.

322 Pipah is not currently the subject of any order under the CCS Act. The interim orders that I made in November 2014 merely require the Farnells to comply with certain requirements that had been proposed by DCP, including that Mr Farnell never be alone with Pipah and that the Farnells comply with the safety plan which was then being finalised. However, if I propose to make a protection order (supervision) as sought, the question that arises under s 202 of the State Act is whether DCP would then have "responsibility for the control or care (however described)" of Pipah.

323 An order such as that proposed by DCP and the ICL would clearly not place Pipah "in the care" of DCP, since she would remain in the care of the Farnells. This follows from s 30 of the CCS Act, which provides:

> **30. When child is in CEO's care**
>
> For the purposes of this Part a child ***is in the CEO's care*** if the child —
>
> (a) is in provisional protection and care; or
>
> (b) is the subject of a protection order (time-limited) or protection order (until 18); or
>
> (c) is the subject of a negotiated placement agreement; or
>
> (d) is provided with placement services under section 32(1)(a).

324 Since none of these conditions would be satisfied here, the remaining question is whether a protection order (supervision) would result in DCP having responsibility for the "control" of Pipah. In answering that question, it must be observed that s 47(2) of the CCS Act provides that a protection order (supervision) "does not affect the parental responsibility of any person for the child except to the extent (if any) necessary to give effect to the order".[80]

325 The concept of a child being under the "control" of DCP was a central feature of the 1947 Child Welfare Act, which was the predecessor of the CCS Act, and which was in force when s 202 of the State Act was enacted. The concept of "control" does not feature in the CCS Act, as the word is only used in quite different contexts. In order to understand what Parliament intended by use of the word "control" in s 202 of the State Act, the best place to start is therefore the 1947 Child Welfare Act.

326 Subsection 4(3) of that Act provided:

> (3) Where a child is placed under the control of the Department under this Act he does not thereby come under the guardianship of the Director-General, but in all other respects he may be treated as though he was a ward and may be placed in any facility, required to

[80] Section 3 of the CCS Act defines "parental responsibility" as meaning "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children".

> carry out the lawful directions of the Director-General or his officers, and required not to leave the State without the consent of the Director General.

327 Given that the concepts of "guardianship" and "parental responsibility" can for present purposes be regarded as synonymous, there is one parallel between a child under the "control" of DCP under the 1947 Child Welfare Act and a child the subject of a protection order (supervision) under the CCS Act. However, the similarity ends there. A child the subject of a protection order (supervision) cannot be treated in the way a "ward" used to be treated. She cannot be placed in a facility; she cannot be required to carry out directions of DCP; and she may leave the State without the consent of DCP, provided DCP is informed of her address.

328 The limited role of DCP in the life of a child who is the subject of a protection order (supervision) can be seen not only from the terms of s 47, but also from s 50 of the CCS Act. Section 50 stipulates that there is only one condition attaching to such orders, although other conditions can be attached if the court so orders, provided they do not infringe s 50(3) which prohibits the court from interfering with responsibility for the day-to-day care, welfare and development of the child.

> **50. Conditions of protection order (supervision)**
>
> (1) It is a condition of every protection order (supervision) that a parent of the child keeps the CEO informed about where the child is living.
>
> (2) A protection order (supervision) may include conditions to be complied with by —
>
> (a) the child if, in the opinion of the Court, the child is able to understand the condition; or
>
> (b) a parent of the child; or
>
> (c) an adult with whom the child is living.
>
> (3) A protection order (supervision) must not include a condition about —
>
> (a) the person or persons with whom the child is to live, unless the condition relates to the child living with a parent of the child specified in the order; or
>
> (b) who is to have responsibility for the day to day care, welfare and development of the child.

329 Apart from imposing an obligation to comply with any conditions attaching to the order, the practical effect of the making of a protection order (supervision) is to be found in ss 52 and 53 of the CCS Act, which relevantly provide:

> **52. Access to child by authorised officer while protection order (supervision) in force**
>
> (1) While a protection order (supervision) is in force in respect of a child, an authorised officer may have access to the child at any reasonable time.
>
> …
>
> **53. Provision of social services**
>
> While a protection order (supervision) is in force in respect of a child the CEO must ensure that the child and the child's parents are provided with any social services that the CEO considers appropriate.

330 These sections reveal the purpose of a court making a supervision order (protection). Such orders permit DCP a limited role in the family, with a view to providing the family with the services it requires while the child is in need of protection. This is no doubt the reason why DCP, in its current consultation process, has sought feedback on a possible amendment to the Act to change the name of such orders from "protection order (supervision) to "protection order (family support)".[81]

331 I conclude that a protection order (supervision) does not place a child under the "control" of DCP because such an order:

- does not infringe on parental responsibility (save to the extent necessary to give effect to the order);
- cannot be subject to conditions dealing with who is to have responsibility for the day to day care, welfare and development of the child; and
- has none of the incidents of a "control" order under the 1947 Child Welfare Act.

332 Although DCP clearly has no objection to the FCWA making orders under the State Act, it has not provided formal "written consent" in compliance with s 202(1)(b). Although I have concluded that consent is not required, I recognise that counsel for DCP did not have an opportunity to make considered submissions on the issue, given it was raised only at the last minute in the course of oral submissions. If I conclude that a protection order (supervision) should be made, then I would give counsel for DCP an opportunity to address me further, since the issue is of importance, not only in these proceedings but potentially in many others.

## Part 7: Human rights, public policy and the Best Practice Principles

333 It is important to consider the extent to which human rights and public policy considerations can be taken into account in arriving at my decision. I should also say something about submissions relating to the application of the Best Practice Principles.

[81] 'Out-of-Home Care Reform Legislative Amendments' (Consultation Paper, Department for Child Protection and Family Support, November 2015) 10.

**How are Pipah's human rights recognised?**

334 The objects of the State Act are contained in s 66. One of them is to give effect to the *Convention on the Rights of the Child* ("the Convention").[82] As the submissions of the Human Rights Commission demonstrate, many of the rights recognised in the Convention have been incorporated in the State Act. Furthermore, the State Act and the Convention share a common purpose, namely that decisions be made in the best interests of the child. In fact, the State Act takes this a step further by providing that the best interests of the child are the "paramount consideration", whereas Article 3(1) of the Convention only makes them "a primary consideration".

335 The rights which are potentially most relevant were identified by counsel for the Human Rights Commission in the following terms:

a. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3(1) and ss 66, 66A & 66C).

b. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents (Article 7(1) s 66(2)(c)).

c. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference (Article 8(1) s 66(2)(b)).

d. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary and in the best interest of the child (Article 9(1) and s 66C(2)).

e. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks. (Article 16).

f. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians or any other person who has the care of the child. (Article 19 and ss 66(2)(b), 66(3A) and 66C(1)).

[82] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

336 The United Nations Committee on the Rights of the Child, which was established under Article 43 of the Convention, has explained that one of the ways in which effect can be given to the child's best interests is by ensuring that if a legislative provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The Committee has also said that in giving effect to the best interests of the child, consideration should be given to the "short-, medium- and long-term effects of actions related to the development of the child over time".[83]

337 I accept the Human Rights Commission's submission that in resolving the issues, I may obtain guidance from these principles and from others referred to in the Convention as they have been explained by the Committee on the Rights of the Child. As counsel said, doing so will provide context to the "best interests" principle.

338 The Independent Children's Lawyer submitted that the Convention "makes it clear that Pipah has a right to have a name, a nationality and, as far as possible, the right to know and be cared for by her parents". This statement reflects the terms of Article 7(1); however, the Convention does not condescend to detail about who is to be regarded as a "parent" for this purpose, although it is tempting to speculate that signatory countries would not have had persons such as Mr Chanbua at the forefront of their thinking.

339 In any event, the ICL also submitted that:

> The Convention does not elevate the importance of one parent over another, it refers to 'parents'. Similarly, it would not be in Pipah's overall best interests to categorise one of Thai, Chinese or Australian culture over that of the other.

340 The ICL went on to argue that Pipah also has a right to have a relationship with her Farnell half-siblings, and with Jackson, Mr Farnell's grandson. It was also argued that whilst Pipah's "sibling relationship with Gammy is special because they are twins, her relationship with her other siblings is also special because of the shared experiences she has had with them". The ICL also submitted that acceptance of the evidence of Jane Farnell would lead to the conclusion that "she and Pipah have a particularly close and loving relationship that has been fostered through significant time spent together". It was further submitted that:

> Pipah also has a right to maintain the close relationship she has already established with her paternal grandmother, other close family friends, in particular those people who form part of the safety network, and to maintain a connection to her community where she has formed social relationships having made playmates at playgroup, church and activities such as swimming lessons.

341 In these reasons, I will return to the human rights issues that are said to be relevant; however, the submissions of the ICL demonstrate that they will be of limited

[83] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) 6.

assistance in disposing of the primary issues, as the circumstances are such that it is not possible to protect all of Pipah's rights, since the protection of some can be achieved only at the expense of others. Furthermore, as my reasons will demonstrate, it is unhelpful to seek to call in aid an international convention of very general application in the construction of specific statutes, which require consideration in the context of very specific and unusual factual circumstances.

**What are the public policy issues?**

342 In *W and C* [2009] FCWA 61, which was one of the first surrogacy cases heard in the FCWA, Crisford J said at [1]:

> In recent years the use of artificial insemination procedures has risen dramatically, both here and overseas. They were once procedures of last resort for infertile heterosexual married couples. They have now become a mainstream solution for various reproductive challenges including absence of a heterosexual partner. New groups such as single women seeking to raise a child alone, same sex couples and gay men who have arranged for a mother to carry their child have used these procedures.

343 Since then, there has been a dramatic increase in the number of people finding the "solution for [their] various reproductive challenges" in commercial surrogacy arrangements utilising the services of poor women in a cluster of developing economies. There are major public policy issues associated with this development. Indeed, the circumstances surrounding the present case have apparently been influential in the banning of international commercial surrogacy in Thailand, which was until then one of the major destinations for those who wanted to buy a baby.

344 Before beginning my discussion of the factors the law requires me to take into account, it is important to identify what I perceive to be the policy considerations underpinning the State laws pertaining to the status of children born as a result of a surrogacy arrangement. In doing so, I am conscious that this is a controversial area of law that is presently under review. In seeking to identify the public policy considerations, I must deal with the law as it is, rather than how it might look after the review.

345 First and foremost, commercial surrogacy arrangements are forbidden by the law of every state of Australia. In some states, the law is expressly given extraterritorial effect, while in Western Australia the prohibition of commercial surrogacy has some extraterritorial effect because of the operation of the Criminal Code. In my view, there could not be a stronger expression of public policy than the imposition of criminal penalties (including terms of imprisonment) for participating in a commercial surrogacy arrangement.[84]

346 Secondly, the law of the Commonwealth not only respects the various state laws by picking them up in the federal Act, but s 21 of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) makes it an offence punishable by 15 years imprisonment to give or offer valuable consideration for the supply of a human egg.

[84] See *Dudley and Chedi* [2011] FamCA 502 at [37].

Many surrogacy arrangements depend upon the provision of eggs from a third party, and there is every reason to believe that money changes hands.[85]

347 Thirdly, although altruistic surrogacy is allowed in Australia, it is permitted only subject to conditions, and the rights of the birth mother (and her husband or partner) can only be extinguished by order of a court. Again, this demonstrates a strong expression of public policy against even altruistic surrogacy, save for those arrangements that meet the legal requirements.

348 It is unnecessary to seek to identify the factors that have driven these public policy considerations, but clearly there are many, some of which reach deep into our understanding of the best ways to protect and nurture children. The extent to which the various surrogacy laws insist upon counselling, assessment and informed consent also makes clear that the public policy considerations are driven by a desire to protect the vulnerable.

349 Against this, however, is the anomalous position under the citizenship laws. These laws, and the instructions issued by the Department of Immigration concerning their implementation, were helpfully gathered together in the submissions of the Human Rights Commission. In a nutshell, the way in which the laws are being interpreted and administered permits conferral of Australian citizenship by descent on a child born as a result of a surrogacy arrangement provided that there is a "biological link between the child and the commissioning parent" or where "an Australian citizen is a parent as that word is understood in ordinary usage". This is how Pipah and Gammy both become citizens.

350 This interpretation of the citizenship laws apparently relies upon a decision of the Full Court of the Federal Court in *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393. However, that case did not involve a person born as the result of an artificial conception procedure, let alone a surrogacy arrangement.[86] It is also important to recognise that there are different public policy considerations in the area of citizenship, and that the current open-door policy for children born as a result of commercial surrogacy arrangements arises in a different legislative context than the one with which I am concerned. Significantly, the Full Court of the Federal Court noted at [92] that "issues that may arise from surrogacy arrangements and artificial conception procedures are especially complex", and observed that it was unsurprising they had required separate treatment in the Citizenship Act, given they were "comparatively recent major developments in science and technology".

351 As the matter has not been the subject of argument, and as Pipah and Gammy have already become citizens, it is unnecessary for me to comment on the validity of

[85] It might therefore be said that the expression "egg donor" is a misnomer.

[86] I am unaware of whether a court has been asked to rule on a citizenship dispute in which the issue was whether a sperm donor in a surrogacy arrangement is a "parent". If such an issue arose, the court would presumably be asked to consider the different legislative context and public policy considerations, including the significance of s 8 of the Citizenship Act, which seems to be clearly aimed at achieving consistency with the federal Act (and hence State laws) on artificial commercial procedures and surrogacy. Consideration might also be needed of whether a child born of an artificial conception procedure is "made" rather than "begotten" given that, prior to *H v Minister for Immigration*, it had been held in the context of migration law that "as a matter of ordinary English … a parent is, 'a person who has begotten or born a child'": *Hunt v Minister for Immigration and Ethnic Affairs* (1993) 41 FCR 380 at 386.

the policy of the Commonwealth Government to rely entirely on biology in determining the entitlement to citizenship of children born as a result of surrogacy arrangements. I will therefore proceed on the basis that public policy considerations are not of such strength as to prevent children born overseas as a result of surrogacy arrangements becoming Australian citizens; nor are the public policy considerations of such strength as to have persuaded the Commonwealth to amend the citizenship laws to fully harmonise them with state laws, which would exclude men in the position of Mr Farnell from being treated as the fathers of such children. However, to the extent I am permitted to do so, I intend to proceed on the basis that there are otherwise strong public policy considerations against commercial surrogacy.

352 Whilst the public policy considerations are strong, I accept that the circumstances in which they can be applied to an individual child are nevertheless limited, since the interests of the child are the paramount consideration when making parenting orders.[87] In my view, public policy concerns could only be taken into account in making (or refusing to make) parenting orders if doing so would not impinge adversely on the child.

353 I therefore respectfully adopt the views expressed by Hedley J when discussing the law in the UK in *In re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 at [24] (emphasis added):

> I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. Bracewell J's decision in Re AW … is but a vivid illustration of the problem. If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing … In relation to adoption this has been substantially addressed by rules surrounding the bringing of the child into the country and by the provisions of the Adoption with a Foreign Element Regulations 2005. **The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.** It is, of course, not for the court to suggest how (or even whether) action should be taken, I merely feel constrained to point out the problem.

[87] *Re D and E* (2000) 26 Fam LR 310 at [21].

354 Although I agree with these views, it is important to note that not all the issues here involve the making of parenting orders. While the best interests of the child will always be relevant, they are only the "paramount consideration" when making parenting orders. In making orders that do not meet that description, I can place such weight on public policy considerations as seems appropriate.

**Do the Surrogacy Best Practice Principles apply?**

355 Counsel for the Human Rights Commission drew attention to the Best Practice Principles proposed by Ryan J in *Ellison & Karnchanit*, and submitted that these "could be adapted to suit the particular circumstances of this case".[88] The principles, of course, have no greater status other than that they have been proposed by an experienced judge with a background as a practitioner in the presentation of complex children's cases, and have since been endorsed by the Family Law Council.[89]

356 The Best Practice Principles, as the name suggests, might properly be seen as the counsel of perfection, since their implementation is dependent upon the extent of the resources available to the court and the parties. Thus, in the present matter, although I requested Legal Aid WA to provide an Independent Children's Lawyer at the first hearing in 2014, I was correctly informed that the case did not fall within the categories of case in which Legal Aid will normally provide an ICL. I was also informed that Legal Aid was experiencing significant funding challenges.

357 On my instruction, the Principal Registrar wrote to Legal Aid asking for a reconsideration of the decision, and drawing attention to the unique features of the case. In its response, Legal Aid acknowledged the "unusual issues", but again declined to grant aid for an ICL because of the funding challenges they were facing.

358 Fortunately, Legal Aid changed its mind in October 2014. However, their letter advising of this change noted that the potential cost was "significant". Accordingly, although an ICL was to be appointed, she was given only "a limited grant that will be reviewed regularly to ensure that Legal Aid WA is able to contain costs".

359 The appointment of an ICL is a central plank of the Best Practice Principles but, as the above chronology demonstrates, even in a quite remarkable case such as the present, the appointment of an ICL cannot be taken for granted.

360 The present case is perhaps unique in Australian surrogacy cases in that ultimately, there was not only a contest, but both parties had high quality representation. There was the added luxury of having an ICL, and the benefit of the intervention of DCP, the Human Rights Commission and the State Attorney General. Even with all of these advantages, there was by no means full compliance with the Best Practice Principles.

[88] The proceedings were completed prior to the amendments to the Family Law Rules 2004 (Cth) which came into effect on 1 January 2016, and which pick up many of the practice principles proposed by Ryan J.
[89] The Family Law Council advises the Commonwealth Attorney General, but its recommendations have no formal status.

## Part 8: Who are Pipah's parents?

361 As the State Act applies, I must determine what order would be in Pipah's best interests by reference to the provisions of s 66C of that Act. Many of the factors in s 66C apply only to a child's "parents", and it is therefore necessary to identify who are Pipah's parents for the purposes of the State Act.

362 The fact that Mr Farnell provided the sperm, and has acted as if he were Pipah's father, does not necessarily make him a "parent" within the meaning of the law (any more than the woman who provided the ova). As it is the law rather than genetics which imposes the obligations and responsibilities attached to parenthood, it is the law that must determine which individuals are to be regarded as the "parents" of a child.[90]

363 The State Act replicates the federal Act in stating that "parent", when used in relation to a child who has been adopted, "means an adoptive parent of the child". However, s 5 of the Interpretation Act provides further guidance as to the meaning of "parent" for the purposes of all written laws of Western Australia. It provides that:

> ***parent*** includes the following —
>
> (a) a person who is a parent within the meaning of the *Artificial Conception Act 1985*;
>
> (b) a person who is an adoptive parent under the *Adoption Act 1994*;
>
> (c) a person who is a parent in a relationship of parent and child that arises because of a parentage order under the *Surrogacy Act 2008*;

364 Further guidance as to the meaning of "parent" can be derived from the definition of "child" in s 5(1) of the State Act. This is a more comprehensive definition than the one in the federal Act, since it provides that "child" includes "a child whose parentage has been transferred under the *Surrogacy Act 2008*".

365 The Farnells and Mrs Chanbua accept that the effect of the Artificial Conception Act is that Mr and Mrs Chanbua are the "father" and "mother" respectively of Pipah.[91] Although the Artificial Conception Act does not expressly say so, it follows in my mind that Mr and Mrs Chanbua must therefore be her "parents" for the purposes of the State Act (noting that the Artificial Conception Act determines their status for the purpose of all written laws of the State).[92] Mr and Mrs Chanbua will remain Pipah's parents unless she is adopted or an order is made pursuant to the Surrogacy Act. Accordingly, references to "parents" in s 66C of the State Act must be taken to refer to Mr and Mrs Chanbua.

366 I recognise that the State Act and the Interpretation Act together do not provide an exhaustive definition of the word "parent". I also accept that in *Tobin v Tobin*

[90] *B v J* (1996) FLC 92-716 at 83,614.
[91] Counsel for Mrs Chanbua's concurrence with this proposition did not sit well with his denial that Mr Chanbua was in a de facto relationship with Mr Chanbua at the time of the procedure.
[92] Walmsley DCJ in *AA v Registrar of Births, Deaths and Marriages and BB* (2011) 13 DCLR (NSW) 51 made the same assumption at [36] in relation to equivalent legislation – i.e. "not the father" means "not a parent".

(1999) FLC 92-848, the Full Court of the Family Court of Australia held that the natural meaning of the word "parent" is "a person who has begotten or borne a child; a father or mother". Hence, it was found for the purposes of Division 7 of Part VII of the federal Act that the natural meaning of the word was "the biological mother or father of the child and not a person who stands *in loco parentis*".[93] However, even if it could properly be said that Mr Farnell has "begotten" Pipah and that he is her biological father, he cannot be her "parent" for the purposes of Western Australian law because the Artificial Conception Act says he is "conclusively presumed not to have caused the pregnancy" and that he is not the father of the child.

367 I recognise that this discussion has proceeded on an assumption that was made by all counsel, other than counsel for Mrs Chanbua, that the question of who are Pipah's "parents" is to be answered by reference to Australian law rather than Thai law.[94] Counsel for Mrs Chanbua did not accept this proposition and submitted that:

> 230. While it may seem satisfying to Australian jurists to look at a situation solely through the prism of Australian law, the simple fact is that Pipah and her brother were born in Thailand and they acquire their legal identities, their domicile, citizenship rights and guardianship from the legal construct in the place of their birth.
>
> 231. It may be that Australia considers that its laws have extra-territorial jurisdiction and effect, particularly in so far as they concern activities of Australian citizens, but from the perspective of a Thai citizen, they may be simply irrelevant.

368 I see the merit in the argument that it should not necessarily be assumed that the law of the forum is the applicable law in determining the status of those involved in surrogacy matters.[95] However, the effect of the Artificial Conception Act is that I am required to determine this issue by reference only to the law of Western Australia.[96]

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[93] The Full Court accepted that the class of people who could be regarded as parents had been extended by statute by creating a relationship of parent and child in the cases of adopted children and children born as a result of artificial conception procedures. As the Full Court observed at [39] this was achieved "not by use of the term 'parent' but by deeming the child to be 'her child', 'his child' or 'their child' for the purposes of the Act in certain circumstances". The Full Court did not consider the possibility that the woman who had "borne" the child might not be the "biological mother".

[94] Counsel for the Human Rights Commission advised that the Commission did not seek to make submissions about the application of the law of Thailand to these proceedings, or how principles relating to conflicts of law should be applied if they are relevant.

[95] See Mary Keyes & Richard Chisholm, 'Commercial surrogacy – Some troubling family law issues' (2013) 27 *Australian Journal of Family Law* 105.

[96] I recognise that my interpretation would have implications for ex-nuptial children who are born in places where surrogacy arrangements are not illegal, but then come to live in Western Australia. However, I do not consider that this can lead to an interpretation of the State Act which confers the status of "parent" on a person who is not, in fact, a "parent" under the laws of Western Australia. Persons denied the status of "parent" can still apply for relief under the State Act if they are "concerned with the care, welfare or development of the child". See also *Carlton & Bissett* (2013) 49 Fam LR 503.

**Rejection of some submissions of the Human Rights Commission**

369 In arriving at my conclusion about who are Pipah's "parents", I have rejected five submissions advanced by the Human Rights Commission.

***(i) The decision in Blake***

370 The first of the submissions relies upon *Blake and Anor* [2013] FCWA 1, in which Crisford J gave an expanded meaning to the word "parent" so as to incorporate the sperm donor in a commercial surrogacy arrangement. In that case, the sperm donor's male de facto partner had applied to the FCWA to adopt the resulting twins.[97] In order for his application to succeed, her Honour found (correctly in my view) that the sperm donor needed to come within the definition of "birth parent" in s 4(1) of the Adoption Act. At the time, this definition was as follows:

> ***birth parent*** means, in relation to a child or adoptee —
>
> (a) the mother of the child or adoptee; and
>
> (b) the father or parent of the child or adoptee under section 6A of the *Artificial Conception Act 1985*.

371 As paragraph (a) clearly did not apply, her Honour had to determine whether the sperm donor answered the description "the father or parent of the child or adoptee under section 6A of the *Artificial Conception Act 1985*".

372 Crisford J recognised that the reference in the definition to s 6A of the Artificial Conception Act had no application, since that deals only with a female partner of a woman who gives birth to a child.[98] Her Honour also found that by operation of the Artificial Conception Act, the sperm donor was not the "father". This in turn led her Honour to conclude that the sperm donor did not come within the categories of "parent" as defined by the Interpretation Act, but her Honour went on to say:

> However, as already noted, that definition is not exhaustive. In the Court's view, there is scope to enlarge the definition and determine what other people might be considered a 'parent' or a 'father' within its ordinary meaning. Unless the Court so determines, a person in [the sperm donor's] position would not be considered a birth parent for the purpose of the [Adoption] Act.

373 Her Honour then turned to discuss the presumptions of parentage in the State Act, which she said "apply when considering who is a parent or birth parent of a child". Prima facie, her Honour was right to do so because of the effect of s 4A of the Adoption Act, which provides that the presumptions in the State Act apply when considering who is a "parent of a person who is a prospective adoptee" or who is "a birth parent of a person who is an adoptee". However, with respect to her Honour, I consider that the presumptions cannot have any application in the case of a child born as the result of an artificial fertilisation procedure. This is because the

[97] FCWA's unique status as a State Court permits it to deal with all adoption applications in Western Australia.
[98] The Artificial Conception Act contains no similar provision for same-sex male partners.

presumptions are rebuttable, and are trumped by the rules of paternity in the Artificial Conception Act, which are not rebuttable, and which apply to all "written laws" of the State, including the State Act.

374 As the Artificial Conception Act provides that a sperm donor, is "conclusively presumed not to have caused the pregnancy" and is expressly declared by that Act not to be the father of the child, the male de facto partner of the applicant in *Blake* could not, at law, be the father of the twins. I therefore respectfully consider that it was not open to her Honour to find that there was "scope to enlarge the definition and determine what other people might be considered … a 'father' within its ordinary meaning".

375 Furthermore, if my earlier discussion of the maxims of construction is correct, then the only persons who can be a "parent" of a child born as a result of an artificial conception procedure or surrogacy arrangement are those who are identified as parents by reference to the definition of "parent" in the Interpretation Act.

376 There is another reason why I respectfully consider that Crisford J was incorrect in concluding that "parent" should be given an extended meaning for the purposes of the definition of "birth parents". As a matter of grammar, the phrase "the … parent of the child or adoptee under section 6A of the *Artificial Conception Act 1985*" expressly confined the operation of the word "parent" to a person answering that description within the meaning of s 6A of the Artificial Conception Act (which is concerned only with the female same-sex partner of the birth mother).

377 Out of fairness, it should be recognised that Crisford J did not have the benefit of submissions from a contradictor. She also adopted a pragmatic approach, given that DCP had submitted that it was not in the best interests of the twins for their adoption to be further delayed.[99] It must also be recorded that the syntax of the definition of "birth parent" in the Adoption Act at the time was not ideal. This has been recognised by the fact that the definition has since been amended to read, "the father, or a parent under the *Artificial Conception Act 1985* section 6A, of the child or adoptee".[100]

378 Crisford J's ultimate reasons for concluding that the sperm donor was a "parent" can be seen in the following paragraphs of her judgment:

> 49 There are a number of pathways that can be pursued in order to establish whether or not [the sperm donor] is a parent or father. Given the applicant seeks orders under the Act I will consider that avenue first.
>
> 50 As previously canvassed, the Act does not specifically define a father or a parent of the child to be adopted. The Interpretation Act does provide a definition, albeit not an exhaustive definition.

[99] Her Honour's approach has been described as "strategic manipulation around legislation in order to achieve the obvious reality": Philippa Trowse. 'Surrogacy: competing interests or a tangled web?' (2013) 33(3) *The Queensland Lawyer* 199.

[100] The insertion of the commas and the rearrangement of the words remove room for any suggestion that anyone other than the same-sex partner of the birth mother is a "parent" for the purposes of the definition.

> The examples that are given do not encompass [the sperm donor]. In circumstances where provisions enlarge rather than restrict here it cannot be said that the provisions operate to exclude a person as a parent if his or her circumstances do not coincide with those identified in the section.
>
> 51 To suggest that [the sperm donor] is anything other than a parent or a father within its ordinary meaning is to turn a blind eye to the reality of "family" in present day society. It is also turning a blind eye to the reality of the situation presently before the Court. The objective facts surrounding the birth and the manner in which various agencies have treated those circumstances coupled with the fact of the genetic father acting in that role since the birth of the twins points to the use of an expanded definition of parent.
>
> 52 To adopt any other interpretation would serve no purpose in addressing any public policy issues if, indeed, any exist. It would serve no purpose in enhancing the future welfare and best interests of these children.
>
> 53 As the Australian Human Rights Commission submitted in Ellison (supra) "the Court really needs to take children as it finds them". There is no valid reason to disadvantage children of surrogacy arrangements.

379 While I recognise that *Blake* involved the interpretation of a different Act, Crisford J's process of reasoning would preclude me from arriving at what I consider to be the correct finding that Mr Farnell is neither a "father" nor a "parent" of Pipah within the meaning of the law. I therefore decline to follow her Honour's reasoning and would instead adopt her earlier approach in *W and C*.[101]

380 In *W and C*, Crisford J was dealing with a child born as a result of an artificial fertilisation procedure where it was proposed that the child would remain with the birth mother, but would have ongoing contact with the sperm donor and his male partner. Her Honour determined parentage by reference to the Artificial Conception Act and the Interpretation Act, and arrived at the conclusion that the sperm donor was not a "parent" of the child.

381 Counsel for the Human Rights Commission attempted to reconcile *Blake* and *W and C*, not only on the basis that the facts were different, but also because of the different intentions of the sperm donors. It was said that in *Blake*, the sperm donor intended to be the "social father", whereas in *W and C* the intention was different. In my view, any interpretation which makes the paternity of a child dependent upon the intention of the donor of the sperm would be a recipe for disaster. As *W and C* itself demonstrates, arrangements involving artificial fertilisation procedures come in a variety of forms. Some sperm donors intend to have no involvement in the life of the child; others intend to live with the child full-time; and others intend to have an

[101] See also the approach taken by Crispin J in *Re Births, Deaths and Marriages Registration Act 1997* (2000) FLC 93-021.

ongoing relationship with the child, falling short of living with the child full-time. If the intention of the sperm donor was to be determinative, the question would arise, at what point on the spectrum does the father's intended involvement in the life of the child change his status from sperm donor to father?

382 If intention was to be determinative of paternity, what would happen where the intentions of the sperm donor and the birth mother differ? For example, in *AA v Registrar of Births, Deaths & Marriages and BB* (2011) 13 DCLR (NSW) 51, a lesbian couple advertised in the *Sydney Star Observer* for a sperm donor who would become an "uncle" figure to the child they ultimately had. However, the male who donated his genetic material after the women responded to his advertisement in *Lesbians on the Loose* offering to be a "father", wanted his own mother to know he had a child.[102]

383 What would be the position in the present case if Mr Farnell really had decided he did not want Gammy because he had Down syndrome? Would he then have become the father of Pipah but not of Gammy? And what would be the position if a birth mother refused to hand over a child in places where altruistic surrogacy arrangements are not enforceable – does the sperm donor still become the "parent" given his intention to be the "social father"?

384 In my view, the law in this area is already sufficiently fraught for it to be highly undesirable to introduce the contestable element of "intention". One need only look at the time and money expended on this litigation to see how difficult it can be to establish intention.

### *(ii) Conformity with other laws*

385 The second submission of the Human Rights Commission that I do not accept stated that:

> 144. … To ensure consistency across Commonwealth legislation it is appropriate to adopt a meaning of parent that is consistent, to ensure greater protection of Pipah's rights to know who her parents are and to have her status as a child of [Mr Farnell] appropriately reflected.
>
> 145. This is particularly the case where there has been a finding by [the] Commonwealth that [Mr Farnell] is a parent and the vesting, through Citizenship, of a significant set of rights and obligations on Pipah … under Australian law…

386 It was submitted that the desired consistency would be achieved by adopting the approach that was applied in determining that Mr Farnell was a parent of Pipah for the purposes of the Citizenship Act. This submission should be rejected for two reasons.

387 First, the question of whether Mr Farnell was Pipah's "parent" for the purposes of federal law was relevant only to the preliminary question of whether she is a "child

[102] For another example of strongly contested evidence concerning the intentions of same-sex partners, see *Wilson & Roberts (No 2)* [2010] FamCA 734.

of a marriage". As I have found Pipah is not a "child of a marriage", the answer to the question of whether Mr Farnell is Pipah's "parent" is relevant only in working out how various provisions of the State Act are to be applied. In those circumstances, I consider that consistency should be achieved by interpreting the various laws of Western Australia in a harmonious way, rather than attempting to achieve consistency with a law of the Commonwealth.

388 Secondly, the Full Court of the Federal Court in *H v Minister for Immigration* at [39] and [40] expressly rejected the proposition that the provisions of the federal Act should inform the interpretation of the Citizenship Act, and held that the two statutes "do not in truth deal with the same subject matter". If there is no need for laws of the Commonwealth to be interpreted consistently, there is even less need for state law on the same subject to be interpreted consistently with federal law.

389 Thirdly, if the Citizenship Act has been correctly applied in permitting the Farnells to obtain citizenship for Pipah, then I consider it is that Act which sits completely outside what otherwise seems to be a coherent national legal framework aimed at discouraging Australian citizens from participating in commercial surrogacy arrangements overseas.

### *(iii) The application of the Artificial Conception Act*

390 Counsel for the Human Rights Commission submitted that the Artificial Conception Act was ambiguous, and that it was necessary to refer to extrinsic materials to discern its true meaning. Counsel argued that reference to those materials would establish that the Act was never intended to apply to children born as a result of a surrogacy arrangement.

391 Counsel's elaborate argument in support of this proposition:

- traced the history of the Artificial Conception Act;
- referred to the second reading speech of the Attorney General and the shadow Attorney General when the Act was first introduced;
- referred to a speech in the NSW Legislative Council on similar legislation;
- referred to the way in which the Victorian legislation had been amended;
- invoked s 18 of the Interpretation Act, which mandates the construction of an ambiguous provision in the way that would promote the purpose or object underlying the law in which the provision appears; and
- sought to rely on the presumption that Parliament would not have intended to violate Australia's international obligations.

392 Surprisingly, given all the material to which I was taken, counsel did not refer to the second reading speech for the Surrogacy Bill 2008. This speech puts beyond any doubt that Parliament intended for both the Artificial Conception Act and the Surrogacy Act to apply to children born as a result of a surrogacy arrangement. The Minister's understanding of the interaction between the two pieces of legislation can be seen from the following extract from his speech (emphasis added):

> Currently, there is no legislation in Western Australia dealing directly with surrogacy. Other legislation such as the Human Reproductive Technology Act 1991, the Artificial Conception Act 1985 and the Adoption Act 1994 indirectly impact on surrogacy arrangements. The Human Reproductive Technology Act regulates access to in-vitro fertilisation procedures and currently restricts access to IVF in connection with surrogacy. The Artificial Conception Act provides for the legal parentage of all children born as a result of assisted reproductive technology and means that the birth parents of a child rather than the parents who intend to raise the child, are legally recognised as the parents. …
>
> …
>
> Transfer of legal parentage: The bill does not deal with the initial birth registration of a child. **This means that in most cases the child should be registered in accordance with the Artificial Conception Act, with the birth mother recorded as the mother of the child and her consenting partner as a legal parent of the child**. …[103]

393 Whatever may have been the intention of the Parliament in 1984 (when surrogacy arrangements were very rare), the terms of the Artificial Conception Act were always wide enough to encompass children born in a surrogacy arrangement. The Minister's second reading speech makes clear that by 2008, there was no doubt that the Act applied to such children, although its effect could be varied by an order made under the Surrogacy Act.

394 For completeness, I should note that counsel for the Human Rights Commission also submitted that the proposition that the Artificial Conception Act was not intended to cover surrogacy arrangements was supported by the fact that it was not amended when the Surrogacy Act was introduced. It is true that the Artificial Conception Act was not directly amended, but the Surrogacy Act did amend the Human Reproductive Technology Act in a way that removes any doubt that the expression "artificial fertilisation procedure" in the Artificial Conception Act is intended to encompass such procedures when used in a surrogacy arrangement.

395 Section 66 of the Surrogacy Act inserted s 18(1)(ca) into the Human Reproductive Technology Act, which is in the following terms:

> (1) The Code [of Practice] may make provision, and may impose conditions or prohibitions, in relation to the following matters —
>
> …
>
> (ca) an artificial fertilisation procedure for implementing a surrogacy arrangement as defined in the *Surrogacy Act 2008* section 3; and

396 The term "artificial fertilisation procedure" in the Artificial Conception Act takes its meaning from the Human Reproductive Technology Act. Given this explicit

[103] Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, 737 (Kim Hames).

acceptance by the State Parliament that "artificial fertilisation procedures" include those undertaken in a surrogacy arrangement, if Parliament had intended to exclude surrogacy arrangements from the ambit of the Artificial Conception Act, then it would also have amended the definition of "artificial fertilisation procedure" in the Artificial Conception Act. In other words, Parliament's failure to amend the Artificial Conception Act at the time of the passage of the Surrogacy Act **supports** the proposition that the Artificial Conception Act should be treated as extending to children born as a result of a surrogacy arrangement.

### *(iv) Relevance of the parentage presumptions in the State Act*

397 The Human Rights Commission also sought to rely upon the following presumption of parentage contained in the State Act:

> **192. Presumption of paternity arising from acknowledgments — FLA s. 69T**
>
> If —
>
> (a) under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and
>
> (b) the instrument has not been annulled or otherwise set aside,
>
> the man is presumed to be the father of the child.

398 The "instrument" relied upon for the purposes of this argument was the document that Mr Farnell executed in support of the application for citizenship in which he declared he was the "responsible parent" of Pipah.

399 For reasons earlier explained, the presumptions in the State Act have no effect here, since they must be taken to be rebutted by the operation of the Artificial Conception Act.

### *(v) Application of s 92 of the State Act*

400 The Human Rights Commission submitted that the requirements of s 92 of the State Act would be triggered if I was to hold that Mr Farnell was not a "parent" of Pipah. Section 92 lays down special conditions for making a parenting order in favour of a "non-parent". This submission is misconceived because s 92 only applies to consent orders.

401 In concluding my discussion, it is important to recognise that children born in a surrogacy arrangement, who are not the subject of an order under the Surrogacy Act, are not left without a "parent". The birth mother continues to be the legal mother of the child, in the same way as a woman who gives up her baby for adoption remains the parent until a court makes an order. There are solid policy reasons why the status of the mother and child should not be varied until such time as those who wish to change their status have complied with the requirements of the law. Any other approach

would involve the validation of unregulated arrangements, which would be contrary to the policy considerations earlier discussed.

## Part 9: Pipah's best interests

402 I turn now to consider what orders would promote Pipah's best interests.

### Navigating the legislative maze to ascertain a child's best interests

403 I will first attempt to describe the pathway that the State Act requires a court to follow in determining the result that will be in Pipah's best interests.

404 The pivotal provision is s 66A, which provides that "in deciding whether to make a particular parenting order … a court must regard the best interests of the child as the paramount consideration". It must be appreciated that not all of the orders sought in this dispute are "parenting orders"; however, the best interests of the child will nevertheless be an important matter in resolving all of the issues before me.[104]

405 In deciding what orders to make, I must be guided by the objects of the Act and the principles underlying them, but only to the extent that they "provide context, indicate the legislative purpose … and operate as an aid to construction of the Act".[105]

406 I have earlier referred to the object in s 66(4) dealing with the Convention. Subsection 66(1) otherwise provides that:

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

407 Subsection 66(2), which specifies the principles underlying the objects of the Act, is set out in full in Appendix 1.

[104] Section 84(2) contains a list of matters that are described as "parenting orders".
[105] *Maldera & Orbel* (2014) FLC 93-602 at [74].

408 Subsection 70A(1) requires me to apply a presumption that it is in a child's best interests for the child's parents to have equal shared parental responsibility, unless there are reasonable grounds to believe that a parent, or a person who lives with them, has engaged in child abuse or family violence.

409 The presumption may be rebutted by evidence that it would not be in the child's best interests for the parents to have equal shared parental responsibility. If an order is made for equal shared parental responsibility, s 89AC(3) requires the persons sharing such responsibility to consult with each other and make a genuine effort to come to a joint decision about major long-term issues (as defined by s 7A).

410 The allocation of parental responsibility does not govern the time a child will spend with each party. However, if an order is made for a child's parents to have equal shared parental responsibility, then the Act requires me to consider whether spending equal time or, failing that, "substantial and significant time", with each parent would be in the child's best interests. If either alternative is in the child's best interests, then I must consider making such an order, provided I have found the arrangement to be "reasonably practicable".

411 In determining what is in Pipah's best interests, I must also consider the matters in s 66C of the Act. These are divided into "primary considerations" and "additional considerations", but the law is now well settled that the "primary considerations" do not necessarily outweigh any combination of the "additional considerations".[106]

412 As earlier explained, all sections of the State Act which refer to parents must be taken to refer to Mr and Mrs Chanbua. Accordingly, the first of the "primary considerations" set out in s 66C(2), which concerns "the benefit to the child of having a meaningful relationship with both of the child's parents", has application only to the Chanbuas. This does not mean that I must ignore any benefit to Pipah of having a "meaningful relationship" with the Farnells. On the contrary, that issue is vitally important.

413 The proper approach in a dispute between parents and non-parents was laid down by the Full Court of the Family Court of Australia in *Donnell & Dovey* (2010) FLC 93-428, in dealing with the equivalent provision to s 66C(2)(a):

> 101. In our view, there can be no doubt that s 60CC(2)(a) has no application to a person who is not a "parent" … However, that fact does not give rise to any difficulty in ensuring all relevant matters are taken into account. In a particular case, the maintenance of a meaningful relationship with a non-parent may be equally important or more important than the maintenance (or establishment) of such a relationship with a parent. As with the additional considerations, it is not necessary to classify a non-parent as a "parent" to ensure that clearly relevant matters are given appropriate weight.

[106] I accept that s 66C(3A) requires me to give greater weight to the "primary consideration" dealing with child safety than the other "primary consideration".

414 In considering the role played by s 66C, it is also important to note what the Full Court said in *Valentine & Lacerra* (2013) FLC 93-539 regarding the equivalent federal provision (original emphasis):

> 53. It is also important to keep in mind that the paragraphs in s 60CC(2)-(3) of the Act are in reality only a means to an end, namely to ascertain where the best interests of the child or children might lie. This was the thrust of the joint judgment of May and Thackray JJ in *Mulvany & Lane* (2009) FLC 93-404 at paragraphs 76 and 77 where their Honours said this:
>
> > 76. It is important to recognise that the miscellany of "considerations" contained in ss 60CC(2) and (3) is no more than a means to an end. Self evidently, they are only matters to be **considered**. Of course, we accept they are of great importance, being the factors identified by Parliament as those the Court must take into account (when they are relevant). However, they must be applied in a manner consistent with the overarching imperative of securing the outcome most likely to promote the child's best interests.
> >
> > 77. It needs also to be remembered that the importance of each s 60CC factor will vary from case to case. Whilst the list of considerations is lengthy, no list could ever encompass all the matters that experience demonstrates could be of relevance. This is no doubt why Parliament has included the catchall consideration in s 60CC(3)(m), namely "any other fact or circumstance that the court thinks is relevant". By this device, judicial officers may consider any matter which (within the reasonable range of discretion) could touch on the child's best interests.

415 It is important to stress that the law does not prefer parents to non-parents in parenting disputes. As the Full Court said in *Re C and D* (1998) FLC 92-815 at 85,243:

> This court made it clear in *Rice and Miller* (1993) FLC 92-415 and more recently in *Re Evelyn* (1998) FLC 92-807 that the biological parent does not stand in any preferred position and that fact does not in any way impinge upon the principle that the best interests of the child are paramount.

416 This position was reaffirmed after major amendments were made in 2006 to both the State and federal Acts. This was explained by the Full Court in *Aldridge & Keaton* (2009) FLC 93-421, which was another case involving a child born as a result of artificial conception where only one party was regarded by the law as a "parent":

> 75. While there can be no doubt that the amending Act has placed greater emphasis on the role of both parents in the upbringing of

their children, as we are presently advised, all applications for parenting orders remain to be determined with the particular child's best interests as the paramount but not sole determinant. Our reasons for upholding this view include the following matters:

- the unaltered provision dealing with best interests (s 60CA) and the positioning of the section in the Act;
- the recognition in s 65D(1) that ultimately a court should make such parenting order as it thinks proper; and
- that no provision was included in the Act suggesting greater or lesser weight should be given to any particular applicant.

76. Experience and common sense demonstrates that the vast majority of applications for parenting orders will be brought by one of a child's biological parents, with the other parent the respondent to the application. But there are also situations where one or both parents are deceased or otherwise unavailable or unsuitable to fulfil the duties of parenthood. Often in the latter circumstances a relative of the child will appropriately seek parenting orders.

77. Further, just as in 1976 Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 recognised changing societal "norms" in rejecting the notion of a presumption in favour, or any preferred role, of a mother to have custody of a child, particularly of a female child, the Act in its present form enables a court dealing with a parenting application the flexibility to recognise and accommodate "new" forms of family, including families with same-sex parents, when making orders which are in the best interests of a child who is part of such a family.

78. Children who have been brought up in these new forms of family may be children who fall within s 60H. There will also be children who, while not conceived with the consent of the co-parent (or as described in the legislation the "other intended parent"), have effectively been treated as a child of the relationship of a same-sex couple. Such children may be the biological child of one parent born, before the same-sex relationship commenced, but whose substantial parenting experience has been from each of the same-sex "parents". More commonly, they may have been conceived as the result of a private agreement with a known donor and without formal consent documentation. These children's best interests are the paramount consideration to be taken into account, not the circumstances of their conception or the sex of their parents.

417 Finally, I repeat what my colleagues and I said on the Full Court in *Yamada & Cain* [2013] FamCAFC 64 (original emphasis):

27. The broad inquiry as to best interests contemplated by [the Act] recognises that it is not parent*hood* which is crucial to the best

> interests of [the child], but parent*ing* – and the quality of that parenting and the circumstances in which it is given or offered by those who contend for parenting orders.

418 I turn now to the relevant considerations in s 66C. Although many of these refer only to "parents", I intend to gather my findings under the most convenient heading.

**The additional considerations**

419 The additional considerations will be discussed first, as they will provide context for my discussion of the primary considerations.

**(a) any views expressed by the child…**

420 Pipah is too young to express any views.

**(b) the nature of the relationship of the child with —**

**(i) each of the child's parents; and**

**(ii) other persons (including any grandparent or other relative of the child);**

421 Although Parliament has not deemed this factor to be a "primary consideration", the nature of a child's relationships with her parents and others is surely a matter of utmost importance. The particular significance of relationships formed in early childhood has been recognised by the Committee on the Rights of the Child.

422 The Committee has said that early childhood is a critical period for realising children's rights and, in particular, is a period during which:

> (a) …
>
> (b) Young children form strong emotional attachments to their parents or other caregivers, from whom they seek and require nurturance, care, guidance and protection, in ways that are respectful of their individuality and growing capacities;
>
> (c) Young children establish their own important relationships with children of the same age, as well as with younger and older children. Through these relationships they learn to negotiate and coordinate shared activities, resolve conflicts, keep agreements and accept responsibility for others;
>
> (d) Young children actively make sense of the physical, social and cultural dimensions of the world they inhabit, learning

> progressively from their activities and their interactions with others, children as well as adults; … [107]

423 Pipah currently has no relationship with Mrs Chanbua or with any of her relatives or friends. They are total strangers to her. On the other hand, Pipah has a very close relationship with the Farnells. [Ms F], the Acting Assistant Director of DCP's South West District office observed:

> a high level of care being provided by the couple to the child and a strong mother/child bond between [Mrs Farnell] and baby Pipah. [Mrs Farnell] presents as a loving, nurturing primary carer to Pipah.

424 Although Mr Farnell accepted that Pipah is more closely attached to his wife than to him, the Single Expert nevertheless commented favourably on the interactions between Mr Farnell and Pipah, and concluded that both Mr and Mrs Farnell had a "secure attachment" with Pipah. The Single Expert felt it was likely that Pipah would "seek her mother out as a first point of contact for nurture and care, but it was readily apparent she was trusting of both parents to provide her with boundaries and signals of safety".

425 Pipah also has close relationships with the extended Farnell family and their friends. Mr Farnell's mother visits on a daily basis and often stays overnight. Jane Farnell lived with Pipah from the middle of 2014 until trial. The Single Expert saw video footage of Jane and Pipah together at a swimming lesson and noted that "a strong relationship between her and Pipah was readily apparent and very positive".

426 Jane Farnell's son, Jackson, has been brought up with Pipah. I accept Jane's evidence that:

> [Pipah and Jackson] have a very loving relationship, like brother and sister. Jackson and I live in one part of the house, which is separated by a glass door – a clear glass door. And if [Pipah] knows that I'm awake, she runs up to the door and knocks on it. And when ... I go to put Jackson down for a sleep, we stand at the door and knock on it and wave goodbye to her and she comes up and puts her little hand on there and blows kisses and she tries to read to him. She gives him toys. At the moment she's taking toys away from him, leading up to terrible twos, you know, but it's beautiful. It's like a normal brother-sister relationship.

427 I also accept Jane's evidence that once she moves out of the Farnells' home, she plans to stay there overnight with Jackson once a week, so the family will have more time together "instead of an hour here and an hour there".

428 Mr Farnell's adult sons are regular but not frequent visitors to the home. I am satisfied they too have a good relationship with Pipah.

429 Pipah's relationship (or more correctly, possible future relationship) with Gammy is such an important issue that I will discuss it under a separate heading later.

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[107] Committee on the Rights of the Child, *General Comment No. 7 (2005) Implementing child rights in early childhood*, 40th sess, UN Doc CRC/C/GC/7 (20 September 2006).

**(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity —**

**(i) to participate in making decisions about major long-term issues in relation to the child; and**

**(ii) to spend time with the child; and**

**(iii) to communicate with the child;**

430 The Farnells have made all decisions about major long-term issues concerning Pipah. Mrs Chanbua has had no opportunity to make decisions about Pipah, spend time with her, or communicate with her since she left Thailand over two years ago.

**(da) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;**

431 Pipah has been entirely maintained by the Farnells. Mrs Chanbua has made no financial contribution, but no contribution has been expected of her.

**(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from —**

**(i) either of his or her parents; or**

**(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;**

432 The Single Expert was asked to expand in his oral evidence on his concerns about the effect on Pipah of being removed from the Farnells. Although his answer was lengthy, it deals with a matter of great importance:

> So I was looking at this, very much, through a window about development. So the court is very familiar with attachment principles, but if I could extrapolate a little bit beyond the normal sort of concept of attachment. If you look at what we are when we're looking at a secure relationship with an attachment figure, which is clearly in evidence here, there is a number of things that are occurring. The first thing that occurs … by 12 months of age, any neurologically typical child will have what's called perspective taking in theory of mind. They will have a sense of their culture. They will have a sense of their family system. They will also be emulating. So they will be predicting their parents . … So there's neurological correlates, if you want to go down that line, but they're just correlates … Now, those things give a sense of order, but also they start to do cognitive development and emotional development. So a person learns how to regulate their body, how to regulate their relationships, and how to understand themselves, by 12 months of age. Now, this is not a little bit of finding. There's an enormous amount of research supporting this. Now, if I was … to disrupt that, then you are going to get neurological effects,

because you will get a hypervigilant response, in psychological terms. In neurological terms, you're going to get increase in all sorts of stress responses … which will come up in the neuroendocrine system. Now, if you look at Pipah, she is in a very secure relationship by any attachment measure you want to use. She has got a clear understanding of language, because she's responding to basic one-step instructions and she's following her parents ... And she's showing safety awareness and she's emulating them. So all the normal developmental processes are well and truly in place. If I was to swap her out of that family system, into another one that is culturally different, now – and I can show you literature that shows that cultural differences mean parental differences. It's not, like, a little thing. With a different language – who will have different modelling responses, different consequential responses, which I see in my clinic with every different culture that comes in. You are going to get significant stress in that child, because she's going to have to dramatically learn a different language, different set of norms, different set of values, with a mother that's also trying to anticipate someone she has only just met. Now, that is an enormously stressful thing to do to a child at the pivotal stage of development. She doesn't have the regulatory skills to step back and look at that, yet. She's totally dependent on that information (indistinct) so you can argue it neurologically. You will find long-term neurological change, in some studies, with cortisol. You will find some long-term change in, like I said, the neuroendocrine system, along the hypothalamus. You will find all of those things. But the major thing, what I'm arguing for, is the developmental process will be significantly disrupted, which will have an emotional change, which leads to, mainly, what we call reactive attachment disorder as the biggest risk. And if you ever deal with reactive attachment disorder, which I do, it is an extremely difficult condition with long-term mental health consequences. So the logic here was not about comparing the homes. It wasn't even about neurological – it was about developmental processes that were clearly intact.

…

If you hunted down the literature upon disrupted attachment, you will find a lot of research on foster parents. And DCP, notoriously, are looking at that research and trying to do it better. I'm involved with a lot of those cases and DCPs plans. We're still struggling to successfully get foster families, that are within our culture, to adequately deal with a child having a significant anxiety response, which is – if you want to use the attachment literature, it's called "attunement". There's many other terms you could use. It is, actually, a very sophisticated thing to do, because a lot of the time your strategies are counter-intuitive. What you have to do to help these children is not respond normally. Because, often, you will react to what is often very aversive behaviour by them, and you have to not react as you normally would. You definitely shouldn't go to coercive or punitive means. So that's the first thing, and that's within culture. If you look at families – and I have a number of families that I've seen over the

> last, say, 18 months, where they have adopted children from overseas. And that just – that just amplifies the challenge dramatically. Now, there is another factor in that. A lot of these kids have come from foster homes or other not effective family environments. So they're inheriting, sometimes, some damaging history. But some of these children are being adopted at one month of age and it is still enough, because they spend a month in a totally different environment. And you could argue along a neurological line there, because there's change in the environment, which has some sort of change in neurodevelopment. All of those things dramatically increase the anxiety response. So we're having even a harder time with those cross-cultural children, in helping the foster parents have adequate attunement. It is a very difficult thing to teach. It is a very difficult thing to teach even within culture. …

433 I accept the Single Expert's opinion that the risk of sexual abuse in the home of the Farnells has to be weighed against the potentially devastating psychological consequences for Pipah of being removed from a secure and loving environment and placed in a home where everyone would initially be a stranger, and where no one speaks the languages that Pipah is beginning to learn.

> **(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;**

434 There would be major difficulties associated with Pipah spending time with Mrs Chanbua if Pipah remains in Bunbury. There would be similar difficulties if she was living in Thailand. Mrs Chanbua does not have the means to travel to Australia to visit Pipah. While the Farnells are better placed, their finances have been ruined by the cost of the surrogacy arrangements and these proceedings. They would be unlikely to be able to afford more than infrequent visits to Thailand if Pipah was living there.[108] If Pipah remains in Australia, the Farnells would be concerned about taking her to Thailand for fear that she might be taken off them.

435 Even if funds could be found for the Farnells to travel to Thailand, many difficulties would remain. For example, the Farnells speak no Thai and Mrs Chanbua speaks no English. Arrangements for visits would therefore need to be made with the assistance of intermediaries and interpreters. There is no suggestion that Mrs Chanbua proposes that Pipah be taught English if she is relocated to Thailand, and Pipah would quickly lose what comprehension of English she currently has. The Farnells would therefore only be able to speak with Pipah through an interpreter.

[108] Although Mrs Farnell's Financial Statement indicates that she has some $100,000 equity in a home she acquired with her own funds and with the help of her family, the Farnells owe Mr Farnell's mother in excess of $300,000 for legal costs. This is on top of the $100,000 that Mr Farnell estimated the surrogacy arrangement itself had cost.

436 There would also be difficulty with enforcing any order for the Farnells to see Pipah, since Thailand is not a party to the Hague Child Protection Convention.[109] Although Mrs Chanbua said she would facilitate visits, there is no basis upon which I can be sure she is likely to do so, especially as I sense that her husband would not be keen on there being any ongoing contact.[110] Indeed, Mr Chanbua gave evidence that if Pipah came to live in Thailand, he would try to get her to forget about Australia.[111]

437 I find that if Pipah went back to Thailand, it is likely there would never be any successful visits by the Farnells. If I am wrong, I would nevertheless expect that the visits would peter out over time, or at the very best be quite infrequent.

438 Counsel for Mrs Chanbua submitted in closing:

> the reality of the situation taking into account law, economics, geography and personalities is that if Pipah lives with [the Farnells] then she is not likely to have a relationship with [Mr and Mrs Chanbua] (or her twin brother) until she is able to determine that for herself.

439 I agree with counsel's assessment, but I find that the same would apply if Pipah were to live with Mrs Chanbua in Thailand.

**(f) the capacity of —**

**(i) each of the child's parents; and**

**(ii) any other person (including any grandparent or other relative of the child),**

**to provide for the needs of the child, including emotional and intellectual needs;**

440 The Farnells are capable of providing for all of Pipah's needs. They appear to have done everything they can to give her a good life and to integrate her into the community. After observing them with Pipah, the Single Expert found both Mr and Mrs Farnell to be skilled and comfortable parents. The Single Expert said, "given the level of analysis and media pressure placed on this family one must conclude that their parenting skills and personal resilience are extremely high as they have managed to protect and maintain a healthy relationship with Pipah throughout".

441 The Single Expert said that Mr Farnell "presented as a person with a long history of parenting", had a "sense of competence and confidence", and was "very natural with Pipah". The Farnells were both able to describe Pipah's schedule to the Single Expert in detail and the reasons why she was enrolled in various activities. The Single

[109] *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, concluded 19 October 1996, 2204 UNTS 95 (entered into force 1 January 2002).

[110] Apart from any other considerations, the Chanbuas' concerns about Mr Farnell's history of sexual offending would make them very wary of letting him spend time with Pipah.

[111] Given the unreliability of media reporting, and the fact it was not put to Mrs Chanbua, I disregard the fact that she was reported in May 2015 as saying she "doesn't want Gammy to ever see her [sic] biological father".

Expert found that they had "an obvious focus on emotional and developmental well-being" and "a commitment to Pipah's physical health".

442 Mrs Chanbua's ability to provide for Pipah's needs might be seen as more doubtful than the Farnells', as she is dependent upon charity to provide the home and standard of living she is presently enjoying.[112] However, I accept the Human Rights Commission's submission that it would be contrary to the human rights of both Pipah and Gammy to take into account any differences in the standard of living between the two households. In any event, Mrs Chanbua would be able to provide for Pipah's basic needs without charitable support.[113] Her husband is in regular employment, as is her step-grandfather. She also has her own cottage business.

443 Although I am satisfied Mrs Chanbua can provide for all of Pipah's other needs, I am concerned that she will be unable to provide for her emotional needs. Pipah will likely suffer trauma as a result of being removed from her current home. In my view, Mrs Chanbua would need professional support to assist her in coping with Pipah's emotional needs. While I am prepared to accept, even contrary to Mrs Chanbua's own evidence, that suitable support services exist in the area around Mrs Chanbua's home, I am not confident that she would engage with them.

444 My views on this topic are informed in part from the following passage of cross-examination:

> BERRY, MR: If the court decided that Pipah should live with you, what would you do if she started being very distressed?
>
> INTERPRETER: I believe that because I am the biological mother. And she would be happy. And I wouldn't let anything that is unhappy happen to her.
>
> BERRY, MR: Do you have access to any mental health professionals who specialise in looking after children?
>
> INTERPRETER: No. No, not in my country. And I don't believe that my daughter would need one if she lives with me.
>
> BERRY, MR: Have you made any inquiries about professional assistance if Pipah was very distressed in your care, if she returned to you?
>
> INTERPRETER: I believe that if that thing happened, I would have a good way out for both us.
>
> BERRY, MR: And what would that good way out be?
>
> INTERPRETER: I cannot tell yet, because it's not happening. But, if it did happen, I would choose the best thing for me and for my daughter.

[112] Mrs Chanbua's previous home lacked the space and amenities that would be commonly found in a home in Australia, but the standard of accommodation was no different to others in the area.
[113] Peter Baines was reported as having told ABC News in May 2015 that the "remaining funds would cover Gammy's expenses for another five or six years".

445 I have no doubt that Mrs Chanbua was genuine in expressing these feelings, and would do her utmost to support Pipah through the transition. However, I do not consider it likely Pipah would receive any professional assistance to help her deal with the trauma she is likely to experience if removed from her home. That said, I am not convinced that counselling could go anywhere near to overcoming the trauma.

**(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;**

446 Pipah's age and sex are clearly matters of relevance to other issues in these reasons, but do not require separate consideration here, other than to say that the Single Expert stressed that Pipah is at an age which is critical to her development.

447 I am satisfied that the Farnells would raise Pipah in a way that is sensitive to their Australian and Chinese heritage. Pipah's full ethnicity is unknown, but she clearly has a connection to Thailand in that her birth mother is Thai and she was born in Thailand. I accept that the Farnells will teach Pipah about her origins, and encourage her to have a basic understanding of Thai traditions.

448 If Pipah were to live in Thailand, I doubt that Mrs Chanbua would have the desire or the means to encourage her to appreciate the cultural traditions from which the Farnells come.

**(h) if the child is an Aboriginal child or a Torres Strait Islander child …**

449 This factor is not relevant.

**(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;**

450 Although Mrs Chanbua gave Pipah up to strangers, her actions were those of a poorly educated young woman, who felt obliged to honour at least part of the surrogacy bargain. I therefore did not form an adverse view of her simply because she gave up her child. On the contrary, she has demonstrated a good attitude to parenthood by taking legal action after she learned about Mr Farnell's history. While there was a long delay between finding out and taking action, I recognise that this was associated with her lack of means to contest proceedings in a country far away.

**(j) any family violence involving the child or a member of the child's family; and**

**(k) if a family violence order applies …**

451 There is no evidence of any violence and there is no family violence order.

**(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;**

452 Any order that mandated ongoing contact or communication with Pipah would be more likely to lead to the institution of further proceedings than an order which, in effect, terminated the association between the two families (which is what both sides had in mind when they entered into the surrogacy arrangement). Nevertheless, I do not consider this factor is of any significance in determining what is in Pipah's best interests. If ongoing contact or communication with the other family is in Pipah's interests, then an order then an order to that effect should be made regardless of the possibility that this might lead to further proceedings.

**(m) any other fact or circumstance that the court thinks is relevant.**

453 There are a number of additional matters which I consider relevant.

***Pipah's relationship with Gammy***

454 The Human Rights Commission submitted that the "special relationship" between the twins "should be recognised and steps taken to ensure Pipah is able to preserve this aspect of her identity". It was argued that proposals for contact between the children were unlikely to be sufficient to protect Pipah's right to the preservation of her identity. It was also submitted that (footnotes omitted, errors in the original):

> twins share a bond that is unique and exceptional. The relationship between twins have 'unique characteristics, many evident since birth and many more that exist before birth'. They are more likely than their non-twin siblings to be 'attached' to their twin in the sense that the bond they share is one similar to an infant-caregiver relationship characterized by: use for 'proximity maintenance', separation distress, serving as a 'safe haven' and use as 'secure base'. This is the case for non-identical twins as well as identical twins.

455 The Human Rights Commission therefore submitted:

> On this basis, Pipah and Gammy have, or have the potential to have, a relationship that will be very significant to them throughout their lives, more significant than the relationships with their other siblings, and potentially as significant as that with their individual caregivers.

456 Assuming, without deciding, that I can take into account the articles relied upon by the Commission, which were provided en masse to the Single Expert, they do not assist me greatly to understand the extent to which the relationship between twins is affected by them spending more than the first two years of their lives apart.[114] I note that no questions were put to the Single Expert seeking his views in relation to the significance of the articles in assessing the importance of Pipah having a relationship with Gammy. The only reference to the articles in the course of the evidence came in a passing remark volunteered by the Single Expert. Significantly, it was the Single Expert's opinion that it was the "shared experience … not the shared DNA that does

[114] In her closing written submissions, counsel for the Commission stated that one of the articles relied upon "deals with a longitudinal study of twins separated at birth" and noted that "the study reports on the issue of nature, shared DNA, versus nurture, shared experience". Counsel did not say what might be drawn from the study and the Single Expert was not asked for his opinion on it.

most of the heavy lifting". The Single Expert also expressed his opinion that a "coherent narrative" could be provided to Pipah to explain why she is living in Australia, while her twin brother is living in Thailand "having a different experience".

457 I largely accept the submission of the Independent Children's Lawyer that the parties' ability to foster a relationship between the twins:

> is likely to be impacted by the extent of Gammy's disability, which is largely unknown, the children's young age and the capacity to effectively overcome geographical, cultural and language barriers.

458 Furthermore, as the ICL said, the relationship between the twins "should not be a relationship simply for relationship's sake. The relationship must be able to provide something meaningful to both children". The ICL went on:

> this issue needs to be considered having regard to practicalities, as while it might be ideal, it may not be achievable for a number of reasons. Both parties may need to consider ways in which the relationship could be fostered, including the provision of photos and the possibility of Skype contact at some point in the future.

459 In largely accepting the ICL's views on this issue, I do not wish it to be thought that I consider there is any impediment to a child with Down syndrome having the same relationship with his siblings as other children have. However, Gammy's special needs, potentially at least, could make it more difficult for him to maintain a long-distance relationship. I accept that his disability would not be an impediment to the formation of a relationship if he and Pipah were living in the same residence.

460 I accept that if Pipah remains with the Farnells, she will be brought up to understand she has a twin brother. Even if the Farnells did not explain to Pipah that she has a twin brother, someone else would be sure to tell her. The Farnells clearly recognise this and I note, for example, they now have a birthday cake for Gammy at Pipah's parties and sing "Happy Birthday" a second time for him.

461 Although I consider Pipah's potential future relationship with Gammy to be an important matter to consider, it is not of overwhelming importance. It needs to be considered alongside the vitally important relationships Pipah already has, but would lose if she were to be sent back to Thailand.

***Abandonment of Gammy***

462 I do not accept the proposition that the question of whether the Farnells abandoned Gammy is of marginal relevance in determining what would be in Pipah's best interests. On the contrary, any couple who would abandon a child merely because he had special needs would, potentially at least, be unfit to care for any child. Their actions would be especially heinous if the child had a healthy twin who they kept.

463 The moral culpability of such behaviour by a commissioning couple would be aggravated by the fact of the child being left with the birth mother, who was in such desperate financial circumstances that she had been prepared to hire out her body.[115]

464 However, for reasons I will give more fully later, I find that the Farnells did not abandon Gammy, and that their conduct is not such as to require consideration here.

***Pipah becoming the subject of further notoriety***

465 I agree with the Independent Children's Lawyer that one matter of potential relevance is the likelihood that Pipah will be the subject of notoriety and media scrutiny if she is returned to Thailand. This is evidenced by the fact that Mrs Chanbua collaborated with *WHO* magazine in its four-page spread celebrating Gammy's second birthday.

466 Mrs Chanbua is quoted in the magazine article as saying:

> Grammy[116] is now famous; most people in Sri Racha [sic] know him ... Sometimes I take him shopping, and the shop owner won't take money [from me] ... People who don't know me want to help!

467 The reunification of the twins and their subsequent life together would clearly be a matter of considerable public interest. Thus far, Mrs Chanbua has not demonstrated any capacity to keep the media at bay. On the other hand, for obvious reasons, the Farnells have shunned all publicity save for their unpaid appearance on *60 Minutes*. Although I am sure that more than usual interest will be taken by people in Bunbury, Pipah will not be the subject of the overt attention she would be likely to receive if living with Mrs Chanbua.

468 Counsel for Mrs Chanbua submitted that "to the extent that Pipah would have any notoriety with her Thai parents, there is no indication that it would in any way be negative in intent or effect". Although it is true that there was no evidence of the likely effect on Pipah of being the subject of "notoriety", I nevertheless consider it would be contrary to her best interests to be placed in the public spotlight. The Farnells have been insistent that they wish to give Pipah as "normal" a life as is possible, and I consider this to be in her interests. The Single Expert also said his advice was "to treat Pipah as similarly as one can to other children of her age".

469 I recognise that it was Mr Farnell's history of sexual offending that was, in part at least, responsible for the significant media attention the family has received to date. However, save for the furore created by the leaking of inaccurate information during the course of these proceedings, there has been no media attention directed at the

[115] In their illuminating article, Keyes and Chisholm recognised that the conduct of the commissioning parents could be relevant in determining their capacity to meet the child's needs: Mary Keyes & Richard Chisholm, 'Commercial surrogacy – Some troubling family law issues' (2013) 27 *Australian Journal of Family Law* 105. The authors demonstrated prescience by citing, as an example of culpable conduct, commissioning parents who "left one or more unwanted siblings behind in India or Thailand with no arrangements being made for their welfare". Their article was published while Mrs Chanbua was still pregnant with Pipah and Gammy.

[116] According to the article, Mrs Chanbua said that the boy's nickname has been "mistakenly reported" and that she had called him "Grammy ... after the Gramophone record company for all the noise the baby made".

Farnell family since the original publicity in 2014, although I recognise that the case is routinely referred to in the wider policy discussion about possible law reform.

***Illegal conduct relating to the surrogacy arrangement***

470 Submissions on behalf of Mrs Chanbua and the Human Rights Commission alluded to the possibility that the Farnells' conduct was illegal in Western Australia. This proposition was not put to the Farnells, although I accept it may have been thought that it was unnecessary, since their own evidence established that they had given instructions concerning the surrogacy arrangement while they were in Western Australia, and had remitted funds to Thailand in payment of their obligations under the arrangement. Prima facie, these actions constituted illegal conduct, but in the absence of comprehensive submissions, I decline to make a finding to that effect. It is sufficient to say that the Farnells almost certainly thought that their conduct was legal.

471 The evidence does not support the submission of the Independent Children's Lawyer that Mrs Chanbua "clearly understood that what she was doing was illegal", and that proposition was not put to her in cross-examination. I accept it is possible that Mrs Chanbua believed her actions were unlawful, but she is an unsophisticated young woman, who may have thought that the age requirement was one imposed by Thailand Surrogacy and similar agencies, and not by the laws of Thailand.[117]

472 In any event, at least in those parts of the proceedings where Pipah's best interests are the paramount consideration, little turns on the parties' understanding of the legality of their actions. As Ryan J said in *Ellison & Karnchanit*, "irrespective of how State law views the applicant's actions, the children have done nothing wrong". I therefore accept the sentiment underlying the submission of the Human Rights Commission that the court:

> should not refuse to either make a finding as to parentage or to make parenting orders that would otherwise be in the best interests of Pipah, only because the surrogacy arrangement may have been unlawful under State law. Such a course would have a significant risk of compromising the rights of Pipah who clearly has no culpability.

***The possibility the Farnells may go to jail for perjury***

473 I accept there is a possibility that the Farnells will be charged with perjury. It is not for me to guess what penalty might be imposed if they are convicted, but I anticipate that the sentencing judge would take into account a variety of mitigating factors that would seem to me at least to be relevant.

474 In the event the Farnells were both jailed, which I hope for Pipah's sake does not occur, I am confident that Jane and other members of the family would step in to care for Pipah and ensure that she visited the Farnells while they were in jail.

[117] I did not have any satisfactory evidence of the age at which a woman in Thailand could become a surrogate.

## The primary considerations

475 The State Act requires two primary considerations to be taken into account. The first is the benefit to the child of having a meaningful relationship with both of the child's parents. The second is the need to protect the child from physical or psychological harm. The Act states that greater weight is to be given to the second consideration than the first.

### *The benefit of a meaningful relationship*

476 In discussing the first primary consideration, it must be emphasised that the Chanbuas are Pipah's "parents". However, the Act does not require the court to make orders that ensure Pipah has a "meaningful relationship" with her parents. Instead, it requires the court to consider the **benefit to the child** of having such a relationship. Given the strong, meaningful relationship that Pipah has now developed with the Farnells, it is essential also to consider the detriment that Pipah will experience if that relationship were to come to an end. The logistics are such that building a "meaningful relationship" between Pipah and the Chanbuas can only come at the expense of her existing relationship with the Farnells.

477 I do not consider it is necessary for Pipah's current or short/medium-term wellbeing to have a "meaningful relationship" with Mrs Chanbua, but I do consider it essential that she maintains and builds on the relationship she has with the Farnells. This is not to suggest that I consider it would be in Pipah's interests for her to grow up knowing nothing of her birth mother and her husband. On the contrary, I consider it would be desirable for Pipah to have as much information as possible concerning Mrs Chanbua, and to have the opportunity to make contact with her if she ever wishes to do so. This is especially so because of the inevitability of Pipah becoming aware of her background, even if she does not learn about it from the Farnells.

### *Protection from harm*

478 The second primary consideration, namely "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence", is of prime importance in the proceedings.

479 As Mr Farnell is a convicted sex offender, and his offences were committed against young girls, I must take very seriously the task of assessing the risk of Pipah being sexually abused by him. Apart from that vital matter, there is no suggestion that Pipah will come to any harm in the Farnells' home. It should also be observed that it is not possible to eliminate the risk that Pipah might be the subject of some form of abuse in Mrs Chanbua's home. I hasten to add that there is no evidence to suggest that she has any greater risk of being abused in Mrs Chanbua's home than in any other home in the world. The fact remains, however, that the details of the living arrangements in Mrs Chanbua's residence remain somewhat of a mystery to the court. For example, there is little evidence concerning Mr Chanbua's background, and no evidence concerning his character. Even less is known of Mrs Chanbua's step-grandfather. However, one very troubling thing is known, which is that Mrs Chanbua had her first child when she was just 14 years of age, when she was being cared for by her grandmother. Mrs Chanbua's mother must have been a similar age when she first

gave birth, since the grandmother is aged 55 and Mrs Chanbua is only 22. It would be unfortunate if Pipah also becomes a mother at such a tender age.

480 Ultimately, however, this case is not about the possibility of Pipah being at risk in Mrs Chanbua's home. The real concern is whether she is at risk in the Farnells' home. Mr Farnell has been convicted of two lots of offences against girls aged between 5 and 12 years. The first set occurred against two girls between January 1982 and December 1984, and these were the ones for which he was initially sent to prison. Whilst in prison, he was convicted of offences against another girl that occurred between January 1988 and May 1996.[118]

481 One charge relating to a fourth girl was dropped. This charge concerned an incident that was said to have occurred in 1996 when the girl was 7 years old. Counsel for Mrs Chanbua submitted that Mr Farnell had conceded that the incident did occur. The transcript reference he gave to support this proposition does not, in fact, support it. However, I am by no means convinced that there were no other victims during this period, and I think it safest to assume there may have been others.[119]

482 Mr Farnell was sentenced to three years' imprisonment in respect of the first tranche of offences and a further 18 months in respect of the second tranche. However, he was only in prison from March 1997 until March 1999, and was then released on parole until March 2000. He was assessed as being suitable for a Sex Offender Treatment Program, which he completed in 1998. It was observed that after initial positive progress in the program, Mr Farnell struggled to recognise triggers of his offending and the behavioural changes required. As a result, it was recommended that he have further treatment after his release. After leaving prison, Mr Farnell had treatment from Mr A, a registered psychologist. In assessing Mr Farnell's suitability for parole, Mr A said:

> Mr Farnell accepts some responsibility for his offending behaviour, has significant insight into the cognitive, emotional, behavioural and environmental precursors to offending behaviour. He does, however, continue to display some faulty thought patterns that aim to minimise his actions. This suggests that there are some further treatment needs.

483 Mr Farnell attended 18 sessions with Mr A while on parole. The outcome of those was described in a report of [Ms G], another psychologist, who was engaged by DCP in August 2014 to undertake a risk assessment:

> [Mr Farnell] was noted to be a reliable attendee, however at times he was noted to give a superficial account of his situation, occasionally playing

[118] The first tranche of charges resulted in guilty pleas on 18 counts and the second tranche resulted in guilty verdicts on four counts.

[119] Some "evidence" about a previously unknown victim emerged in closing addresses after I made a request for a less redacted version of one of the DCP exhibits. Even assuming the information had been provided in a form that could carry any weight, and overlooking that the "evidence" was not put to Mr Farnell, it related to something that had occurred prior to Mr Farnell being imprisoned. I have elected not to discuss this "evidence", as I accept that there was good reason for the information to have been redacted in the first place, given the basis upon which the notifier approached DCP and given that this judgment is to be published. I also do not accept that the "evidence" establishes that the notifier has a blood relationship to Mr Farnell as was implied in the submissions of counsel for Mrs Chanbua.

> down stress and minimising personal distress. This fits with the current author's finding that he has limited emotional awareness, suggesting his response is probably is likely [sic] not to be deliberate, and is a coping strategy he has learned in childhood. Nevertheless Mr Farnell was reported to have made significant gains in relation to establishing and maintaining his relapse prevention strategies. He was reported to be modifying his life and establishing more appropriate patterns of communication in relationships. His level of offence acknowledgement improved markedly which was consistent with his presentation to the current author. Since the conclusion of treatment, there have been no other reports that he has sexually victimised children.

484 Ms G provided her report in October 2014 after interviews with Mr Farnell totalling more than six hours. She undertook psychometric testing and perused much material, including transcripts of the criminal trial, the Statements of Material Facts in the criminal proceedings, and previous assessments and reports. She also interviewed, or had discussions with, Mrs Farnell, two of the Farnell children, Mr A, three senior specialist psychologists and DCP's Chief Psychologist.

485 Ms G has worked in private and government practice as a clinical and forensic psychologist, both in the United Kingdom and in Western Australia, for over two decades. She completed the requirements for a Master of Philosophy (Clinical Psychology) at the University of Edinburgh and a Bachelor of Science with first class Honours in Psychology at the University of Plymouth. She has worked in many fields including juvenile justice, adult prisons, community corrections, community welfare and in acute psychiatric care. She has extensive experience in the criminal justice system in Western Australia and has written a number of expert reports.

486 Ms G observed that while Mr Farnell was initially anxious at his first assessment and eager to make a good impression, he established good rapport with her and demonstrated capacity for interpersonal warmth. Mr Farnell reported that when he was 8 years old he was subjected to intermittent sexual abuse by the teenage daughter of a family friend. Despite claiming closeness to his parents, he was unable to disclose his victimisation.

487 Mr Farnell told Ms G that he is sexually stimulated by adult females and not children. Ms G observed that "caution is always required when one relies on such self-disclosures", but nevertheless concluded that it appeared that Mr Farnell's sexual attraction towards girls over two time periods in his history "is secondary and his attraction to adult females is his dominant arousal pattern". In making this observation, Ms G noted that there had been no further allegations since Mr Farnell's treatment concluded in 2000.

488 Although the psychometric testing suggested the possibility that Mr Farnell had "limited emotional awareness and repression of emotions in his repertoire of coping", Ms G emphasised that "this is not a risk variable known to correlate with sexual offending, although it is often a treatment target with sexual offenders". She also noted that Mr Farnell admitted his offending behaviour "without challenge and expressed remorse and demonstrated victim empathy". I too found him to be

genuinely ashamed of his behaviour, notwithstanding what was reported about his attitude closer to the time of his offending.[120]

489 It is not possible here to do justice to the whole of Ms G's report. However, it is important to record her unchallenged evidence that there have been developments in the "sexual offence risk assessment field" since Mr Farnell's release from prison, and that she used "the latest tools" to assess the risk of reoffending. It was Ms G's opinion that:

> The fact that [Mr Farnell] could spontaneously arrest his offending suggest he already had some functional strategies at times of low stress and increased emotional connectedness. That, coupled with treatment, appears to have set him up well. It is likely that Mr Farnell's treatment intervention has assisted him in relation to managing his risk by building upon his capacity for emotional fulfilment and emotional regulation, which appear to have served him well at recent times. In addition he appears also motivated by the aversive consequences of another jail sentence if he replicates this behaviour. In terms of managing his risk of recidivism, Mr Farnell relayed that he strives for better communication with his partner, improved work/life balance and that he will never be alone with children. His daughter reported a marked change in her father after treatment, noting that he was much more balanced in his lifestyle and confirming that he was chaperoned around children from that time. His son relayed that he was a supportive father and he also described his father's engagement with his children after jail as being significantly improved.

490 Ms G accepted that risk assessment is not an exact science and acknowledged that the information available at the time of the assessment will determine its quality. Nevertheless, she said that "actuarial data combined with structured clinical judgment can allow for an informed opinion in relation to the probability of recidivism".

491 Ms G considered that Mr Farnell fell into the category of individuals who, on average, have been found to have a 6.6% chance of reoffending within a five-year period. However, use of another tool suggested to Ms G that:

> Mr Farnell's dynamic risk may be lower as the only areas of concern are his past emotional identification with children, which does not appear to be an issue post-treatment. He has positive social influences, a stable relationship with his current wife, shows no hostility towards women, is generally socially integrated, has been resilient during stressful times, shows warmth and concern in relationships, is not impulsive, demonstrates good problem solving skills, demonstrates no evidence of negative emotionality towards others, no sexual preoccupation (from self-reports and reports from his wife and children) or current sexual coping strategies and he has been cooperative with DCPFS. He has in the past shown deviant sexual interest towards children, but has been in an appropriate relationship for over 10 years and there is an absence of behavioural

[120] The Single Expert also commented on Mrs Farnell's "ability to show compassion for Mr Farnell's victims, as she visibly did" when the Single Expert spoke to Mr Farnell about the victims.

> indicators of deviant sexual interest for recent years. He is judged to be in the low risk category at this stage utilising this tool. In combining the 2 tools, based on the sample of sexual offenders utilised, offenders that fell within the same category as Mr Farnell have a 2.6% chance of sexual re-offending within 3 years. Utilising a 95% confidence interval, offenders who scored in a like manner reoffended sexually at a rate of between 0.7% and 4.5% within a 3 year period. Mr Farnell is assessed to be a low risk of re-offending with both tools combined at this current time.

492 Ms G concluded that:

> [Mr Farnell's] risk of offending against Pipah is currently considered low as she does not fit his victim profile, where he has been able to distort his thinking around the relationship with the victims by imagining he is befriending them or not hurting them. It is noteworthy that he did not offend against his children (including his daughter) and his relationship with them appears to have been protective in terms of his sexual offending, possibly as he was not able to objectify them for his sexual gratification. This is considered likely to be protective on an ongoing basis, particularly when you consider his treatment gains and lack of sexual offending for a 14 year period.

493 At trial, Ms G updated her assessment by reference to revised statistical information, and concluded that offenders who fell within the same category as Mr Farnell have a 5.1% chance of reoffending within five years, but utilising a 95% confidence interval, offenders who scored in a like manner reoffended at a rate of between 2.3% to 7.9%. Thus, although these figures had gone up, Ms G correctly described the risk of reoffending as "fairly low". It is important to recognise, however, that these figures related to offenders who had not been in a treatment program, whereas Mr Farnell has had treatment, as well as the benefit of all of the follow-up work done by DCP since August 2014.

494 Notwithstanding her generally positive findings, Ms G stressed that while Mr Farnell is currently a low risk, this may change in future given the dynamic nature of risk. She therefore recommended reassessment at key times or events, particularly when Pipah is a similar age to Mr Farnell's victims or if he and Mrs Farnell separated. Ms G recommended that Mr Farnell continue to be monitored in two ways:

- by administration of psychometric testing on a three to six monthly basis using an instrument called the "ACUTE tool", which can be administered by a trained social worker or case manager;[121] and
- a comprehensive risk assessment once every year or two years.

495 I accept Ms G's evidence that the risk of Mr Farnell offending against Pipah is very low, but that the risk cannot be ignored. The risk could increase if Mr Farnell faces serious stressors in his life, although, as Ms G pointed out, he has successfully managed very serious stressors in the last few years. The risk is nevertheless such that

[121] Ms G said it would cost about $1,000 if she administered the test and wrote the report, but it could also be done by a DCP case worker under the supervision of someone suitably qualified.

it would be appropriate for Mr Farnell to be monitored, but I do not consider that the psychometric testing needs to be undertaken as frequently as every three to six months. The frequency of testing sought by DCP and the Independent Children's Lawyer would be sufficient given the other protective mechanisms, including the safety network.

## Part 10: Resolution of the Family Court Act issues

496 I turn now to give reasons for my decision in relation to each of the disputes concerning matters arising under the State Act.

### Who should have parental responsibility for Pipah?

497 The Farnells seek equal shared parental responsibility, whereas Mrs Chanbua seeks sole responsibility. However, both claims presuppose success in the application about where Pipah is to live.

498 The statutory presumption in favour of equal shared parental responsibility does not apply to the Farnells because they are not Pipah's parents; however, it is not in dispute that they should have parental responsibility if an order is made for Pipah to live with them.[122] An order giving the Farnells parental responsibility would not trigger the requirement to consider the equal time and "substantial and significant time" options discussed earlier. That requirement arises only if an order is made for the child's **parents** to have equal shared parental responsibility.

499 The presumption in favour of equal shared parental responsibility **does** apply to the Chanbuas, even though Mrs Chanbua does not seek to share parental responsibility with Mr Chanbua. However, the presumption is rebutted if an order for equal shared parental responsibility would not be in Pipah's best interests. As Mrs Chanbua has legal representation, and as Mr Chanbua did not seek to take part in the proceedings until he was belatedly called as a witness, I am entitled to assume that they have their own reasons for deciding that Mrs Chanbua should have sole decision-making responsibility for Pipah if she lives with them. I find that it would not be in Pipah's interests to foist decision-making responsibility on a man who does not seek it.

500 It follows that an order will be made for the Farnells to have equal shared parental responsibility if Pipah is to live with them, and that an order will be made for Mrs Chanbua to have sole parental responsibility if an order is made for Pipah to live with her.

### Where should Pipah live?

501 The Farnells say that Pipah has lived with them all her life, is happy and content in their care, and would be traumatised if removed. Mrs Chanbua says that Pipah is at

[122] Counsel for DCP alluded in her closing address to the possibility that an order could be made in favour of just one of the Farnells. That is true, but the option was never advocated by anyone, and the logistical consequences of it were not explored in cross-examination.

risk in the Farnells' care, and that she would be happier and safer if reunited with her and Gammy.

502 Counsel for DCP advised in her closing address that DCP did not see its role as supporting either party, but rather identifying protective measures if Pipah remains in Western Australia. However, I note that DCP has been guided throughout by Resolutions Consultancy, who say that "the risk of abuse [to] Pipah is currently low, and that it is in her best interest to remain living within her family supported by their network".

503 The Attorney General and the Human Rights Commission also did not support either party, albeit the Commission was clearly sympathetic to Mrs Chanbua's position. The Commission's primary submission was that the decision would depend to a large degree on the nature and extent of the risk posed by Mr Farnell.

504 Counsel for the Farnells asked me to accept the evidence of Mr Cairns, Ms G, Resolutions Consultancy and the DCP workers by concluding that the risk associated with Pipah staying with the Farnells was outweighed by the risk associated with her removal from their home. The Independent Children's Lawyer made submissions to similar effect in strongly supporting the Farnells' case.

505 The ICL also submitted that the court had the "opportunity to experience the product of Mr Farnell's parenting" by seeing Jane Farnell give evidence. Although the ICL recognised that Jane Farnell was a "strong supporter of her father", it was submitted that she presented as a "thoughtful, warm and family focused person who delights in her little sister". I acknowledge that the fact that Jane Farnell appears to have been provided with a good upbringing would not be of much comfort to Mr Farnell's victims. I also accept that the quality of Jane's upbringing may have as much, if not more, to do with her mother than with Mr Farnell. However, notwithstanding their father's offending, Jane Farnell and her brothers appear to have enjoyed a very loving and caring home life. This provides some comfort in anticipating the life Pipah might experience if she stays with the Farnells.

506 Counsel for Mrs Chanbua asked me to consider the long-term impact on Pipah of living in the Farnells' home, where she could not be alone with Mr Farnell, and where she would be taught from a book that Mr Farnell was a risk to her. Counsel also submitted that if the safety network was not maintained, the risks of Mr Farnell reoffending "will rise in a statistically significant way". He also observed that the Farnells "face ongoing stress, orders and uncertainty arising from this litigation and face the prospect of further proceedings in related matters".

507 Counsel for Mrs Chanbua submitted that Mr Farnell's history of offending against pre-pubescent children was especially relevant because Pipah will soon start kindergarten and then school, and will inevitably develop friendships outside the safety network. Counsel claimed that there was less opportunity for Mr Farnell to access young children since he left prison, because his children were aged between 12 and 16 at the time of his release and his previous offending was against their associates. This proposition appears not to be entirely accurate, if information given to Ms G was correct; however, I accept that Pipah will be likely to form relationships with a range of children when she starts kindergarten and school.

508 Counsel for Mrs Chanbua further submitted that Mrs Farnell does not consider Mr Farnell to be a risk and has limited understanding of her role in protecting Pipah. He said it was a matter of concern that all members of the safety network are supporters of Mr Farnell, and that key members of the network were not called to give evidence as to their knowledge of Mr Farnell's offending and their understanding of their role. Counsel went so far as to submit that the safety plan itself was a risk to Pipah, noting that the "Words and Pictures Story" includes a comment that "Daddy has said this was a long time ago now and that he is not a worry to Pipah or any other child now". It was submitted that this could be confusing for Pipah, who is asked on the one hand to understand that her safety depends upon the adults in her life complying with the plan, while on the other hand being told her father is not a risk.

509 Counsel for Mrs Chanbua argued that the safety plan had been created "by a range of professionals operating with tunnel vision and closed minds to the option presented by [Mrs Chanbua]". That proposition, with respect, is unfair because the "option" presented by Mrs Chanbua did not emerge until after the safety plan was created (albeit it has been the subject of refinement and implementation since Mrs Chanbua made known her desire to have Pipah returned to her).

510 Counsel for Mrs Chanbua further submitted that even if the two-year protection order sought by DCP was granted, it would come to an end around when Pipah would be commencing at kindergarten, and there would then be no legal requirement for the Farnells or their family to comply with the terms of the safety plan. Counsel submitted that "it remains to be seen whether the family will maintain their commitment to the Safety Plan once the scrutiny of the Court and [DCP] is removed".

511 Counsel for Mrs Chanbua also drew attention to DCP's view that, notwithstanding all the work done by departmental officers, further work is still required to ensure the Farnells are able to protect Pipah. Counsel for Mrs Chanbua also observed that the proposals of the Independent Children's Lawyer and DCP not only required that Mr Farnell never be alone with Pipah and that he comply with the safety plan, but also that Pipah should live with Mrs Farnell if the Farnells ever separated. It was submitted that these conditions made clear that, but for the orders proposed, there is a risk to Pipah that would be unacceptable.

512 A stronger argument than that of counsel for Mrs Chanbua could not have been mounted on the available evidence. However, the fact remains that the expert evidence establishes that there is a low risk of Mr Farnell reoffending against children in general and an even lower risk of him offending against Pipah. Furthermore, I am satisfied that the safety network does provide a degree of protection for Pipah, and that the protective measures I intend to put in place will further reduce the risk.

513 Nothing advanced during the trial has in any way diminished my view of the wickedness of Mr Farnell's offending against vulnerable little girls; and of course, nothing advanced could ameliorate the damage he did to those girls and their loved ones. However, Mr Farnell was penalised, he underwent the treatment programs that were recommended for him, and he appears to have responded well to them.

514 Mr Farnell was 41 years of age when he left prison and he is now 58. In the intervening years, notwithstanding all the publicity, no further charges have been

brought against him. He has seemingly led an exemplary life and is living in what appears to be a stable marriage. He has chosen to remain in the community in which his offending occurred, when he could have gone anywhere else. His children and even his ex-wife have stuck with him, as have friends who hold positions of responsibility and respect.

515 Although I cannot exclude the possibility that Mr Farnell will offend again, the evidence leaves me with an acceptable degree of satisfaction that he will not.

516 Like so many others, resolution of this case requires an assessment of risk. Risk assessment comprises two elements: the first requires prediction of the likelihood of the occurrence of harmful events, and the second requires consideration of the severity of the impact caused by those events.[123] Accordingly, in assessing the risk, I must consider the potentially devastating consequences of Pipah being abused in light of the fact that the evidence indicates that the prospects of abuse occurring are low. I must then weigh that risk against the much higher degree of probability that Pipah would suffer serious psychological damage if she is made to leave the only family she knows.

517 Examination of the advantages and shortcomings of each option has led me to conclude that Pipah's interests will be promoted by remaining with the Farnells. The destruction of all of the attachments she has made with the Farnells and others in their circle could cause incalculable harm. This could only be justified if the risk of her being abused in the Farnells' home was higher than the evidence suggests it is.

518 I was referred to authorities such as *M v M* (1988) 166 CLR 69, where the High Court stated at 78 that "the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse". Reference was also made to relocation cases. In my view, none of these assist. The "unacceptable risk" test is of no practical utility when both options involve risks. Similarly, the relocation cases invariably involve families where the child already has attachments to both parties.

519 Although the Farnells are not legally Pipah's "parents", the evidence establishes that they are her "psychological parents". This is a matter of great significance in arriving at my decision. As the Family Law Council said (footnotes omitted):

> The term psychological parent is used to designate the person whom a child forms an 'emotional attachment' with as their parent. A classical formulation of this is given by Goldstein, Freud and Solnit:
>
> > [F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his

[123] *Deiter & Deiter* [2011] FamCAFC 82 at [61].

> "psychological parent" in whose care the child can feel valued and "wanted".[124]

520 I recognise that Mrs Chanbua was denied the opportunity to build this psychological relationship with Pipah because she was an impoverished young woman who agreed to give Pipah to people who had the money to persuade her to do what free women have traditionally abhorred. Yet, in the meantime, Pipah has grown to love other people as her mother and father. I cannot overlook this uncontested fact, and it has drawn me to the conclusion that Pipah should remain with the people she regards as being her parents.

521 I must emphasise that I consider Mrs Chanbua's concerns arising out of Mr Farnell's history of offending are valid. Anyone in her position would have the gravest fears about a child being left in the care of a convicted paedophile. However, grave misgivings should also be felt about a little girl being removed from the company of everyone she knows and loves if there is no evidence of her being abused, and the evidence suggests there is only a very low risk of her being abused if she stays.

522 In assessing the risks of Pipah's removal, I have not overlooked the suggestion floated by counsel for the Human Rights Commission (and adopted by Mrs Chanbua's counsel) that:

> If the Court finds that it is in Pipah's best interest to be removed from her present home but that the risk of separating her from her current family and relocating her to Thailand immediately is too high, then it is open to the Court to make such orders as is necessary to provide a less abrupt transition for Pipah from her present home to her birth mother's home in Thailand.

523 The difficulty with this proposition is that it was never properly explored during the trial. Counsel for Mrs Chanbua accepted that neither Mrs Chanbua nor the Farnells have the means to fund a staged transition from one family to the other. In my view, the logistics associated with some kind of gentle transfer would be insurmountable, and in any event, contrary to Pipah's best interests.

524 I should also record that I do not accept the submission of counsel for Mrs Chanbua that the Independent Children's Lawyer and others have commenced from a starting point that some good reason needed to be shown for Pipah to be sent to live with her birth mother and twin brother. If anything, the starting point was probably to ask why a little girl should be left with a man with a history of molesting little girls. Whatever may have been the starting point of others, I have had no starting point other than the one mandated by the law, namely that Pipah's best interests are the primary consideration.

525 I conclude this crucial part of my discussion by recording that Mrs Chanbua said in her oral evidence that she felt the Farnells did not love Pipah. It may be small comfort to Mrs Chanbua, but I can reassure her that the evidence and my own observations of the Farnells over the last 18 months satisfy me that they love Pipah

[124] 'Report on Parentage and the *Family Law Act*' (Family Law Council, December 2013) xxviii.

very dearly. I am convinced that the Farnells and their family and friends are conscious of the heavy responsibility they have taken on, and that they will do everything possible to give Pipah a good life in Australia.

**What conditions should be attached to the order for Pipah to live with the Farnells?**

526 The Farnells, DCP and the Independent Children's Lawyer have all proposed that there be conditions attached to the orders if I decide that Pipah should remain with the Farnells. The content of those conditions may vary depending upon whether or not DCP is successful in obtaining a protection order. I therefore propose to delay discussion of the conditions until after I have dealt with DCP's application.

**What contact (if any) should there be between the families?**

527 The Independent Children's Lawyer agreed with DCP's view that it is "important for Pipah to establish a relationship with family members who are significant to her, and this includes most importantly Gammy as her twin brother". However, the ICL also submitted that there "should not be a relationship simply for relationship's sake".

528 The final orders proposed by Mrs Chanbua did not deal with contact orders to be made if she was unsuccessful in her primary application; however, in her earlier response, Mrs Chanbua sought an interim order permitting her to spend time with Pipah by:

- Skype and/or FaceTime on not less than one occasion each week; and
- having direct contact in the event she travels to Western Australia.

529 Mrs Chanbua's application for an interim contact order was never pressed and accordingly, no orders have been made dealing with that issue.

530 The Farnells join with the ICL and DCP in seeking that they and Mrs Chanbua "keep each other informed of their contact details, including an address at which they can receive mail, and if [Mrs Chanbua] has the ability to communicate by email, with their respective email addresses".

531 The ICL and DCP went further in proposing that the Farnells send Mrs Chanbua:

- current photos of Pipah, no less than 3 times a year;
- samples of Pipah's artwork, schoolwork and a copy of her school reports; and
- photos of themselves and presents for Gammy (if they so wish).

532 The ICL and DCP also sought Skype or FaceTime contact "as can be agreed". The ICL said that if the two families were agreeable to this, the contact could be facilitated with the assistance of a translator. The ICL acknowledged that she had concerns as to whether such contact would be in Pipah's best interests at present, as she is too young to understand the complexities of her family system. She

nevertheless submitted that if the Skype/FaceTime contact was handled well, it would likely be of benefit to Pipah.

533 The orders proposed by the Farnells did not contain any requirement for any contact between the families nor any obligation to send photographs and other material. The Farnells' counsel expressed serious reservations about the proposed requirement to send photographs to Mrs Chanbua and about the order relating to Skype or FaceTime contact. He argued that if the Farnells provided details of Pipah's life to Mrs Chanbua, she "will almost certainly recount them to the media, and generate more unwelcome attention". In support of this, he referred to the interview Mrs Chanbua had recently given to *WHO* magazine. Counsel's submissions drew attention to the fact that Mrs Chanbua had been advised by her solicitors not to make any media statements but had disregarded that advice.

534 I am satisfied that it is in Pipah's interests for her to become aware, as she matures, that she has a twin brother living in Thailand. This is a vitally important part of her life story, which will best be told to her by the people she regards as her parents. The Farnells have already commenced this process in an age-appropriate way by having a birthday cake for Gammy.

535 It is equally important that Pipah becomes aware, as she matures, that while Mrs Chanbua agreed to the Farnells taking care of her, she has nevertheless retained a keen interest in her welfare and wants the best for her in life. Notwithstanding the suspicions and mistrust that have developed between the two families during the course of these proceedings, I am satisfied that the Farnells can be relied upon, with the help of others, to create a narrative for Pipah that will assist to ameliorate the potential psychological harm to Pipah arising out of knowing that she has been separated from her birth mother and twin brother.

536 Sadly for Pipah, nothing can now be done to guarantee that she will not experience psychological harm arising out of the circumstances of her birth and early life. Remaining with the Farnells leaves open the distinct possibility of emotional trauma associated with the knowledge that she was given away by her mother and separated from her brother. Returning her to her birth mother would have left open the distinct possibility of emotional trauma associated with the knowledge that she was once given away by her mother and then, more than two years later, removed from the people she had grown to know and love. I therefore do not wish for anything I say in relation to the present topic to suggest that I think there is a panacea for Pipah's future emotional wellbeing. All that I can say is that I have confidence that the Farnells will now make what I regard as being the best of a bad job.

537 Strictly, I do not have before me an application that would ensure there was any greater degree of contact between the two families other than the agreed order for the parties to keep each other informed of their contact details. The proposed order about Skype/FaceTime contact would have no legal effect, as is it expressed to be dependent upon the agreement of the parties.

538 In my view, it would not be in Pipah's best interests to mandate any form of contact between her and Mrs Chanbua and Gammy. Quite apart from any advantages or disadvantages to the children associated with such an arrangement, there are

logistical issues which, although not necessarily insurmountable, would make such contact very problematic. First, there is an assumption that both families will continue to have the capacity to access electronic forms of communication. Secondly, there would need to be communication between the families to arrange the contact in circumstances where there is no common language. Thirdly, if the arrangements could be set up, there would need to be a translator present to assist the conversation. Fourthly, both children are still very young and their language would be at a fairly early stage of development, noting that both children have experienced serious health issues and that there is no evidence of the extent to which Gammy's Down syndrome is likely to impact on his linguistic ability.

539 Even if a way could be found to resolve these difficulties, I consider that it would be fraught with danger for both children to participate in this form of communication where there would be no control over how the adults conduct themselves. A mistimed remark or a spontaneous outburst of emotion could have serious consequences.

540 In my view, a great deal of work would need to be done with the adults to develop a shared narrative about the twins' separation before they could be safely brought face-to-face by electronic means or otherwise. I share the Single Expert's opinion that if the Farnells

> could see an opportunity to forge a relationship with [Mrs Chanbua] that was good for Pipah and Gammy they would do so. However, the context would have to be highly transparent and they would need to feel very secure that no agency, organisation or media would become involved or seek to gain in some way from such actions.

541 Even if, contrary to my expectation, the electronic communication worked "well", the question would arise, what next? If there was some prospect that, in due course, the twins could spend some physical time together, then there might be a stronger argument for attempting to establish contact by electronic communication. However, once again, the logistical issues associated with there being anything more than perhaps a once-off visit are very problematic. It should also be realised that any orders would only be binding on the Farnells, since Mrs Chanbua is beyond the jurisdiction of the court.

542 For these reasons, I do not propose to make any orders relating to electronic communication. This, of course, will not prevent the parties, if they are so inclined, from making their own arrangements in relation to contact at an appropriate time.

543 I also do not intend to make orders requiring the Farnells to send photographs or school reports to Mrs Chanbua. Although I can see the advantage to Gammy of having photographs of his sister and can readily understand why Mrs Chanbua would like to have photographs, I am concerned about the photographs and reports falling into the hands of the media and about Pipah's privacy being invaded by them being reproduced. If those advising Mrs Chanbua can devise a means by which photographs or reports could be seen by her, without any opportunity for them to be further distributed, then I would be prepared to consider the matter again.

544 I propose to require the Farnells to send Mrs Chanbua and Gammy samples of Pipah's artwork and schoolwork after she commences kindergarten, since they could not be used in a way that would impact on Pipah's privacy. This will create a modest physical link between the two children and perhaps provide a topic of conversation in building a narrative for them concerning their separation. Although I consider it unnecessary to descend into details in making my orders, the Farnells might also consider encouraging Pipah, in due course, to send cards to Gammy on his birthday or on culturally significant occasions.

545 I propose to make the order sought by the Independent Children's Lawyer and DCP requiring the Farnells to inform Mrs Chanbua if Pipah suffers from any serious medical condition. Apart from the fact that I would regard this as common decency, the fact that Mrs Chanbua is kept informed about aspects of Pipah's welfare could, in time, be a useful addition to the narrative I have discussed. I will also make, by consent, the order about Pipah celebrating Buddhist festivals and events.

**Should Pipah's name be changed?**

546 The Farnells want Pipah's family name to be changed to "Farnell". Mrs Chanbua said she would prefer the name to remain unchanged.

547 Mrs Chanbua's counsel made no submissions on the topic other than to note that his client had expressed opposition to the change of name in her oral evidence. This omission of counsel was unsurprising, as Mrs Chanbua's Papers for the Judge recorded that if Pipah remains in Australia, it would likely be appropriate for her name to be changed to Farnell.

548 The Independent Children's Lawyer argued that Pipah's name should be changed, although she invited the Farnells to consider whether it might be an acknowledgement of Mrs Chanbua's role if Pipah retained "Minjaroen" as a middle name. The ICL filed a minute seeking a formal order for Pipah's name to be changed to "Pipah Li Minjaroen Farnell". DCP sought the same order.

549 The Human Rights Commission submitted that "Pipah's right to preservation of her identity generally and in terms of her relationship with Gammy and [Mrs Chanbua] would likely be best served by not changing her name". It was argued that not changing Pipah's name would mean that she will "have the same name as at least one member of her family if she lives in Thailand". This was obviously a reference to Gammy, but there was no evidence of the family name by which Gammy will actually be known in everyday life in Thailand. In fact, in their letter of 5 October 2015 to the Farnells' solicitors, Mrs Chanbua's solicitors referred to the trust fund "established for the benefit of Gammy **Chanbua**". Mrs Chanbua changed her name within weeks of the birth of the twins, and it would therefore not be surprising if she intends for Gammy to be known by her new name.

550 The Human Rights Commission also submitted it was relevant to consider the negative associations of the Farnell name, given Mr Farnell's criminal history and the "notoriety of his involvement in Gammy being left in Thailand". Given that Pipah will be living with the Farnells, I consider she will be associated with such negativity

regardless of her name. However, the Farnell name is not of such notoriety in Western Australia that Pipah will automatically be associated with Mr Farnell, and in any event, it is not part of our culture for the sins of a father to be visited on the child. If anything, I anticipate that many Bunbury people will quietly go out of their way to welcome and nurture Pipah, precisely because of her background.

551 The Human Rights Commission provided a list of factors it submitted would be relevant to the name change. I accept they are matters that would properly be taken into account and I have done so, even though I have not addressed them specifically. Counsel for the Human Rights Commission also noted that it is now settled law that if the paramountcy principle is not decisive in name-change cases, it is relevant and must be given careful consideration.[125]

552 There is no doubt that the paramountcy principle would apply if a name-change order is properly characterised as a "parenting order". In *Reynolds & Sherman* [2015] FamCAFC 128, the Full Court of the Family Court of Australia expressed a tentative opinion that such orders fall within the broad terms of s 64B(2)(i) of the federal Act and are therefore "parenting orders". As I was a member of that bench, I maintain that view in dealing here with the equivalent provision in the State Act, namely s 84(2)(i).

553 If that view is correct, then it is necessary to consider all of the s 66C factors to the extent they are relevant to a name change. I have already referred to these, albeit in a different context. Having taken all of them into account, I have concluded that Pipah's best interests will be advanced by having the same name as Mr Farnell, who she will regard as her father (and noting that the name is also sometimes used by the woman she regards as her mother). As Mr Farnell said in his evidence, it will be easier for Pipah at school and other places if she has the same name as her carers.

554 Although the matter was not the subject of any submissions, in arriving at my decision, I have not overlooked what I perceive to be the policy imperative underlying s 74(2) of the Adoption Act, which relevantly provides:

> (2) Before making an order changing an adoptee's name, the Court is to have regard to —
>
> (aa) the principle that the adoptee's first name before the making of an adoption order should be included in the name by which the adoptee is to be known; and
>
> …
>
> (ca) the adoptee's relationships with his or her birth parents or any other person and the extent to which those relationships should be recognised in the name by which the adoptee is to be known; and
>
> (cb) the adoptee's cultural background and the principle that the name by which the adoptee is to be known should recognise that background…

[125] *Flanagan & Handcock* (2001) FLC 93-074 at [42].

555 I also note that the Surrogacy Act appears to place great importance on retaining a child's first name. Section 25 of that Act provides:

> **25. Name of child**
>
> (1) If a parentage order is made, the court is to, by the same order, declare the name by which the child whose parentage is transferred is to be known.
>
> (2) Before making an order changing the child's name, the court is to have regard to —
>
> (a) the principle that a child's first name should not be changed by a parentage order except in special circumstances…

556 Although neither the Adoption Act nor the Surrogacy Act apply to Pipah, I consider that, together, they can be seen as evincing an intention of the Parliament that it is desirable for the first name of a child not be changed unless there are special circumstances. Such an intention would accord with my apprehension that for a child, especially one as young as Pipah, their given name is of greatest importance. The orders I propose to make will ensure that Pipah retains the first name by which she has always been known.

557 Pipah will know of her association with Mrs Chanbua by what she is told by the Farnells, without having to carry a name that her birth mother changed within weeks of her birth. I do not see any advantage in complicating Pipah's life by adding "Minjaroen" as part of her name. This would see her, potentially for the rest of her life, being lumbered with a rather long, four-part name, which may invite unwanted questioning. As it is, she will routinely have to spell out "Pipah" and "Li", and possibly even "Farnell".

**Should a declaration be made that Mr Farnell is a "parent" of Pipah?**

558 The Farnells, with the support of the Human Rights Commission and the Independent Children's Lawyer, seek a declaration that Mr Farnell "is a parent of Pipah".

559 I have earlier found that the law does not recognise Mr Farnell as Pipah's father. Indeed, the Artificial Conception Act goes further in stating that it is to be "conclusively presumed" that he did not cause the pregnancy that led to the birth of Pipah. I therefore would have thought it self-evident that Mr Farnell could never be Pipah's "parent".[126] Any argument to the contrary must accept that, as a matter of law, a child can have more than two parents at the same time. Indeed, given the rate at which family constellations can form and dissolve, the argument that Mr Farnell could

[126] The converse would also be true. The Full Court of the Federal Court in *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 said at [66]: "We accept that, where a child is said to be a child of a person, then that person is ordinarily described as a parent of the child. Where Parliament states in an Act that a child is a child of a person, then, absent any contrary indication, it is reasonable to assume that Parliament intended that that person has the status of parent of the child, if that status is relevant for the operation of the Act."

be Pipah's "parent" must lead to acceptance of the proposition that a person can have multiple "parents" in their lifetime.[127]

560 In my view, these propositions are not only at odds with the common law, but are also inconsistent with both the State and federal Acts, which are drafted on the basis that a child can have only two parents.[128] For example, the first of the objects in s 66 of the State Act states that the best interests of children are met by "ensuring that children have the benefit of **both** of their parents having a meaningful involvement in their lives". The use of the expression "**both** of the child's parents" appears repeatedly throughout the legislation. When the legislation describes a person who is not a parent of a child, but who treats the child as a member of their family, it does so by describing that person as a "step-parent".[129]

561 In any event, I accept the Attorney General's submission that the Artificial Conception Act and the Surrogacy Act were introduced into State law

> to determine the parentage of children born as a result of [artificial conception procedures] and surrogacy arrangements and the determination of parentage in such circumstances should be limited to those governing provisions and not to general parentage provision such as those in s 162 of the [State Act].

562 Section 162 is the provision on which the Farnells rely in seeking a declaration, since the Act does not contain a provision equivalent to s 69VA of the federal Act, which provides:

> **69VA Declarations of parentage**
>
> As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.

563 Subsection 162(1) of the State Act provides a much more general power:

> **162. Orders relating to welfare of children — FLA s. 67ZC**
>
> (1) In addition to the jurisdiction that a court has under this Act in relation to children, a court also has jurisdiction to make orders relating to the welfare of children.

564 Crisford J drew attention in *Blake* to the absence of an express power under the State Act to grant a declaration of parentage when she said at [42]:

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[127] The fact that a person in Mr Farnell's position is defined by the Human Reproductive Technology Act as Pipah's "biological parent" does not assist his argument, since the definition of "biological parent" is provided only for the purposes of that Act and has no wider application.
[128] *Tobin v Tobin* (1999) FLC 92-848 at [44].
[129] See the definition in s 5 of the State Act, but note that an individual is not even entitled to the description of "step-parent" unless they are married to or the de facto partner of a parent of the child.

> There is no equivalent to s 69VA in the Family Court Act. The Court does, however, have a general power to make orders relating to the welfare of children. This might include a power to determine who the child's parents are.

565 Her Honour was here alluding to the possible relevance of s 162 of the State Act; however, her Honour did not discuss that possibility, and she did not make a declaration of parentage, as she found a different way to resolve the issue.

566 The Human Rights Commission submitted that I could make an order recognising Mr Farnell as Pipah's "parent" by reliance on s 162 of the State Act which, as counsel for the Commission noted, differs from the equivalent provision in the federal Act because it does not need to be read subject to the constraints of ss 75 and 76 of the Constitution.[130]

567 Counsel for the Attorney General, in responding to the submissions relating to the declaration of parentage, stressed the importance of appreciating the different statutory contexts when construing the State and federal Acts; however, she did so in the context of recommending that I exercise caution in attempting to apply any decisions under the federal Act on the topic of who is a "parent". As counsel for the Human Rights Commission demonstrated, there is a sharp divergence of judicial opinion on that topic, leading to "different outcomes between decisions and even different outcomes within the same family" in the rapidly growing number of surrogacy cases.[131]

568 Ultimately, it is unnecessary to seek to reconcile the decisions under the federal Act or to consider the breadth of operation of s 162 of the State Act. Whichever way the argument is framed, it always runs into the same difficulty – I cannot declare something to be the case when the law itself provides to the contrary.[132]

569 In arriving at my decision, I have not overlooked the Human Rights Commission's submission that "there are a number of rights arising under the Convention that are relevant to whether orders can and should be made as to who Pipah's biological and legal parents are". In support of this submission, attention was drawn to s 191(1) of the State Act, which deals with presumptions of parentage arising out of a finding made by a court. It was argued that if I declared Mr Farnell to be Pipah's parent, "this may have implications in other circumstances which are relevant to the human rights of [Pipah]". Even if I accepted the validity of all the submissions made by the Commission on this topic (which I do not), they would not be such as to authorise me to confer on Mr Farnell a status which the law expressly denies him.[133]

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[130] As to which see *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

[131] The decisions under the federal Act provide stark evidence of the amount of time that is taken up in dealing with surrogacy cases. As a head of jurisdiction, I trust that policy makers will consider this impost on judicial resources when deciding whether the floodgates of commercial surrogacy should be thrown open in Australia.

[132] *PJ v Director General, Department of Community Services* [1999] NSWSC 340 at [13]. There was no evidence about the law in Thailand relating to the legal status of Mr Farnell. Nor was it suggested that I adopt findings (which the Act permits) in other cases where it has been established that under Thai law, the donors of the gametes are not regarded as parents.

[133] One submission of the Commission which does cause me concern is the proposition that Mr Farnell would not be treated by the child support legislation as being liable for child support, absent a declaration of him being

570 I have also not overlooked the submission of the Independent Children's Lawyer that I should make a finding recognising Mr Farnell as Pipah's biological parent because of "the increasing importance of having access to one's medical history". It was submitted that "Pipah will benefit from having open and transparent information available to her" about the full circumstances relating to her conception. There is no substance in these submissions, since it is common ground that Mr Farnell provided the genetic material for the procedure that led to Pipah's birth. The Farnells can simply tell Pipah that Mr Farnell is her genetic father and, in due course, show her the DNA test if she has any doubts. Pipah will, however, remain forever ignorant of her full genetic inheritance, as her genetic mother is unknown.

571 Before passing from this topic, it is important that I comment on a submission made by counsel for the Attorney General in which she said:

> Section 36(2) of the [State Act] expressly states that the Family Court of Western Australia's non-federal jurisdiction to make parenting orders and orders in relation to the welfare of children, is subject to the Surrogacy Act. This suggests that the power of the Family Court to make parenting orders in surrogacy cases is limited to those powers contained in the Surrogacy Act.

572 This is an important submission, as it draws attention to the primacy of the Surrogacy Act. I agree with the submission, provided it is understood that counsel inadvertently used the term "parent**ing** orders" rather than "parent**age** orders" in the second sentence. The Surrogacy Act does not purport to regulate anything other than the transfer of "parentage". It is therefore open to the FCWA in surrogacy cases to make the full range of "parent**ing** orders" it can make in any other case involving a child within the court's jurisdiction.

**Should a formal finding be made that the Farnells did not abandon Gammy?**

573 The Farnells seek a finding that they did not abandon Gammy. Mrs Chanbua opposes the finding being made. Although no formal finding is sought about whether the Farnells asked Mrs Chanbua to have an abortion, I propose to consider that topic first, as it provides important context to what happened after the babies were born.

574 The Farnells asked for further testing when they learned in September 2013 that there was a "risk of Down's syndrome". They did not receive the results until 22 October 2013. In the meantime, although Mrs Chanbua was briefly hospitalised in mid-October, the Farnells were assured that "both babies are healthy" and "doing well". Although I accept that, while waiting for the results, the Farnells discussed the possibility of an abortion, it is highly unlikely they did anything to progress that other than making enquiries and speaking with Antonio about the possibility of an abortion. Perusal of the emails indicates that they were just hoping for the best.

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a parent. While I have not considered the issue carefully, my preliminary view is that the Commission's submission is well founded. If so, this may be an area requiring legislative reform, since Mr Farnell would also not fall within the "step-parent" provisions relating to child maintenance. However, see *W v G* (1996) 20 Fam LR 49 for a possible alternative, albeit somewhat convoluted, remedy.

575 On 22 October 2013, the Farnells received the following email from Antonio (emphasis added, errors in original):

> Dear David and Wendy,
>
> Yesterday, I received your surrogate mother's test results. The results are mixed news. Your baby girl is very healthy, but unfortunately your baby boy has Down Syndrome. We were so shocked because the chances have Down was so extremely low. No one knows the reason, not even the doctor.
>
> I spoke to several doctors in Bangkok and they all told me that no doctor in Thailand will do "Selective Reduction" at 23 weeks because it is too risky losing the healthy baby. **They left us with no choice but to deliver both babies.** Amber and I researched extensively on "Selective Reduction" and here in the U.S., it is very common procedure. They insert a needle into the baby that has Downs and it is aborted and the healthy one is untouched. However, in Thailand, this procedure is not as common due to technology and ethical beliefs.
>
> Amber and I know how sad this news must be. **Believe me, if it happened to us, we would want to abort the Down baby too. So please don't feel bad about that. Just think though that you have a healthy baby girl and you will want to keep her. What we are thinking is since Wendy has family in Guangzhou maybe she can find a doctor there in China that would be will to do "Selective Reduction."** I am sure there are doctors that would do it if you paid them enough money.
>
> I hate to leave you with little choices, but that is basically your only two options. Either to have both babies delivered in Thailand and accept that one has Downs or to take your surrogate mother to China for the selective reduction procedure.
>
> Please whatever you decide, you must act swiftly as time is running out and your babies are getting bigger every day.
>
> Let us know how we can help. …

576 Mr Farnell denied knowing about "selective reduction" until being told about it by Antonio. This would be consistent with Antonio explaining the details in his email; however, the email also can be read as suggesting that the Farnells had already raised the possibility of an abortion with him. Although the timing is unclear, Mrs Farnell acknowledged that she had made enquiries of a medical practitioner friend in China about "selective reduction". Whatever enquiries were made, and whenever they were made, it is clear that by the time the test results were confirmed, an abortion in Thailand was out of the question, and the Farnells never did anything to pursue the option of an abortion in China.

577 The Farnells insist, and I accept their evidence, that they never asked for Mrs Chanbua to have an abortion. Mr Farnell said that they thought such a late

abortion would have been "morally wrong", although they would have opted for one if the results were known earlier. I note that Mrs Chanbua gave evidence that, in October 2013, Antonio told her he was pleased she had not had an abortion.

578 Mrs Chanbua was accompanied to her medical appointments by Joy. When the final results became available, Joy heard the advice from Mrs Chanbua's doctor that selective reduction was not available in Thailand at such an advanced stage in the pregnancy. However, although the evidence is unclear, it seems likely that the option of an abortion had been discussed with Mrs Chanbua while the results were being awaited. There was also a discussion at some point in which Mrs Chanbua was told that she would face many problems (health and financial) if she kept both babies, assuming the baby boy survived at all.

579 Mr Chanbua gave evidence that he was party to a conversation in which he heard Joy say to Mrs Chanbua, "Take one out. Just give abortion to one baby and leave one in the womb". He claimed this occurred at a hospital in Bangkok when Mrs Chanbua was about seven months pregnant.[134] Mrs Chanbua was hospitalised in Bangkok on 16 October 2013 because, according to an email from Antonio, her "immune" was low at the time. It is improbable that Joy would have been suggesting at this point that they "take one out", as the results of the test were still being awaited and the babies were reported by Antonio as being "healthy" at the time.

580 Mrs Chanbua and Joy would have been at the hospital again shortly after, when the test results became available. Although an abortion was discussed at this time, it seems improbable that Joy would have been giving instructions about what should occur, since the Farnells presumably did not learn of the results before Mrs Chanbua was told. Furthermore, the medical advice at the time was that selective reduction was not available in Thailand.

581 Communications between the Farnells and Thailand Surrogacy were mainly conducted by Antonio. Joy did not speak to the Farnells about any views they had about an abortion. Although I am not convinced that I have been told all that passed between Antonio and the Farnells, Joy's evidence was that she was never told that the Farnells wanted an abortion. She was therefore insistent that she did not tell Mrs Chanbua that the Farnells wanted an abortion. As Joy was a witness whose evidence I was inclined to accept, I find it more likely than not that she and Mrs Chanbua merely discussed the options. In an email of 11 August 2014 responding to a series of questions from Mr Farnell, Joy wrote:

> [Mrs Chanbua has] been telling the media about abortion. I said [to Mrs Chanbua] that we were just discussing about each option because the parent [sic] didn't seem to take this news very well. Attached Thai newspaper stated that a doctor told her to get abortion without tell [sic] her why. So she decided to take the boy, and the parents would take the girl.

582 I accept the possibly that Joy's recollection may not be complete. The Farnells were very angry after the test results became known. Mr Farnell later told an

[134] Mrs Chanbua also repeatedly said in her evidence that she was about seven months pregnant when the abortion was being discussed. However, she must have been confused, since she also said she was seven months pregnant in October 2013, when in fact she was only seven months pregnant when she gave birth in December.

interviewer from *60 Minutes* that he had demanded his money back from Thailand Surrogacy.[135] The Farnells were shattered and exhausted at the time of the interview, having had virtually no sleep for days while they were being hounded by the media. Mr Farnell was at times almost incoherent in the interview, and Mrs Farnell was not as fluent as she now is (no doubt her fluency was also impaired by her exhaustion). The Farnells therefore did not clearly explain why they were so angry with Thailand Surrogacy; however, they had become disillusioned for a number of reasons, one being that they had paid for proper medical care for Mrs Chanbua and taken a keen interest in her welfare. The Farnells believed that had routine testing been carried out earlier, they would have been able to consider all the options, including an abortion. The demand for a refund also stands to be considered in light of the fact that, at the time, they did not have a written agreement with Mrs Chanbua, even though Antonio had promised in August 2013 that it would be obtained and sent to them "soon".

583 Mr Farnell was still angry about the conduct of Thailand Surrogacy when he was being interviewed on *60 Minutes*. It is therefore not difficult to imagine that he exchanged strong words with Antonio when the second test results were being awaited and when they became known. I therefore accept it is possible that, in the heat of the moment, Mr Farnell told Antonio that they were going to pull out on the arrangement altogether or that they wanted Mrs Chanbua to have an abortion. It is therefore possible that Joy became aware of this, and let it be known to Mrs Chanbua.

584 Whatever may have been said, I accept that Mrs Chanbua gained the impression that the Farnells wanted her to have an abortion and that they did not want the boy. In fact, Mrs Chanbua went further in her oral evidence and claimed that the first time Joy called her on the telephone, she was told that the Farnells did not want either child; but a week later, she says she was told the Farnells were prepared to take the girl. Mrs Chanbua also gave evidence of being told around this time that the Farnells would put Gammy in an institution if they were obliged to take him to Australia. Again, I am inclined to accept Joy's evidence that this was not said, although I accept it is possible that mention was made that Gammy's condition might be such that he might require care in an institution, whether in Thailand or Australia.

585 Although it is clear that Antonio did not inform the Farnells when he learned that Mrs Chanbua had admitted faking her name and age, it is less clear whether the Farnells were aware of Mrs Chanbua's ambivalence about allowing them to take Gammy until after the babies were born. Mr Farnell's remarks on *60 Minutes* strongly suggest that he and his wife already knew before the birth that Mrs Chanbua was thinking about keeping Gammy. His remarks also suggested some ambivalence about whether they would want both children, as they were adopting a wait and see approach.[136]

[135] Mr Farnell could not remember saying this when he gave evidence. His recollection was that he may have asked Thailand Surrogacy to assist by paying some of the medical bills they were incurring.

[136] This would not be surprising if they had learned there was some doubt whether they would be allowed to take both children. Mr Farnell also told *60 Minutes* that Down syndrome children have varying degrees of disability. The context in which he volunteered this observation led me to infer that it was at least possible that the Farnells felt that their position on agreeing to allow Mrs Chanbua to keep Gammy could differ depending upon his condition (and, of course, on whether he survived at all, which was in doubt).

586 Although the Farnells did not tell their entire family they were expecting twins, they did tell Mr Farnell's children and his mother, as well as Mrs Farnell's family in China. They also told at least some of these people that one of the twins had Down syndrome. They never suggested to their family that they proposed to keep only the female baby, and they say that they thereafter continued to equip their home in readiness for the arrival of two children.[137]

587 I am not persuaded that the Farnells abandoned Gammy. To accept that proposition would involve the rejection not only of their evidence, but more importantly the evidence of Joy, who was convincing in asserting that the Farnells were very upset when she told them about not being able to take Gammy. I accept Joy's evidence that the Farnells cried and asked her to speak with Mrs Chanbua to convince her to give them both children. I accept that Joy told the Farnells that Mrs Chanbua "had all the power in this situation, and that if she wanted to keep one or both of the children, she may well be able to". As Gammy was still very sick, Joy suggested to the Farnells that they should "focus on Pipah first".

588 The proposition that the Farnells intended to abandon Gammy is also inconsistent with the email Mr Farnell sent to Jane Farnell on 31 December 2013 and her response. Mr Farnell's email was in the following terms (errors in the original):

> Hi Jane,
>
> First chance to sit down and relax, we have been rushing ever since we arrived.
>
> Well the boy is still in a very serious condition, we spoke to the doctor today and he did not give us much hope, they have given him medicine to help him develop his lungs and heart, but his blood pressure is still very low. It was very sad to see him like this as we still don't know what will happen.
>
> The little girl is going well, she has also had so medicines to help with her lungs, the nurse,s are very nice and let Wendy hold her tiny hand today. They are both still in the incubator with oxygen but the little girl is breathing by her self now.[138]
>
> We have been to see the apartment, so on Thursday we will move in, then we will be closer to the hospital, at the moment we are on the other side of Bangkok because they moved the twins to a different hospital to the original one we were told.
>
> We will keep you up-to-date as often as we can, the next few days our holidays here so not much will happen until Friday.

[137] I accept that duplicates of many necessary baby items were acquired, but there was no documentary evidence to indicate that any of the duplicates were purchased after the test results became known. However, Jane Farnell's evidence was clear that duplicate items were purchased after it was known one of the children had Down syndrome.

[138] The fact that Mrs Farnell held Pipah's hand and not Gammy's is consistent with the fact that Pipah was in much better health than Gammy, who still required help with his breathing.

We tried to take a picture but were told we can not.

OK, Jane look after your self and we will be in contact soon.

Love from Wendy and Dad…

589 Jane Farnell's response of 5 January 2014 was in the following terms (errors in the original):

Hi dad!!!

Sorry it's taken me so long to reply, we had lost all communications in the storm…

I hope your closer to the hospital now!?

That's so sweet that Wendy got to hold her hand! I can only imagine how mixed up all your emotions are right now!…

Is there any more news?

Nothing too much has probably changed… I just hope he is not getting worse?

…

My hopes and prayers are with all four of you right now!

Love you all so much!...

590 In my view, these two emails are redolent of a family hoping for a future together with both children, and hoping and praying that the little boy would survive. In my view, the emails are entirely inconsistent with any suggestion that the Farnells were disinterested in the boy's welfare, had any intention of leaving him behind in Thailand if he survived, or were thinking of putting him in an institution.

591 Mr Farnell again wrote to Jane on 10 January 2014, in the following terms (errors in the original, emphasis added):

Hi Jane,

I guess you can say that it's human nature to put off talking about bad news.

**We have had to say goodbye to our little, little boy**.

I am trying to write this to you with a box of tissues by my side so it is taking a long time.

The doctors here have done all they can, even if we were back in Australia the out come would be the same. The hospital is also a training hospital so it is a bit like ER on the TV, a doctor they call the professor is followed

around by a lot of the student doctors. We have bought a local SIM card for the phone so the students can keep in contact with us. **Wendy and I have been told about this for about four months now so we should be prepared for this but we still live in hope.**

It has been very sad to see them both in ICU with all the tubes and wires attached to them, **It just reminded me of when Josh was born**. The little boy just never developed like the little girl, the reason for this the doctor say is maybe the embryo was damaged during freezing or during the IVF process or maybe the quality of Wendy's egg wasn't good, who knows this is still not an exact science. I am reminded of some words I once read "Our eyes have rained a flood of tears but if it wasn't for our soul to know sadness then how would we know what happiness is"

I can explain more when I come home, it is hard to try to write about all of this, I really can not think to much at the moment as I have crashed big time. I been sick for a few days now, Wendy has been the strong one. I guess we all know who is the strongest sex. She is at the hospital now with our little girl while I am trying to write this message.

OK, time to dry the eyes and talk about your little sister. She is so beautiful!! Her name is Pipah Li Farnell, born at 10:43 PM on 23-12-2013, birthweight 1900 g. her body weight dropped to just below 1480 g as she had a few complications with the lungs and had a low blood cell count so needed a blood transfusion.

Now she is out of ICU and out of the incubator, she breathing well and gaining weight every day.

Yesterday the nurses let Wendy try to feed her with a bottle, she managed to suck about half of it then fell asleep, she was exhausted! The doctors say that she keeps improving at the rate she is she should be able to leave the hospital in about 1 or 2 more weeks, then we can start the immigration process…

Love you all heaps, Wendy sends her love, and can you please let Josh know and also Ben and Meagan, and if possible if you go down to Bunbury can you drop in to Nan and Pop and give them an update. We never mentioned to Ross and Yuhzi about having twins because we did not want to go in to long explanations so if you can remember try not to say anything to them. Just say we have a beautiful daughter who defiantly looks like a Farnell but with Wendy's nose and eyes.[139]

…

592 In my view, there are two likely explanations for Mr Farnell sending this email.

[139] Josh and Ben are Mr Farnell's sons and Meagan is his daughter in law. Ross and Yuzhi are Mr Farnell's brother and sister-in-law.

593 The explanation which I consider to be more probable is that, by 10 January 2014, the Farnells knew Mrs Chanbua would be unlikely to allow them to take Gammy. Realising they would be coming home with only one of the twins, the Farnells decided to inform their family that the other twin had died so as to provide an explanation for why they were coming home with only one child. The email provides evidence of the Farnells' preparedness to mislead their family, as it maintains the fiction that Mrs Farnell's eggs were used. Just as they anticipated that no one would ever find out that this story was untrue, they would also have anticipated that no one would find out that Gammy had not died.

594 The second possible explanation is that Mr Farnell did believe on that day that Gammy had died. Gammy **was** extremely ill and all parties had been informed there was a possibility he would die. The Farnells claim that they thought Gammy had died because they had seen him being wheeled away on a trolley, and could not find out what was happening because the staff present did not speak English. In effect, they wanted me to infer that they had decided not to wait for some form of official confirmation that Gammy had died before writing to suggest to their family he was dead. This seems improbable. Furthermore, while I accept that the staff on hand at the time Gammy was wheeled away may not have spoken English, the email of 10 January 2014 implies that the Farnells were able to communicate with some of the medical students in English. It is also highly significant that the Farnells saw Gammy alive on the day after Mr Farnell sent his email, but he did not thereafter advise his family of the good news that the boy had survived.

595 The fact the Farnells probably intentionally misled their family about what had happened to Gammy does not, in my view, provide support for the proposition that they abandoned him. In coming to this view, I have not overlooked the possibility that the email of 31 December 2013 was part of a larger hoax by which the Farnells had decided before leaving Australia that they would not be bringing back Gammy, but had kept this a secret from their family. Considering all of the evidence, I am not persuaded of the existence of such an elaborate scheme.

596 I have earlier discussed why the Farnells maintained their deception of their family when they returned to Bunbury. I also accept Mr Farnell's evidence that even after they brought Pipah into Australia they did not feel she was "safe". They knew Gammy was still alive and they knew they had concealed his existence from the Australian Embassy. They also knew that Mrs Chanbua had lied about her name and age. It is understandable in these circumstances that they were fearful about "officials coming to take [Pipah] back to Thailand". It is also understandable why they were not frank even with their relatives about what had transpired, and why they attempted to keep under the radar. As Mr Farnell said in his evidence, "We were confused. She didn't have our name. She's ours but she's not ours".

597 During oral argument, counsel for the Independent Children's Lawyer drew attention to disparities in the evidence of Mrs Chanbua about whether the Farnells had abandoned Gammy, although in her closing written submissions the ICL had said:

> His Honour is being asked to make a finding with respect to Gammy being left in Thailand. If they receive a finding in their favour, it is likely to provide Mr Farnell and [Mrs Farnell] with some sense of exoneration

> having regard to the vilification they have been subject to by the media. If a negative finding is made against them, it may raise questions about Mr Farnell and [Mrs Farnell's] personal character. Irrespective of whatever finding His Honour makes about this issue, if any, the Independent Children's Lawyer does not consider that this will significantly advance matters for Pipah.

598 I disagree that my findings on this issue will not "significantly advance matters for Pipah". My rejection of the proposition arises, in part, from the possibility that my judgment will be widely published (a prospect that was not so clear when the ICL made her submission). The Farnells have been vilified in the media relating not only to the separation of the twins, but also in relation to them endeavouring to access Gammy's trust fund. Such vilification can only have further damaged their reputation, and has the potential to impact adversely on Pipah. I consider it would be better for Pipah if those who are caring for her, and who she will regard as her parents, are held in higher esteem in the local community.

599 It is not only unfair but also emotionally debilitating for Mr and Mrs Farnell to be thought of as people who deliberately caused twins to be separated, and then tried to get their hands on money donated for the benefit of the twin they allegedly left behind. In my view, it is likely that a positive finding by the court that they have been falsely accused of these things will lead to an improvement in their own emotional health and thus an improvement in their capacity to care for Pipah. In saying this, I recognise that a proportion of the community will be likely to continue to shun them because of Mr Farnell's record.

600 For these reasons, I find that the Farnells did not abandon Gammy.[140]

**Should a formal finding be made that the Farnells did not try to access Gammy's funds?**

601 The Farnells seek a finding that they "did not apply for funds from Hands Across the Water". In opposing such a finding, Mrs Chanbua's counsel argued that the relevance of the issue

> is unclear but is at best tangential ... At worst, it is an attempt to obtain a finding for an unstated collateral purpose ... In any event, such a finding is not supported by the evidence. [Mr Farnell] repeatedly declined to disclose relevant information with his solicitors.

602 This part of the dispute has its origins in one of the meetings that counsel routinely held prior to the many interlocutory hearings with a view to narrowing issues and reaching agreements. Given the number of counsel involved, the logistics must have been difficult, but I was most grateful to all of them for saving the court so much time, and their conduct serves as an example to others.

[140] In arriving at my decision, I have not overlooked the fact that the Farnells did nothing after returning to Australia to secure the reunification of the twins. Although counsel for Mrs Chanbua sought to place weight on this fact, the reality is that the Farnells felt grateful that they at least had Pipah, and they had no reason to believe that Mrs Chanbua would have changed her mind about keeping Gammy.

603 Following one meeting on 22 April 2015, Mrs Chanbua's solicitor wrote to Peter Baines of Hands Across the Water, to report on the outcome. She advised that the Farnells' lawyer had raised an issue about "the nature and extent of the Trust established for Gammy's care – and in particular whether that could be called upon to meet ongoing costs relating to the proceedings". The solicitor advised Mr Baines that she would:

> be very strongly opposed to allowing the funds to be used for these proceedings and unless directed by the court, I don't see circumstances that would lead to this. These proceedings were not instigated by Gammy nor [Mrs Chanbua] and are well outside the ambit I would suggest that the funds were first donated for and I believe my responsibility is to the appropriate distribution of the funds for Gammy's health care.

604 One of the issues for determination by me on the following day was whether the parties could afford to meet any of the costs of the Single Expert's report and some of the costs of the Independent Children's Lawyer. Such matters are commonly considered, as it is expected that parties will make a contribution if they have the capacity to do so. In order to obtain information about the financial position of the parties, I made an order for an affidavit to be filed by the "Trustee of the fund believed to exist for the benefit of the child, Gammy". Apart from any other consideration, details relating to Mrs Chanbua's financial position might have been relevant to her capacity to care for both children if she were successful in her application.

605 On 23 April 2015, Mrs Chanbua's solicitor reported to Mr Baines on the outcome of the hearing. Her email started out appropriately by advising on the content of the affidavit that would be required to comply with my order. However, the email continued (emphasis added, errors in the original):

> There are two aspects to the issue.
>
> The first is whether the funds held on behalf of Gammy should be utilised for the Family Court proceedings – my view is that the Court would say that is offensive to public policy and likely to be offensive to the terms of the charity.
>
> The second is slightly more relevant and relates to [Mrs Chanbua's] financial position and how she will care for Pipah (and whether she can afford to do so) if Pipah is returned to her care.
>
> …
>
> This is simply an exercise to shut down **a rather strong proposal from the Farnell's that somehow funds for the benefit of Gammy should be used to meet the welfare needs of Pipah** (I won't even start on the issue of the morality of such a sentiment but you can be assured that I have a real concern about a suggestion that money donated to care for a child that on [Mrs Chanbua's] case was rejected by the Farnell's should be applied to

> proceedings where one of the possible outcomes is that the child they wanted to retain should live with them!!).[141]

606 Mr Baines responded by saying, "I was left a little gob smacked at the content". Nevertheless, he said he would provide the information required for the affidavit.

607 Mrs Chanbua's solicitor replied by email on 24 April 2015 (errors in original):

> Yes, I was a bit gobsmacked that I did not receive a little more support from the other parties as to the issue when we were discussing before Court.
>
> To be frank the issue arose because:
>
> - The funding available for the Independent Children's Lawyer is very restricted – the Legal Aid Authority that manages the funding has very strict guidelines as to funding (and the only reason they are involved in this case is that the Chief Judge of our Court has directed that they be), and as a general rule expects the parties to the proceedings to fund any reports;
>
> - The Farnell's are saying they have no money, partly because of the publicity surrounding this case – every time there is a media report Mr Farnell says he loses more work (this is in direct contradiction to his own sworn evidence that he is a successful small businessman) and their lawyers say this is a direct result of [Mrs Chanbua's] behaviour in the media (I have responded on each occasion by saying that the whole issue arose because of decisions the Farnell's made over the course of 2013)
>
> - The Court has to be satisfied as to the potential sources of funding for the proceedings and that includes any resources available to [Mrs Chanbua]
>
> - The easiest way for this to be resolved is for evidence to be given as to the "trust" and the use to which the funds can be put.

608 It will be noted that in this email, there was no repetition of the suggestion that the Farnells were seeking funds "to meet the welfare needs of Pipah".

609 On 18 May 2015, Mr Baines was contacted by a journalist advising that Fairfax Media had learned that "there may be an attempt by David Farnell to gain access to the money raised by Hands Across the Water for baby Gammy". The journalist advised that an article was to be published and asked Mr Baines to respond to some questions, which he did. No indication was given of the source of the information.

[141] I was originally given a redacted copy of the email. Counsel for Mrs Chanbua advised me that his instructing solicitor wanted the email redacted because she recognised her language had been a "tad emotional".

610 On 19 May 2015, Mr Baines issued a media statement, in which he advised that his organisation had "no information as to the justification the Farnells, or their legal team, are making to support the application for access to the funds". With respect to Mr Baines, this statement was not correct. There was no "application for access to the funds", but rather a request for information. More importantly, the email from Mrs Chanbua's solicitors of 24 April 2015 contained clear advice to Mr Baines as to why it was appropriate for Mrs Chanbua's finances to be explored. At that point, there was no information available concerning the details of the $234,000 that had been donated for the benefit of Mrs Chanbua and her family.

611 In any event, the story that was then disseminated showed the Farnells in a poor light. The Sydney Morning Herald headline read, "Baby Gammy's father trying to access donations, charity claims". The story itself opened with the assertion that:

> The charity set up to support baby Gammy, the Thai infant at the centre of an international surrogacy battle, claims his Australian biological father is now seeking to access more than $235,000 in funds it has collected.
>
> …
>
> …Gammy's biological father, convicted sex offender David Farnell and his wife Wendy Li, who left Gammy in Thailand because he has Down syndrome, want access to the money, the Charity has confirmed.

612 The article continued, "Fairfax Media understands the Farnells may be seeking to access the money to assist in funding their legal costs". There has never been any suggestion that the Farnells sought to access the trust funds to pay their legal costs.

613 The story also ran in other media. For example, the ABC headline said, "Baby Gammy: Biological father David Farnell tries to access donations raised for child's medical costs". The story noted that Gammy's mother "depends on the money donated to charity to cover his medical costs". It quoted Mr Baines as saying:

> It's perplexing. I don't understand it on any level … The funds were donated by everyone because of the alleged actions of Mr Farnell, and to think he believes he has some right of claim over it … I find it perplexing … I certainly don't think [the funds] were donated by anyone thinking that Mr Farnell would at some point have access to them, and we'll do all we can to prevent that.

614 Mrs Chanbua was quoted as asking if Mr Farnell had (emphasis added):

> **gone insane to think like this** … He does not deserve or have any rights to the fund as he abandoned Gammy in the first place … I want to ask him 'Who do you think you are? What made you think you have the right to take it?'

615 SBS News also ran the story online.[142] It opened its article with:

> A man who abandoned his baby son in Thailand after it was revealed he had Down syndrome has allegedly tried to access donations raised for the infant's medical costs. David Farnell and his wife Wendy Li made international headlines last year after they left their baby son Gammy in Thailand with his surrogate mother … The couple returned to Australia with Gammy's twin sister, who did not have the condition.

616 The Brisbane Courier-Mail, Sydney Daily Telegraph and the West Australian all ran the headline, "Gammy's dad in legal bid for charity cash". The story said that:

> Gammy made international headlines last year when West Australian couple Wendy Li and David Farnell left him in Thailand with his surrogate mother but took home his healthy twin sister, Pipah.
>
> …
>
> Premier Colin Barnett said he was surprised to hear the Farnells were trying to access the money but did not think they would be successful.

617 Journalists began pulling up outside the Farnells' home and parking on their front lawn from 6.30 am on 19 May 2015. By 7.45 am, they had started knocking on the door and ringing the doorbell. By 9.00 am, there were nine cars outside the house, and the Farnells had received 30 to 40 calls from media organisations.

618 Mr Farnell's affidavit continued describing the events of the day:

> Between 9.00am and 2.00pm journalists continued to knock on our door, ring our doorbell and yell things at us and call our phones with a view to speaking with us about the allegations. For example, a journalist yelled "Mr Farnell, why are you trying to steal money from the charity that is looking after your baby that you abandoned?"
>
> By 6:40pm the journalists left for the day but Wenyu and I continued to receive calls until around 9.00pm.
>
> I was meant to go work that day but I feared that if I left the confines of my home I would be harassed by the media. I needed to work after suffering a downturn in work.
>
> …
>
> [On the next day journalists] arrived at around 6.30am to set up their cameras and spotlights so that they pointed at our house again;

[142] I am unaware of the extent to which the story was broadcast on television and radio. There was reference in an affidavit of Mr Farnell to the ICL proposing "to provide to the Court a copy of a news story from Channel 9 … which refers to me allegedly trying to 'get hold of' money … raised for Gammy's care".

> We were woken up by the sounds of knocking on our front door and our door bell ringing;
>
> Wenyu and I were both distressed and I heard Jane calling the police to have the journalists removed;
>
> The police arrived at around 7.30am.
>
> By this time our front lawn was covered in journalists;
>
> …
>
> Wenyu was meant to take Pipah to swimming and playgroup but she did not do so out of fear of the media.
>
> …
>
> I am a self-employed electrician. As a result of the media interest in these proceedings I have lost business. For example I have been told by contractors that they were not allowed to provide me with work because they did not want be on site, and were worried that the media would approach work sites.
>
> I had begun to receive more business, particularly from real estate agencies. However since the 19 May 2015, I have not received any business from real estate agencies.[143]
>
> The media frenzy has also been emotionally traumatic for both Wenyu and I and I have sought counselling to deal with the impact of the false allegations in the media that I have tried to access funds from Hands Across the Water.

619 The Farnells' then solicitors wrote to Mrs Chanbua's solicitors on 19 May 2015 asserting that (original emphasis):

> It is disgraceful and completely inappropriate that Mr Peter Baines of Hands Across the Water has made untrue and embellished statements to various media outlets that stem from the Order of the Court requiring him to file an Affidavit as to the circumstances in relation to the charity fund set up for Gammy … The statements which have been made to the media are not only false; they are also destructive and defamatory … Our client is **not** attempting to take funds from Hands Across the Water.

620 There is no suggestion that any attempt was made by Mr Baines or by Mrs Chanbua's solicitors to correct the record after publication of these stories.

621 On 29 September 2015, the Farnells' new solicitors wrote to Mr Baines drawing attention to his media statement and a radio interview in which he participated on 19 May 2015. The letter asked Mr Baines to advise "what led you to believe that our

[143] The affidavit in which Mr Farnell was deposing to these events was sworn on 3 November 2015.

client Mr Farnell was trying to get access to Hands Across the Water Funds". On 5 October 2015, Mrs Chanbua's solicitors responded drawing attention to what they claimed had been said at the conference on 22 April 2015. It was claimed that:

> During those discussions … issues were raised by your client's then legal representatives as to the nature and extent of the Trust established for the benefit of Gammy Chanbua … The position taken by your client's previous solicitors was that any funds that might be available through the Trust established for Gammy's care could be a source of funds for the payment for some of the disbursements in this matter, namely Independent Children's Lawyer and Single Expert Report ... The position taken by the Independent Children's Lawyer was that the existence or otherwise of the Trust and the payments was relevant as it related to our client's capacity to care for Pipah in the event there was a change of care.

622 On 14 October 2015, the Independent Children's Lawyer wrote to Mrs Chanbua's solicitors asking "whether Mr Baines or any employee of Hands Across the Water, has had a direct request from [the Farnells] or any agent or representative acting on their behalf, seeking access to the Trust monies set aside for Gammy, and if so, whether he could provide information about the nature of the request". On 22 October 2015, Mrs Chanbua's solicitors responded and confirmed that there had been no such direct contact.

623 I consider it probable that Mr Farnell was truthful in asserting he did not instruct his former solicitor to make any request for money from the trust fund for any purpose, including meeting costs associated with the expert report and the ICL. Given the multitude of issues that had to be dealt with in the interlocutory stages, I would not find it surprising if Mr Farnell's solicitor, without seeking instructions, raised the possibility of Mrs Chanbua meeting **her share** of the costs of the Single Expert and the ICL from monies to which she might have access. The Farnells did not attend the meeting where the issue was discussed, and I accept that they left such matters in the hands of their solicitors.

624 I am convinced that Mr Farnell did not request that funds be made available to meet the "welfare needs of Pipah", and there is no evidence to suggest that such a request was made on his behalf at the informal meeting. I consider that, in a momentary lapse in concentration/judgment, in an emotionally charged dispute, Mrs Chanbua's pro bono solicitor led Mr Baines to believe that the Farnells were seeking more than they actually were.

625 For the same reasons I considered it was in Pipah's interests to make a finding about the abandonment of Gammy, I also make a formal finding that the Farnells did not seek to access Gammy's trust fund in order to meet Pipah's welfare needs. I also find that the Farnells did not make an application to the court seeking such an outcome. At the very most, it may have been suggested that Mrs Chanbua might be able to meet her share of the costs of the Single Expert and the ICL from monies to which it was reasonable to believe at the time that she might have access.

**Should orders be made relating to the registration of Pipah's birth?**

626 The Farnells seek an order in the following terms:

> An order that the Family Court of Western Australia has approved Pipah's name to be changed to "Pipah Li Farnell" and that the applicants may apply to the Registrar of Births, Marriages and Deaths to register her change of name pursuant to s 33 of the Births, Marriages and Deaths Registration Act 1998 (WA) [sic].

627 The Independent Children's Lawyer and DCP seek an order that the Registrar of Births, Deaths and Marriages ("the Registrar") be requested to amend Pipah's birth certificate to show her name as "Pipah Li Minjaroen Farnell".

628 Pipah's birth has not yet been registered in Western Australia, because the Registrar properly refused to register her birth when the Farnells requested him to do so. I therefore accept the submission of the Attorney General that the outcome proposed by DCP and the ICL cannot be achieved until the birth is registered here.

629 Section 13(5) of the Births, Deaths and Marriages Act provides that "if a child is born outside the Commonwealth, but the child is to become … a resident of the State, the birth may be registered under this Act". However, as counsel for the Attorney General pointed out, the Farnells cannot register the birth because registration is the responsibility of "parents" and the Farnells are not Pipah's parents.

630 Nevertheless, s 20 of the Act provides that a State court may, on the application of an interested person, order the Registrar to register a birth or "include or correct registrable information about a birth or a child's parents in the Register". In addition, pursuant to s 22(5), if the FCWA has resolved a dispute about a child's name, the Registrar must assign the child's name in accordance with the order of the court. Furthermore, s 33 permits any person to apply to change a child's name if the change has been approved by the FCWA, and obliges the Registrar to register the change. I therefore accept the Attorney General's submission that I have power to order the Registrar to register Pipah's birth, and power to approve changes to her name which the Registrar is then required to register.

631 The next issue is what details should be shown on the Register. Section 17 of the Births, Deaths and Marriages Act provides that the Registrar is to register a birth by making an entry in the relevant Register "including such particulars as the Registrar considers appropriate to register the birth". Section 18 provides that the Registrar is not to include certain information in the Register about the identity of a child's parents unless one of a number of conditions is satisfied. One condition is if "a State court orders the inclusion of registrable information about the identity in the Register or makes a finding that a particular person is a parent of a child".

632 I accept the Attorney General's submission that the only persons who should be noted as Pipah's parents on the Register are Mr and Mrs Chanbua, who I have found to be her parents for the purposes of Western Australian law.[144] However, s 49 of the Births, Deaths and Marriages Act provides that in addition to containing "the

[144] *Re Births, Deaths and Marriages Registration Act 1997* (2000) FLC 93-021.

particulars of each registrable event", the Register can contain "further information if its inclusion is considered appropriate by the Registrar". Although the matter has not been the subject of submissions, as presently advised, I consider that my power to direct the Registrar is limited to directions in relation to the inclusion of information about the identity of the child's parents and concerning the child's name. However, in the unusual circumstances of this case, it may be in Pipah's best interests for the registration to make some reference to the legal authority pursuant to which she is under the care of the Farnells. I would therefore invite the Registrar to consider whether it is appropriate to include a notation on the Register to the effect that an order has been made under the State Act conferring parental responsibility on the Farnells.

633 I do not accept the submission of Mrs Chanbua's counsel that the Farnells should be required to seek the cooperation of the authorities in Thailand in relation to issues associated with the registration of Pipah's birth. Quite apart from the logistical difficulties likely to be encountered, Pipah is entitled to have her birth registered here pursuant to the Births, Deaths and Marriages Act, as she is a resident of this State and her birth has not been registered under a "corresponding law" within the meaning of s 13(6) of the Births, Deaths and Marriages Act.[145]

634 If I correctly understood another submission of Mrs Chanbua's counsel, he proposes that if Pipah's birth is registered in Western Australia, then I should order that Gammy's birth should also be registered here. I am unable to make such an order, as the capacity to register the birth of a child born outside the Commonwealth is limited to children who will be resident within the State.

635 Counsel for Mrs Chanbua was concerned that the information contained on Pipah's registration of birth in Western Australia would be in conflict with the information on Gammy's birth certificate in Thailand. I have found that Mr and Mrs Chanbua are Pipah's parents under Western Australian law, so there will be no conflict, aside from the fact that the Western Australian certificate will identify Mr Chanbua as Pipah's legal father.

## Part 11: Resolution of the Children and Community Services Act issues

636 I turn next to deal with issues arising under the CCS Act.

### The orders sought by DCP

637 DCP intervened in the proceedings in October 2014, pursuant to s 207(2) of the State Act, seeking a "protection order (supervision)" for a period of one year.

638 On 23 October 2015, DCP filed its proposal as required by s 143 of the CCS Act. Section 144 of the Act requires me to consider DCP's proposal before making a protection order. The proposal contemplates DCP's ongoing involvement, by way of review and liaison with members of the safety network, beyond the conclusion of the proposed one-year period.

[145] Section 4 of the Births, Deaths and Marriages Act defines "corresponding law" as "a law of another State that provides for the registration of births, deaths and marriages".

639 On 2 November 2015, DCP filed an amended minute in which it maintained its application for the protection order to be for a period of one year. However, after the Independent Children's Lawyer filed her minute on 24 November 2015 seeking that the protection order be for two years, DCP revised its position. It now joins the ICL in seeking that the order be for two years.

640 The orders finally proposed by DCP were contained in a further amended minute filed on 3 December 2015. The ICL joined in seeking those orders, save for one minor difference. The orders proposed are attached as Appendix 2. The additional words the ICL wants to have included are in square brackets and italicised in paragraph F.2.

641 The ICL's concurrence with the orders sought by DCP was subject to a protection order being made. If I did not make such an order, the ICL proposed that orders be made in terms of her minute filed on 24 November 2015, a copy of which is attached as Appendix 3.[146]

**The relevant provisions of the *Children and Community Services Act***

642 The CCS Act governs the extent to which the executive and judicial arms of government can intervene in the lives of families in order to protect children from abuse and neglect.

643 Section 6 provides that the objects of the Act are:

> (a) to promote the wellbeing of children, other individuals, families and communities; and
>
> (b) to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and
>
> (c) to encourage and support parents, families and communities in carrying out that role; and
>
> (da) … ; and
>
> (d) to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care; …

644 Section 7 provides that the court must regard the best interests of the child as the paramount consideration when exercising any power under the CCS Act. Accordingly, any adverse consequences to the Farnells arising from a protection order will be outweighed by Pipah's best interests if "there is a clear overall conflict between them": *J v Lieschke* (1987) 162 CLR 447 at 462–463 per Deane J.

[146] Appendices 2 and 3 can be viewed, along with these these reasons, on the Family Court of Western Australia website: www.familycourt.wa.gov.au.

645 Section 8 provides a non-exhaustive list of matters that must be taken into account in determining what is in a child's best interests. These include "the need to protect the child from harm", "the capacity of the child's parents to protect the child from harm" and "the capacity of the child's parents, or of any other person, to provide for the child's needs".

646 This again raises the question of who are the child's "parents". Section 3 supplies the answer to that question for the purposes of the CCS Act. It provides that:

> In this Act, unless the contrary intention appears —
>
> …
>
> ***parent***, in relation to a child, means a person, other than the CEO, who at law has responsibility for —
>
> (a) the long-term care, welfare and development of the child; or
>
> (b) the day-to-day care, welfare and development of the child;

647 Section 4 of the CCS Act provides that the presumptions of parentage in the State Act apply when considering who is a "parent". However, for reasons earlier explained, these presumptions are rebutted by the Artificial Conception Act. Accordingly, for the purposes of the CCS Act, Mr and Mrs Chanbua are currently Pipah's "parents" since they have responsibility for the long-term and day-to-day care, welfare and development of Pipah.[147] However, as soon as I make the order I propose to make giving the Farnells parental responsibility, the Farnells will become Pipah's parents for the purposes of the CCS Act. I will therefore proceed with my discussion on the basis that the Farnells are the "parents" for the purposes of the CCS Act.

648 Section 9 provides that "in the administration of this Act" certain principles must be observed. The Independent Children's Lawyer sought to highlight three of these, namely:

> (a) the principle that the parents, family and community of a child have the primary role in safeguarding and promoting the child's wellbeing;
>
> (b) the principle that the preferred way of safeguarding and promoting a child's wellbeing is to support the child's parents, family and community in the care of the child;
>
> …
>
> (f) the principle that intervention action (as defined in section 32(2)) should be taken only in circumstances where there is no other reasonable way to safeguard and promote the child's wellbeing;

[147] By operation of s 69(1) of the State Act.

649 Although it has been assumed in some decisions of single judges of the Supreme Court that s 9 has application to judicial proceedings,[148] I would respectfully doubt that courts are concerned with the "administration" of the legislation, which seems to me to be the responsibility of the relevant Minister and the Chief Executive Officer of her department. This view is supported by reference to the way the word "administration" is used in other provisions in the Act (see in particular the definition of "Department" in s 3 as meaning "the department of the Public Service principally assisting the Minister in the administration of this Act"). However, as the matter was not fully argued, I decline to express a concluded view on the topic and accept that s 9 is consistent with the policy considerations underpinning the legislative scheme.

650 Subsection 28(2) of the CCS Act provides that a child "is in need of protection" if any one of a number of circumstances is found to exist.[149] The one relevant here is s 28(2)(c), which provides that a child is deemed to be in need of protection if "the child has suffered, or is likely to suffer, harm as a result of … sexual abuse … and the child's parents have not protected or are unlikely or unable to protect, the child from harm, or further harm of that kind".[150] This form of wording makes clear that a child who has never been harmed may nevertheless be deemed in need of protection because of the likelihood of future harm. It is also to be noted that there is no requirement for the threat of harm to be imminent.

651 Section 45 of the CCS Act provides that:

> **45. Court may make protection order**
>
> If, on a protection application,[151] the Court finds that the child is in need of protection the Court may, subject to this Part —
>
> (a) make the protection order in respect of the child; or
>
> (b) make another protection order in respect of the child.

652 The use of the permissive "may" in s 45 is important. Even if the court finds that the child is in need of protection, the best interests of the child may not necessarily be promoted by the making of a protection order after consideration of the matters in s 8 and any other matters the court considers relevant.[152]

653 Although there are two other types of protection orders, the order sought by DCP is the least serious of all of them, namely a "protection order (supervision)".

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[148] For example, *PVS v Chief Executive Officer, Department for Child Protection* (No 2) [2011] WASC 318 at [190] and *AB v Chief Executive Officer, Department of Child Protection* [2014] WASC 87 at [62]. However, Magistrate Hogan in the Children's Court recently declined to apply s 9 on the basis that "the trial process is not part of the administration of the Act": *Chief Executive Officer of the Department for Child Protection and Family Support v AP* [2016] WACC 1.

[149] There is no need to provide additional evidence of the child's "need" for protection once any of the specified circumstances is found to exist: *Watson v Thomas* (1985) 22 A Crim R 56. It is a status created by the statute.

[150] "Harm" is defined in s 28(1) as meaning "any detrimental effect of a significant nature on the child's wellbeing, whether caused by … a single act, omission or circumstance; or … a series or combination of acts, omissions or circumstances".

[151] "Protection application" is defined in s 3 to mean "an application to the Court for a protection order".

[152] *In re O (Minors) (Care: Preliminary Hearing)* [2004] 1 AC 523 at [23]–[25].

654 Section 47 of the CCS Act provides:

> **47. Protection order (supervision)**
>
> (1) A protection order (supervision) is an order providing for the supervision of the wellbeing of a child by [DCP] or the period specified in the order.
>
> (2) A protection order (supervision) does not affect the parental responsibility of any person for the child except to the extent (if any) necessary to give effect to the order.

655 A protection order (supervision) must not be made for a period of more than two years (s 48), but may be extended once for a further period not exceeding two years on application made by DCP (s 49).

656 Section 50 of the CCS Act lays down provisions relating to the conditions that may be attached to a protection order (supervision) – one of which is attached to all such orders:

> **50. Conditions of protection order (supervision)**
>
> (1) It is a condition of every protection order (supervision) that the parent of the child keeps [DCP] informed about where the child is living.
>
> (2) A protection order (supervision) may include conditions to be complied with by —
>
> …
>
> (b) a parent of the child; or
>
> (c) an adult with whom the child is living.

657 Section 51 allows for the variation of conditions attaching to a protection order (essentially this is permitted where there are changed circumstances or if all parties consent).

658 Importantly, ss 52(1) and 53 of the CCS Act, which I have cited earlier, provide that while a protection order (supervision) is in force, an authorised officer may have access to the child at any reasonable time, and DCP must ensure that the child and the child's parents are provided with any social services that DCP considers appropriate.

659 Unlike the State Act, but like its English counterpart, the CCS Act contains a "no order principle". This is laid down in s 46, which provides:

**46. No order principle**

The Court must not, on a protection application, make a protection order in respect of a child unless the Court is satisfied that making the order will be better for the child than making no order at all.

660 The fact that no order is made does not mean that DCP is excluded from taking an active supervisory interest in ensuring the protection of the child. Sections 21 and 32 of the CCS Act provide DCP with a number of options to safeguard and promote the wellbeing of children. These include the provision of social services; arranging meetings with parents or other significant people in the child's life; carrying out investigations to ascertain whether the child may be in need of protection; and/or taking any action in respect of the child that DCP considers reasonably necessary.

661 The interaction between s 28 of the CCS Act and the "no order principle" was explained by Murray J in *PVS v Chief Executive Officer, Department for Child Protection (No 2)* [2011] WASC 318:

> 141 It is well then, that I should start my consideration … by setting out in summary form the requirements of the CCS Act s 28 for the determination of the fundamental question that each child was in need of protection. …
>
> 142 Before giving consideration to the no order principle in finally making the decision whether a protection order was required to be made in each case, the magistrate had to find that it was more probable than not —
>
> (1) that the children had suffered or were likely to suffer harm, defined as any detrimental effect of a significant nature on the child's wellbeing. It should be noted that the concept is a broad one (I would think deliberately so) and harm need not in fact have been suffered if, at the time when the judgment was to be made, it was likely that such harm might be suffered. In other words, the Act is written in terms which enable intervention before harm actually occurs;
>
> (2) that the harm suffered, or likely to be suffered was, or would be a result of abuse of any or all of the types specified, and/or neglect; and
>
> (3) that the responsible parent, in this case … may or may not have caused the harm or likelihood of harm to arise, but had not protected or was unlikely to protect, or was unable to protect the child from harm as at the date when the judgment was to be made, or from further harm in the future.

> 143 The concepts involved are flexible. While the Act as a whole imports a discretionary judgment and requires the court to refrain from acting unless satisfied that a protection order is required in the best interests of the child, it is written in such a way as to permit the court to act where necessary to prevent the occurrence of likely future harm where it is judged that the necessary protection for the child has not been, is unlikely to be, or is unable to be provided by the parent or parents.

**The powers of the FCWA under the CCS Act**

662 Out of an abundance of caution, I raised with counsel whether the FCWA has power to make the orders sought by DCP. Historically, orders under the CCS Act have been sought in the Children's Court; however, this approach is undergoing transformation, as DCP has commenced seeking orders in proceedings in the FCWA in cases like this, where litigation is already pending concerning the same child.[153]

663 This is a significant development, as it will ensure that in Western Australia, one court can determine all issues relating to a child, rather than having the child's future being dealt with in two different courts as occurs elsewhere in Australia, where there are no State Family Courts able to exercise both state and federal jurisdiction.[154]

664 The power of the FCWA to make orders under the CCS Act appears to be beyond doubt in light of s 36(6) of the State Act, which provides that:

> Where a child the subject of proceedings appears to be a child in need of protection within the meaning of the *Children and Community Services Act 2004* the Court has, in relation to the child, in addition to the powers conferred by this Act, all the powers of the Children's Court.

665 The powers of the Children's Court include the authority to make a protection order upon an application made by DCP. As "the Court" referred to in s 36(6) is the FCWA, it seems to follow that the FCWA should also have authority to make such an order (provided DCP has formally made an application for a protection order).[155]

666 All of the parties accepted that the FCWA has power to make the orders sought by DCP. However, given the probability of more applications being made in the FCWA, and given the quality of counsel in the present matter, I thought it appropriate

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[153] The present case is the first significant matter to proceed to trial in the FCWA, hence the reason for me dealing at greater length with some topics than will be necessary when these cases become routine in the court.

[154] Avoiding litigation in two courts in the present matter has, in my estimate, saved the taxpayer and the parties collectively many hundreds of thousands of dollars. By contrast, see the wasteful duplication of proceedings in two Victorian courts which occurred in *Prantage & Prantage* [2015] FamCAFC 145. Writing as a member of the Full Court of the Family Court of Australia in *Prantage*, I suggested at [99] that the case provided "an excellent example of the irrationality of the present system [in the Eastern states]".

[155] This proviso was considered by the Full Court of the Family Court of Australia in an appeal heard on 16 July 2008 in the matter of *Pacy & Chief Executive Officer, Department for Child Protection* (WA 19 of 2008). The Independent Children's Lawyer appealed against a refusal of a judge to make an order under the CCS Act, but abandoned the appeal when my colleagues and I expressed a view from the bench that a formal application by DCP was required to be filed in the FCWA before the FCWA could make an order under the CCS Act. No such application had been filed. I am unaware of the matter otherwise being the subject of judicial consideration.

to seek submissions concerning a different interpretation that was advanced in a report prepared during the consultation process relating to the integration of the work of the FCWA and the Children's Court.

667 This interpretation suggested that the FCWA does not have power to make orders under the CCS Act because of s 36(2) of the State Act, which I recited earlier.

668 The alternative interpretation draws upon the fact that s 44(2)(a) of the CCS Act provides that an application for a protection order must be lodged with "the Court", which is defined in s 3 of the CCS Act as being the Children's Court. It is then argued that since s 36(2) is expressed to be "subject to … the *Children and Community Services Act 2004*", an application under that Act cannot be lodged in the FCWA.

669 In my respectful view, this argument ignores the opening words of s 36(2), namely "Without limiting subsection (1)". Subsection s 36(1) provides:

> (1) The Court has throughout the State the non-federal jurisdictions conferred on it by or under this or any other Act.

670 Since one of the "non-federal jurisdictions" of the FCWA is that conferred by s 36(6), I conclude that the power so conferred is in no way limited by s 36(2).

671 I therefore have power to make the order sought by DCP.

**The onus and standard of proof in proceedings under the CCS Act**

672 DCP bears the burden of proving that Pipah is in need of protection, and that making a protection order would be better than making no order at all.

673 Section 151 of the CCS Act provides that the requisite standard of proof is "proof on the balance of probabilities". That test presents no conceptual difficulty if the application for a protection order is based on past abuse of the child. However, the test seems more problematic when there is no suggestion that the child has been abused, but it is alleged that she is "likely to suffer harm". I struggle with the concept of "proving" something that can only be expressed in terms of "likelihood", since this calls for a prediction of the future, which by its very nature cannot be proved.[156]

674 Nevertheless, in the passage from *PVS* earlier quoted, Murray J said that the judicial officer at first instance was required to find that it was "more probable than not … that the children had suffered or were likely to suffer harm". Ultimately though, in cases such as the present, the outcome will turn not so much on how the standard of proof is expressed, but rather on the interpretation of the word "likely" in s 28 of the CCS Act. I will discuss the meaning of that word a little later.

675 In discussing s 151 of the CCS Act, Murray J said in *PVS* at [55]:

[156] *Mallett v McMonagle* [1970] AC 166 at 176; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.

> Because of the seriousness of the court's powers upon a finding that a child is in need of protection the evidence to be relied upon should … be of a relatively high degree of cogency and persuasive power…

676 As authority for this proposition, Murray J cited his decision in *In the matter of J (a child); S v Paskos* (1992) 8 WAR 561 ("*Paskos*"), which was an appeal under the 1947 Child Welfare Act. In that decision, his Honour said at 566:

> Because these are civil proceedings, the standard of proof to be applied will, however, be the civil standard of proof upon the balance of probabilities and not the criminal standard of proof beyond a reasonable doubt. But it has also often been said that having regard to the seriousness of the factual allegations in such cases, the application of a standard of proof upon the balance of probabilities will often require evidence of relatively high persuasive force, leading to the court being satisfied to a relatively high degree of the facts upon which the court's declaration is to be grounded.

677 In support of this proposition, Murray J relied upon *Briginshaw v Briginshaw* (1938) 60 CLR 336, in which his Honour said that Dixon J had "referred to the need for the court of trial to achieve reasonable satisfaction as to the existence of relevant matters of fact having regard to the serious nature of the allegations".

678 In my respectful view, Murray J's observations in *Paskos* do not provide support for the wider proposition stated in *PVS*. In *Paskos*, his Honour considered the quality of the evidence required might differ depending upon the "seriousness of the factual allegations", whereas in the later decision, his Honour considered the quality of the evidence required might differ depending upon the "seriousness of the court's powers". I accept, however, that in *Paskos*, his Honour cited other decisions such as *Nairn v O'Reilly* (1986) 11 Fam LR 472 and *Foskey v L* (1987) 12 Fam LR 407, where it was accepted that the gravity of the consequences flowing from a particular finding is one of the matters to be taken into account in deciding whether a case is made out on the balance of probabilities.

679 This approach is inconsistent with what the House of Lords found in *In re B (Children) (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141, in the context of the equivalent child protection legislation in the UK:

> The standard of proof in finding the facts necessary to establish the threshold … or the welfare considerations … was the simple balance of probabilities, neither more nor less; neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. There was only one civil standard of proof, and that was proof that the fact in issue more probably occurred than not. There was no 'heightened civil standard' and no legal rule that 'the more serious the allegation, the more cogent the evidence needed to prove it'…[157]

[157] My citation is from the headnote in the Family Law Reports (the authorised report is [2009] 1 AC 11).

680 Murray J's statement in *PVS* about the "seriousness of the court's powers" leading to a need for cogent and persuasive evidence in child protection proceedings does seem to derive support from the passage from the judgment of Dixon J in *Briginshaw* at 361 that I have highlighted below:

> Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, **or the gravity of the consequences flowing from a particular finding** are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

681 Notwithstanding the eminence of Dixon J, his words need not be given the status of text in a statute, and I note that they have not been the subject of universal approval. For example, in *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 440 at 457, Priestley JA said:

> The facts that these words are well-known and that they come from a judge of the stature of Sir Owen Dixon do not make them or the whole passage of which they form a part any easier to understand. One of a number of difficulties in the well-known passage is why the gravity of the consequence of a particular finding should affect an objective appraisal of the likelihood of its having happened.

682 In my view, it is of more than passing interest that many years after *Briginshaw*, Dixon CJ (as his Honour had by then become) did not refer to the "gravity of the consequences" when discussing the English law that had led to the "*Briginshaw* principle", but did speak of the "triviality or importance [of] questions arising in a civil trial". In *Murray v Murray* (1960) 33 ALJR 521 at 524–525, his Honour said:

> The passages cited in *Briginshaw's Case* … show that in English law there never were more than two standards of persuasion … But they show that from the beginning of the nineteenth century courts did not impose on the parties, or one may perhaps say claim from the parties, the same strictness or exactness of proof about all questions arising in a civil trial without regard to their triviality or importance, the likelihood or the probability of their occurring. In other words the tribunal might reason upon the evidence to a conclusion as a responsible and sensible man would in all the circumstances … On civil issues there is one standard, that of persuasion to the reasonable satisfaction of the tribunal but a sensible tribunal will not ignore the nature of the issue in arriving at its conclusion…

683 It might be argued that when Dixon J spoke in *Briginshaw* of "the gravity of the consequences flowing from a particular finding", his Honour was not referring to the

consequences if the entire dispute was determined in favour, or against the interests, of a particular party. Rather, he may have been concerned with the relative importance to the outcome of the litigation of a particular factual issue that required resolution. Accordingly, if the finding was crucial to the determination of the litigation, a greater "strictness or exactness of proof might be required" as compared with the proof of another fact that would not necessarily be determinative of the outcome.

684 While the words of Dixon J in *Briginshaw* have been repeatedly cited, they must now be understood in light of what was said in the High Court in *Neat Holdings Pty Ltd v Karajan Holdings* (1992) 110 ALR 449 at 450 (footnotes omitted):

> The strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw*:
>
> > The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ...
>
> There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading.[158]

685 In my respectful view, the same should be said of generalisations about taking into account the gravity of the consequences that flow from a finding, especially given that the probability of an event having occurred cannot logically be affected by the gravity of the consequences of a finding that it did occur.[159]

686 Furthermore, if the gravity of the consequences of the court's finding were to be considered relevant in arriving at the ultimate decision, the question would arise, which consequences? Are they, for example, the consequences associated with a child

[158] See also *G v H* (1994) 181 CLR 387 at 399.

[159] Although the *Evidence Act 1995* (Cth) does not apply in the FCWA, it is noteworthy that s 140(2) of that Act, which is accepted as stating the common law on the civil standard of proof, requires a court to take account of the "gravity of the matters alleged", but does not refer to "the gravity of the consequences of the court's finding". I accept, however, that the list of matters the court is required to take into account by s 140(2) is not exhaustive. Thus, for example, a court can take into account the inherent unlikelihood or otherwise of the occurrence of the fact alleged: *Qantas Airways Limited v Gama* (2008) 167 FCR 537 at [138] per Branson J.

being removed from her carers and placed in the care of the State? Or are they the consequences for the child of being left with carers who it is alleged have abused her or are likely to abuse her in the future? Either way, the consequences are grave.[160]

687 There is another reason why, in my view, the court should not consider the gravity of the consequences when making, or refusing to make, a finding that a child is in need of protection. This is because there is not a pre-determined set of consequences that flow from the finding. A finding that a child is in need of protection is the gateway to a range of potential consequences – starting with "supervision" by DCP, and working all the way up to removal of a child from her family until she turns 18 and stripping the parents of parental responsibility. It would seem to me to be contrary to principle that a court would more easily find that a child is in need of protection if asked to make a protection order (supervision), but would require evidence of "a relatively high degree of cogency and persuasive power" if asked to make an "until 18" order. While the consequences of making a protection order (supervision) might not seem terribly "grave", the consequences of **not** making an "until 18 order" could be fatal.

688 As already noted, the CCS Act makes clear that a court is not obliged to make the form of protection order sought by DCP – it can make a more, or less, draconian order as it sees fit in the exercise of its discretion. In my view, it would be a case of putting the cart before the horse to be considering the gravity of the consequences of the court's finding in determining the quality of the evidence necessary to establish that the child is in need of protection, since the court does not proceed to determine the consequences until after it has made the finding.

689 For these reasons, I will proceed on the basis that I will only make the findings of fact sought by DCP and the ultimate finding sought by DCP if they are made out to my reasonable satisfaction, recognising that the ultimate finding involves prediction of future events. In adopting this approach, I would not require evidence of "a relatively high degree of cogency and persuasive power".

690 In respectfully declining to follow the view Murray J expressed in *PVS* about having regard to the "seriousness of the court's powers upon a finding that a child is in need of protection", I would suggest that that his Honour's choice of words was *per incuriam*, since he relied for authority on his earlier decision in *Paskos*, where a different proposition was stated. However, the same cannot be said of similar remarks made in *Director General for Family and Children's Services v E* (1998) 23 Fam LR 546 and *KLR v Director General, Department of Community Services* (Unreported, WASC, Anderson J, BC9201021, 11 September 1992), where single judges of the Supreme Court of Western Australia were sitting on appeal from the Children's Court. In both those matters, their Honours, citing *Briginshaw*, referred to the gravity of the consequences flowing from a finding that a child was in need of care and protection as "affect[ing] the process by which the necessary standard of proof is attained" (Heenan J) or requiring "convincing" evidence leading to a "firm degree of

[160] This point was made in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1, where Anderson J held that "the seriousness of consequences is not a persuasive argument" in the context of professional disciplinary proceedings, since such proceedings are concerned not only with the risk of an erroneous finding being made *against* a practitioner but also with the risk to the public of an erroneous finding made *in favour* of a practitioner.

satisfaction of the need to make [the finding]" (Anderson J). I hesitate to disagree with judges of such high reputation, but I respectfully consider that their observations must be read in light of what was said by the High Court in the passage from *Neat Holdings* quoted earlier.

691 In the present case, there is no doubt about the primary facts upon which the prediction required under s 28(2)(c) of the CCS Act is to be based, since there is not only a finding by a jury, but also an admission of guilt by Mr Farnell concerning his offending. There are, however, a few other factual matters which would be relevant in making the required prediction about Mr Farnell's future conduct. For example, is Mr Farnell to be believed in asserting that he has never abused a child since he left prison? Is it true that he is no longer attracted to young girls? Is he genuinely remorseful for his past offending?

692 The first and last of these three questions can be answered in the affirmative to my reasonable satisfaction. The second involves something known only to Mr Farnell. Given his lack of credibility on other issues, I am not persuaded to a level of reasonable satisfaction that Mr Farnell is not attracted to young girls; however, I am also not persuaded that he will act out on any urges that he may have. This is far from being the end of the matter though, as the question remains whether it is "likely" that Pipah will suffer harm in Mr Farnell's care, and it is to that issue I now turn.

**The meaning of "likely" in s 28 of the CCS Act**

693 The threshold question I am required to answer is whether the evidence establishes that Pipah is "likely to suffer harm" as a result of possible sexual abuse by Mr Farnell. Counsel for the Farnells emphasised that there is a second limb of the test, namely whether the child's parents are "unlikely or unable to protect, the child from harm". However, I agree with the submission of counsel for DCP that it is nonsensical to consider Mr Farnell's ability to protect Pipah from any harm that he himself poses. The point at which Mr Farnell should be considered is in dealing with the first limb of the test – i.e. whether Pipah is "likely" to suffer harm as a result of his behaviour.

694 The answer to the threshold question will turn, in part, on the interpretation of the word "likely" in s 28 of the CCS Act. However, the meaning of that word is elastic, as was explained in *Tillmanns Butcheries v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, where Bowen CJ (with whom Evatt J agreed) said at 375:

> The word "likely" is one which has various shades of meaning. It may mean "probable" in the sense of "more probable than not" – "more than a 50 per cent chance". It may mean "material risk" as seen by a reasonable man "such as might happen". It may mean "some possibility" – more than a remote or bare chance. Or, it may mean that the conduct engaged in is inherently of such a character that it would ordinarily cause the effect specified.

695 As the Farnells' counsel noted, the observations in *Tillmanns Butcheries* are of limited assistance because they do not explain in what circumstances the various

meanings of "likely" apply. In my view, much more assistance can be obtained from the authorities under the *Children Act 1989* (UK), which is couched in very similar terms to the CCS Act. Thus, for example, s 31(2) of the UK Act requires a court to be satisfied that the child "is suffering, or is likely to suffer, significant harm".

696 In the leading English case, *In re H (Minors) (Sexual abuse: Standard of Proof)* [1996] AC 563, Lord Nicholls (with whom the majority agreed) said at 585:

> Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this were the correct reading of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm … When exposed to this risk a child may need protection just as much when the risk is considered to be less than 50–50 as when the risk is of higher order … It is eminently understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not. In my view, therefore, the context shows that in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.

697 *In re H* has been reaffirmed, most notably in *In re B (Children) (Care Proceedings: Standard of Proof)*, where a party unsuccessfully sought to persuade the House of Lords to introduce a "real possibility" test. In her judgment in *In re B* at 22, Baroness Hale posed the critical questions:

> This case is about the meaning of the words "is likely to suffer significant harm". How is the court to be satisfied of such a likelihood? This is a prediction from existing facts, often from a multitude of such facts, about what is happened in the past, about the characters and personalities of the people involved, about the things which they have said and done, and so on.
>
> But do those facts have to be proved in the usual way, on the balance of probabilities? Or is it sufficient that there is a "real possibility" that they took place, even if the judge is unable to say that it is more likely than not that they did?

698 The way in which these questions were answered can be seen in *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678, where Baroness Hale delivered the judgment of the Supreme Court of England and Wales. I intend to cite from the decision at length, as I consider the judgment is instructive in

understanding how the CCS Act should be interpreted (original emphasis, footnotes omitted).[161]

> 8. The leading case on the interpretation of these conditions is the decision of the House of Lords in *In re H (Minors) (Sexual Abuse: Standard of Proof*) [1996] AC 563. Three propositions were established which have not been questioned since. First, it is not enough that the court suspects that a child may have suffered significant harm or that there was a real possibility that he did. If the case is based on actual harm, the court must be satisfied on the balance of probabilities that the child was actually harmed. Second, if the case is based on the likelihood of future harm, the court must be satisfied on the balance of probabilities that the facts upon which that prediction was based did actually happen. It is not enough that they may have done so or that there was a real possibility that they did. Third, however, if the case is based on the likelihood of future harm, the court does not have to be satisfied that such harm is more likely than not to happen. It is enough that there is "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case", per Lord Nicholls of Birkenhead, at p 585F.
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> 9. Thus the law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school.
>
> 10. The House of Lords was invited to revisit the standard of proof of past facts in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11, where the judge had been unable to decide whether the alleged abuse had taken place. The suggestion that it would be sufficient if there were a "real possibility" that the child had been abused was unanimously rejected. The House also reaffirmed that the standard of proof of past facts was the simple balance of probabilities, no more and no less.
>
> 11. The problem had arisen, as Lord Hoffmann explained, because of dicta which suggested that the standard of proof might vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned: para 5. He pointed out that the cases in which such statements were made fell into three

[161] The passage deals not only with the meaning of "likely", but also with the standard of proof.

categories. In the first were cases which the law classed as civil but in which the criminal standard was appropriate. Into this category came sex offender orders and anti-social behaviour orders: see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 and *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787. In the second were cases which were not about the standard of proof at all, but about the quality of evidence. If an event is inherently improbable, it may take better evidence to persuade the judge that it has happened than would be required if the event were a commonplace. This was what Lord Nicholls was discussing in *In re H (Minors)* [1996] AC 563, 586. Yet, despite the care that Lord Nicholls had taken to explain that having regard to the inherent probabilities did *not* mean that the standard of proof was higher, others had referred to a "heightened standard of proof" where the allegations were serious. In the third category, therefore, were cases in which the judges were simply confused about whether they were talking about the standard of proof or the role of inherent probabilities in deciding whether it had been discharged. Apart from cases in the first category, therefore, "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not": *In re B* [2009] AC 11, para 13.

…

15. In *In re B* [2009] AC 11, the House also declined an invitation to overrule the decision of the Court of Appeal in *In re M and R (Minors) (Sexual Abuse: Expert* Evidence) [1996] 4 All ER 239. This was concerned with the stage after the court is satisfied that the threshold has been crossed. The court has then to decide what order, if any, to make. The welfare of the child is the paramount consideration: 1989 Act, section 1(1). In deciding whether or not to make a care or supervision order, the court must have regard in particular to the so-called "checklist" of factors: 1989 Act, section 1(3)(4). These include "(e) any harm which he has suffered or is at risk of suffering".

16. In *In re M and R*, the Court of Appeal determined that section 1(3)(e) should be interpreted in the same way as section 31(2)(a). The court must reach a decision based on facts, not on suspicion or doubts. Butler-Sloss LJ said, at p 247:

> "[Counsel's] point was that if there is a real possibility of harm in the past, then it must follow (if nothing is done) that there is a risk of harm in the future. To our minds, however, this proposition contains a non sequitur. The fact that there might have been harm in the past does not establish the risk of harm in the future. The very highest it can be put is that what might possibly have happened in the past means that there may possibly be a risk of the

> same thing happening in the future. Section 1(3)(e), however, does not deal with what *might* possibly have happened or what future risk there *may* possibly be. It speaks in terms of what *has* happened or what *is* at risk of happening. Thus, what the court must do (when the matter is in issue) is to decide whether the evidence establishes harm or the risk of harm."

17. In agreeing with this approach in *In re B*, para 56, Baroness Hale commented that in such a case,

> "as indicated by Butler-Sloss LJ …, the 'risk' is not an actual risk to the child but a risk that the judge has got it wrong. We are all fallible human beings, very capable of getting things wrong. But until it has been shown that we have, it has not been shown that the child is in fact at any risk at all."

699 There seems no reason why the same approach should not be followed in Australia. As the majority of the High Court said in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78], "the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have". In performing that duty, it is well established that a court must have regard to the statutory text, context and purpose of the legislation. The *text* of s 28 is not helpful given the variety of meanings of "likely", and it has not been suggested that the *text* of any other provisions of the Act assist in giving meaning to "likely". The *context* is also not necessarily helpful since, as earlier noted, the threshold test in s 28 is the gateway to a range of potential consequences – starting with supervision by DCP and moving all the way through to removal. Even the *purpose* of the Act points in different directions, since the Act is not aimed at protecting children at all costs.

700 This latter point has been made by Baroness Hale, both in her judgments and when speaking extra-curially. At a lecture given in 2013, she posed the question "What are Care Proceedings for?" and went on to answer it by saying:

> It may seem a silly question to which the answer is obvious. Surely care proceedings are there to protect children from harm? But we could simply empower social workers to do that. Care proceedings are also there to protect children and their families from the intrusive power of the state. The freedom of families to choose their own life-styles and to bring their children up as they please is a crucial attribute of a free society.[162]

701 In this lecture, the Baroness was returning to a topic she had discussed in *In re B* where she commenced her speech in the House of Lords with these potent words:

> 20. … taking a child away from her family is a momentous step, not only for her, but for her whole family, and for the local authority

[162] Baroness Hale, 'What are Care Proceedings for?' (Munkman Lecture delivered at the BPP Law School, Leeds, 5 September 2013).

> which does so. In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design. Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all the modern human rights instruments including the European Convention on Human Rights (article 8), the International Covenant on Civil and Political Rights (article 23) and throughout the United Nations Convention on the Rights of the Child. As Justice McReynolds famously said in *Pierce v Society of Sisters* 268 US 510, 535 "The child is not the mere creature of the State".
>
> 21. That is why the *Review of Child Care Law* (Department of Health and Social Security, 1985)) and the White Paper, *The Law on Child Care and Family Services* (1987) (Cm 62), which led up to the Children Act 1989, rejected the suggestion that a child could be taken from her family whenever it would be better for her than not doing so. As the Review put it, at para 2.13, "Only where their children are put at unacceptable risk should it be possible compulsorily to intervene. Once such a risk of harm has been shown, however, [the child's] interests must clearly predominate".

702 While DCP is not seeking the removal of Pipah from her home, its proposed role involves a degree of intrusion into the lives of the Farnells, including unannounced visits; instructions that Pipah is never to be left alone with Mr Farnell; and even prescription about a story that is to be read to her. While it can be reasonably thought that Parliament intended that children be kept safe from abuse, it can also be reasonably thought that Parliament would not have intended that the State have such an intrusive role in the life of a family unless warranted by the circumstances.

703 The Independent Children's Lawyer and DCP submitted that the proper meaning of "likely" for the purposes of s 28(2)(c) was either of the following drawn from those offered in *Tillmanns Butcheries*: "a 'material risk' as seen by a reasonable man 'such as might happen'" or '"some possibility' – more than a remote or bare chance". Counsel for the Farnells accepted that the "consensus of opinion is that 'likely' does not mean that an event has to be proved to be more likely than not to occur, but that there is a 'real possibility' or a 'possibility that cannot sensibly be ignored' that it could occur". However, he disputed that "likely" could mean "such as might happen" or "some possibility". He acknowledged that the "material risk" test might be acceptable, although noting that it looked very much like a "real possibility" test.

704 In my view, adopting the "such as might happen" test would not strike the right balance between the objectives of protecting the child and limiting state interference in the lives of families. Sadly, child abuse "might happen" in any Australian home, since abuse happens so commonly.[163] Something more needs to be established before the

[163] Especially as "emotional abuse" is defined in the Act to include being exposed to an act of family and domestic violence. The Council of Australian Governments has estimated that over $2 billion is spent annually

executive government can be given the green light to intervene in the life of a family. In saying this, I have not overlooked the fact that the Act itself provides that the best interests of the child are the paramount consideration, since I consider it is also in the interests of a child for the State not to intervene inappropriately in the life of her family.

705 In my view, the balance between the two competing objectives is best achieved by the test laid down in the United Kingdom under similar legislation, and I therefore intend to proceed on the basis that "likely" is used in the CCS Act in the sense of a "real possibility" – a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.[164]

706 Lord Nicholls, who was the exponent of the "real possibility" test, later said in *In re O (Minors) (Care: Preliminary Hearing)* [2004] 1 AC 523 at [16]–[17] that while this formulation requires "a comparatively low level of risk", a finding that the test has been satisfied must be founded on proved facts, as distinct from allegations. As his Lordship said, "therein lies the protection Parliament intends the threshold criteria shall provide against arbitrary intervention by public authorities".[165]

**Why is DCP seeking a protection order?**

707 Ms Julieanne Davis, DCP's Executive Director of Country Services, set out in her affidavit of 12 October 2015 the reasons a protection order is sought:

> 54. As at the time of affirming this affidavit it is my view that, on all the information available to the Department, a protection order (supervision) with clear conditions and orders setting out requirements on Mr Farnell and [Mrs Farnell] over the 12 months of the proposed order is the appropriate order to address the risk posed to Pipah's safety. The requirements of a supervision order provides the Department with a legislative framework within which to continue to work with Mr Farnell and [Mrs Farnell] to address the risk posed to Pipah's safety and the safety of other children who may be in the home with them. The safety plan has been working effectively to date but there is still considerable further work to carry out with Mr Farnell, [Mrs Farnell] and members of the safety network to ensure that [Mrs Farnell] is fully supported to be protective and keep Pipah safe into the future.

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on child protection services: 'Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020' (Council of Australian Governments, June 2009) 9.

[164] Interestingly, this was also the formulation suggested by the Australian Law Reform Commission for its proposed test of an invasion of privacy that is "**likely** to have a serious effect on a person of ordinary sensibilities": 'Serious Invasions of Privacy in the Digital Era' (Discussion Paper No DP 80, Australian Law Reform Commission, 31 March 2014).

[165] A cursory search suggests that Lord Nicholls' test also finds favour in Victoria and New South Wales. For example, in the Children's Court of New South Wales, Truscott CM said, "I am gratified that Lord Nicholls' expression is so easily applicable, sensible and logical, that to not adopt his reasoning would be nothing but contrary. I also note that no Australian authorities setting out a different position have been placed before me": *In the matter of Adam and Michael* [2004] CLN 3 at [44].

> 55. Court orders setting out specific conditions would enable clarity of what is required and would not solely rely on the ongoing co-operation of Mr Farnell and [Mrs Farnell]. I recognise and acknowledge that some of the case practice work has at times been confronting and challenging for Mr Farnell and [Mrs Farnell]. It is my view that, without a legal requirement to comply, should concerns arise regarding participation by Mr Farnell and/or [Mrs Farnell] in the continuing protective work which is designed to address the risk posed to Pipah's safety both in the shorter term and in the long term, the Department will be left in an untenable situation in terms of protecting Pipah.
>
> 56. To date Mr Farnell and [Mrs Farnell] have co-operated however, in my view based on the information contained on the Department's file including information from [Ms G] and safety planning meetings, there is still a level of denial in terms of the potential for Mr Farnell to re-offend and some misunderstandings regarding the nature of child sexual abuse. It will continue to take time for [Mrs Farnell] to understand fully requirements of her, particularly given that she does require the assistance of an interpreter to understand complex matters and she has had to adjust to a considerable amount of additional and challenging information. A supervision order will allow for education and counselling to occur to address these concerns and continue to establish long term sustainable safety for Pipah.
>
> 57. I am concerned to put in place arrangements that ensure Pipah's safety and to strengthen longer term safety planning including arranging psychological counselling and supports for both Mr Farnell and [Mrs Farnell] to support Pipah's safety and longer term wellbeing.
>
> …
>
> 60. The Department is seeking a Protection Order (Supervision) to address the risk posed to Pipah's safety and to keep her in a stable care arrangement. The Department is seeking a supervision order for 12 months to address the risk posed to Pipah's safety while child protection workers and family members continue to carry out the Case Plan. This takes into account the work that has been done with Mr Farnell, [Mrs Farnell] and the safety network since the Department become involved with the family. Child protection workers will continue to assess and monitor the safety and wellbeing of Pipah in the care of Mr Farnell and [Mrs Farnell]. They will also continue to assess [Mrs Farnell's] capacity to be protective of Pipah's safety and wellbeing in the longer term.

708 The closing submissions of DCP, which were provided only a few weeks after Ms Davis swore her affidavit, indicated that DCP had agreed to the Independent Children's Lawyer's proposal that the protection order should be for two years, rather

than the one year originally sought by DCP. This change of heart was said to have come about as a result of "taking into account the course of this matter to date, the evidence from witnesses at trial including particularly the evidence of the Single Expert Witness and Pipah's best interests". The submissions did not give any clue as to which parts of the "course of this matter" or "the evidence of the Single Expert Witness" had persuaded DCP to change its mind.

709 DCP has now been working with the Farnells since August 2014, and if I make a protection order for a period of two years, it will not expire until April 2018. The Farnells would, by then, have been under the supervision of DCP for three and a half years, in circumstances where it seems that DCP initially thought its resources would be better expended on dealing with other children in the Bunbury region.

**The submissions relating to the orders sought by DCP**

710 The Independent Children's Lawyer recognised that, looking in isolation at the reports of Ms G and the Single Expert, it could be argued that the threshold test set by s 28 has not been met. However, the ICL submitted that issues of child safety "should not be so narrowly construed", and that a protection order for a period of two years should be made as this would promote Pipah's safety and wellbeing by:

49.1 providing the Department with an extended period of time to work with and monitor the family and extended safety network to ensure the safety plan is working well;

49.2 monitoring Mr Farnell's ongoing compliance with the conditions set out in the safety plan, which would include further psychometric testing;

49.3 working with the Farnells with respect to updating Pipah's Words and Pictures story to ensure it is age and developmentally appropriate, that it promotes both a physical but also her emotional/developmental wellbeing, and that it includes reference to Mrs Chanbua, Gammy and Thai culture;

49.4 ensuring that Pipah is school age when the Supervision Order is due to expire, which would mean that the school and school community could be included in the safety network and safety plan. The Independent Children's Lawyer considers this type of community monitoring to be an important aspect of building safety around Pipah; and

49.5 Pipah's language acquisition will develop to a level where protective behaviours could be undertaken with her.

711 The ICL also submitted that the involvement of DCP would assist the Farnells in developing more insight and understanding as to the importance of Pipah being told about her birth mother and Gammy. She submitted that the way in which this information was conveyed to Pipah would be important to her psychological wellbeing, and that DCP could provide specialist support to the family.

712 The ICL noted that, prior to the expiration of the proposed order, DCP would undertake a review of Pipah's circumstances. In the event DCP was satisfied that the safety plan and network were working well, it would be able to provide ongoing support services without the need for a further order, by virtue of the obligations imposed by ss 21 and 32 of the CCS Act. As the ICL noted, these services could include an annual review, which would incorporate testing suggested by Ms G.

713 Counsel for DCP submitted that further work is required with the Farnells to ensure they are able to protect Pipah from harm and to support the development of the safety network. She submitted that, without support, the Farnells would be unable to provide the necessary level of protection for Pipah. Counsel also noted DCP's intention to provide ongoing counselling for Mr Farnell, and submitted it would also take time for Mrs Farnell to complete her work with the DCP psychologist.

714 Like the ICL, counsel for DCP drew attention to an annexure to the affidavit of the DCP worker [Ms H], who conducted the home visits. This was an email dated 31 October 2014, which concluded with Ms H reporting that the Farnells "are clearly following the plan around [Mr Farnell] not being alone with [Mrs Farnell] and Pipah but there is not much evidence of [Mrs Farnell] utilising the safety network herself". With respect to both counsel, this submission might be seen as clutching at straws, as DCP's work with the family had only just started when the email was sent, and according to Ms H's evidence, the safety plan was not finalised until March 2015. Furthermore, Ms H ended her affidavit sworn nearly a year later by saying:

> To the best of my knowledge Mr Farnell, [Mrs Farnell] and the members of the safety network appear to be following the safety plan and are committed to ensuring the safety of Pipah and other children.

715 The Papers for the Judge filed by the Farnells prior to trial indicated that they "would be happy to accept" a one-year protection order as was then sought by DCP. Given that Papers for the Judge had been filed, counsel for the Farnells did not seek to expand on his case before calling his first witness. In these circumstances, I doubt the propriety of the Farnells then arguing, after the evidence was closed, that the case for a protection order had not been made out.[166] However, as the point was not taken, and as I have to be persuaded that the test has been met, I have proceeded on the basis that the entire question arising under s 28 is in issue.

716 Counsel for the Farnells, in arguing against a finding that Pipah was in need of protection, submitted (footnotes omitted):

> 4.22 [Ms G's] assessment was that Mr Farnell presented a low risk of reoffending. Of itself, that would not seem to pass any test of "likely" other than "some possibility". It would certainly not constitute a "material risk".

[166] The alternative sets of orders/conditions proposed by the Farnells are attached as Appendix 4 and available for viewing along with this entire judgment at www.familycourt.wa.gov.au.

> 4.23 However, the thrust of the DCP's case seems to be that risk might arise from something that could cause Mr Farnell to repeat his past behaviour with Pipah.
>
> 4.24 That does present evidential difficulties. To take an example, one of the factors that was identified by [Ms G] as being a possible cause of change in Mr Farnell's risk of re-offending, was that his marital relationship might break down and he had no intimate relationship in which is emotional needs were met. But no evidence has been referred to as demonstrating that it is more probable than not that Mr Farnell's marital relationship might break down. In the same way, there does not appear to be any evidence that there is going to be significant stress in his life where he does not receive appropriate support. One would have to be very careful about differentiating between evidence and speculation and example (in the sense of "for example if…").

717 Counsel for the Farnells also submitted that if the court was satisfied that Pipah is in need of protection, the Farnells would propose a one-year protection order under the conditions suggested in the minute they filed on 14 December 2015. Counsel also noted that some of the conditions would, in accordance with the terms of the minute, extend well beyond the expiry of any protection order.

718 Counsel for the Farnells submitted that his reservations about the conditions proposed by DCP were supported by the views of the Single Expert who had drawn attention to what he said was an excessive focus on protecting Pipah from what had been "identified as a low level risk [that] has led to a lack of consideration for healthy developmental processes". Counsel for the Farnells submitted that if the proposed conditions were imposed, they would have an adverse effect on Pipah's family life and development.

719 The Farnells agreed with the Single Expert that protective behaviours training for Pipah can be "captured as effectively and more functionally by heavily highlighting core societal values associated with personal safety and self-care", rather than by focussing on Mr Farnell's offending. Counsel emphasised that this should not be "reinterpreted as suggesting that Pipah should be responsible for her own safety".

720 Counsel for Mrs Chanbua described the DCP proposal as being "a highly intrusive regime of supervision". He accepted that Mr Farnell poses a risk of harm to Pipah, but argued that "the cure may be as bad as the ailment". Nevertheless, he submitted that the protection order was "necessary" for the same reasons why he submitted that Pipah should live with his client.

721 Counsel for Mrs Chanbua submitted that it was impermissible for DCP and the ICL to ask for the imposition of conditions that would extend past the two-year period permitted by the CCS Act. This argument was no doubt mounted to buttress counsel's submissions about the residence applications, but it nevertheless requires careful consideration. I have therefore set out below my exchange with counsel for Mrs Chanbua on this topic (emphasis added):

[MR HOOPER]: Your Honour, what you're being asked to do is to make an order for indefinite supervision of a child by the Department in circumstances where the Act permits two years only without a further hearing, and then only another two years.

So in other words, what you're being asked to do is to make an order under a combination of Family Court Act and the community welfare legislation which provides for indefinite supervision in circumstances where the relevant State Act does not permit it. And I refer you to section 48 of the Community and Children's Services Act.

HIS HONOUR: But I can do it, can't I?

HOOPER, MR: You can do it for two years.

HIS HONOUR: Right. Well, I can do it under the Family Court Act.

HOOPER, MR: Well, your Honour - - -

HIS HONOUR: We've got here what I might like to have in some other cases, the Department having a "look in" and giving a hand but not necessarily in a position where the child is in the care of the Department.

HOOPER, MR: No, but you're being - - -

HIS HONOUR: Under the protection of the Department formally.

HOOPER, MR: Yes. But, your Honour, what you're being asked to do is to use the Family Law Act to make an order which the Community and – Children and Community Services Act expressly does not permit.

HIS HONOUR: All right. I will look at that.

HOOPER, MR: And that, I would say, is an improper use of power. Secondly, you're being asked to delegate to the Department in an open and indefinite way which gives them power to do whatever they will. Now, it might seem strange for me to raise this but I'm concerned that your Honour doesn't make an order thinking that it has some ability to be enforced when I would suggest that it may not. And your Honour will see that what's proposed is – and this is – I'm looking at the minute – the joint minute, if I can put it that way, by the ICL and the Department, under safety planning, E1, it says that:

> *The applicants will comply with the safety plan and any updated safety plan, the overarching principle that Mr Farnell will not be alone with Pipah.*

And then:

> *The department will review the overarching principle having regard to Pipah's changing age and psychological development.*

> In other words, if your Honour considers that it's appropriate for a supervision order to be made and Mr Farnell not to be left alone with Pipah, what you're being asked to do is to delegate to the Department the ability to change that as they please, without reference to anybody else.
>
> HIS HONOUR: Well, could I order liberty to apply to the court if anyone was unhappy with what they proposed?
>
> HOOPER, MR: Well, your Honour, my submission to you is that the safest course to proceed is if a supervision order is to be made for two years, it be made for two years, and the matter will then come back before the court. That's what the legislation contemplates. It does not contemplate that children are given up to the Department for something other than being in the Department's care. It doesn't contemplate the Department being involved in this way in the minutiae of somebody's life in circumstances where the Department has not taken control or in loco parentis with the relevant child. And I would say to you that's - - -
>
> HIS HONOUR: Well, it's the Department of Child Protection **and Family Support**.
>
> HOOPER, MR: Yes.
>
> HIS HONOUR: Supporting the family.
>
> HOOPER, MR: But the Act Parliament limits what the Department can do.
>
> HIS HONOUR: All right.
>
> HOOPER, MR: It's either you've got to take one course or another. And - - -
>
> HIS HONOUR: Unless I have the power to do that with their cooperation under the other legislation.
>
> HOOPER, MR: Well, the cooperation should be the cooperation of the parents of the child or those interested in its care. It's not just the cooperation of the Department, I would suggest to your Honour, because the Department … is constrained by the executive of what it does.

722 DCP and the ICL responded to these submissions by saying that if my powers under the CCS Act were exhausted, I had power under the State Act to impose the conditions requested, provided that they were in the best interest of the child.

723 Unsurprisingly, the Farnells' counsel adopted the submissions made on behalf of Mrs Chanbua about the imposition of long-term conditions. He argued that it was "not permissible to extend the state's intervention in family life by the device of a condition on what might be described as a residence order to avoid the restrictions in the Children and Community Services Act on a supervision order". Notwithstanding this argument, the Farnells themselves proposed the imposition of conditions on their

arrangements for the care of Pipah, regardless of whether or not a protection order was made. Some of these conditions extended indefinitely into the future.

724 The conditions proposed by the Farnells, if no supervision order is made, include a requirement for compliance with the safety plan; a review of the plan; and the three monthly reading to Pipah of the Words and Pictures Story, provided that the story is reviewed in 18 months' time. As counsel for the Farnells pointed out, much of his clients' proposal was taken from the proposals of DCP and the ICL, and the competing proposals had much more in common than might first appear. Arguably, the major point of difference was the Farnells' opposition to an order that Pipah would automatically have to live with Mrs Farnell if the Farnells separated.

**The court's reasons for not making a protection order**

725 As earlier recorded, the outcome of the application for a protection order turns on whether I am persuaded there is a possibility that cannot sensibly be ignored that Pipah will suffer harm as a result of abuse if she is left in the care of the Farnells.

726 While the evidence suggests it is probable that Pipah will come to no harm if she remains with the Farnells, I do not consider that the possibility she might come to such harm can be sensibly ignored. In arriving at that conclusion, I have had regard to all of the evidence and to the likely devastating impact on Pipah if she were to be abused.

727 The fact that I consider the threshold test in s 28 of the CCS Act has therefore been satisfied does not mean that I am obliged to make a protection order.

728 First, I must first consider whether I should apply the "no order" principle. In deciding whether it is in Pipah's interests to make a protection order, I must take into account all of the work that DCP, the Farnells and the safety network have done since 2014. In my view, the extensive planning, education and counselling already undertaken has gone a very long way toward achieving the goals set by DCP and its consultants at the commencement of the exercise. While this has been important for Pipah's safety, it must inevitably have had a significant impact on the capacity of the Farnells to devote their attention to looking after Pipah (and in Mr Farnell's case, on his capacity to earn an income). This is a factor to consider in determining whether a protection order should be made at all, and if one is made, the duration of the order.

729 Second, I must consider the factors set out in s 8 of the CCS Act, which I am obliged to take into account in determining what is in Pipah's best interests. Although I have not discussed these, I have taken them into account to the extent they are relevant, especially the first three, namely:

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

(b) the capacity of the child's parents to protect the child from harm;

(c) the capacity of the child's parents, or of any other person, to provide for the child's needs;

730 Third, on my reading of the legislation, there is nothing that can be achieved by a protection order (supervision) which cannot be achieved by orders under the State Act, especially given the preparedness of DCP to work with the family.[167] Thus, I can order the Farnells to keep DCP informed about where Pipah is living, thereby matching the one requirement attaching to all protection orders (s 50(1)). I can make the residence order subject to the same conditions as could be applied to a protection order (s 50(2)). I can order the Farnells to allow DCP to have access to Pipah at any reasonable time (s 52). There is nothing to prevent DCP from offering social services to the family (s 53). Finally, DCP has all of the options available under ss 21 and 32.

731 The fact that there is nothing that can be achieved by a protection order (supervision) that cannot be achieved by orders made under the State Act can be seen from all of the work that DCP and its consultants have done with the family after they became involved in August 2014. All of that has been done without a protection order in place. I recognise, of course, that the Farnells have had a significant incentive to cooperate with DCP pending resolution of these proceedings. While I am inclined to consider that their cooperation would be ongoing after the proceedings finish, their cooperation would not be required in the event that a protection order is not made, since they will be obliged to comply with any conditions I impose under the State Act.

732 For all of these reasons, I intend to apply the "no order principle" and will dismiss the application for a protection order. This decision has one further, albeit modest, advantage. The orders proposed are already long enough and complicated enough without having the added layer of one set of conditions attaching to a protection order, and another set attaching to the residence order that would only come into effect when the protection order expired. Although they will still be lengthy, the orders I propose to make will have the benefit of greater simplicity, thereby increasing the prospect of them being understood, especially by Mrs Farnell.

## Part 12: Publication by the media

733 During the closing addresses, the issue arose as to whether permission should be given for the media to publish an account of this judgment.

734 Ordinarily, it is an offence to publish an account of proceedings under the State Act that identifies parties to the proceedings, or persons related or associated to them. However, ss 243(8)(d) and (g) of the Act permit publication of a report of proceedings authorised by the court. Permission has already been given for a report of an earlier stage of these proceedings.[168] There has also been unauthorised publicity concerning the alleged attempt by the Farnells to access Gammy's trust fund.

735 In *Sedgwick and Rickards* [2013] FCWA 52, Duncanson J considered the relevant statutory provisions and case law relating to publication of an account of proceedings in the context of a surrogacy case. At [48], her Honour concluded:

> I accept there is an aspect of public interest to this case. Surrogacy is becoming increasingly prevalent. Unfortunately not all surrogacy

[167] The position would be different if a more draconian protection order was sought.
[168] Some of the reports that came to my attention incorrectly suggested that the interim orders were final orders.

> arrangements are carried out in accordance with the legislation leading to the exploitation of vulnerable adults and children both in Australia and overseas. The reporting of the arrangements in this case is informative. It may provide an example to others and discourage surrogacy arrangements undertaken contrary to the terms of the legislation. The permission to report the account of proceedings will not be inconsistent with the best interests of the child. Had it been so, the best interests of the child would have overridden the public interest.

736 I respectfully agree with Duncanson J, and I have decided to permit publication of my judgment for the following additional reasons:

- the story is already in the public domain;
- an account has already been permitted of what occurred at an interim stage;
- there has been significant public interest in the case and it has been at the forefront of discussion about possible law reform;
- the public has a legitimate interest in knowing how Australian law deals with the complex issues that arose in the proceedings;
- it would be impossible to publish an account in a way that did not immediately link the story to the notorious "baby Gammy" case; and
- if the Farnells are to receive the "vindication" they want, it would be of limited value unless published in the way the earlier inaccurate story was published.

737 Ultimately, no one expressed any objection to me making an order permitting publication of an account of the proceedings, and some counsel urged me to make such an order. Counsel for the Farnells submitted that the publication should be limited to a "reasonably fulsome" but "quite carefully constructed" summary of the decision. It was submitted that publication should be limited in this way, because "if too much information is given about the restrictions under which [the Farnells] are living, that will be used as a stick to beat them with and could well be the cause of malicious complaints, ill-founded accusations".

738 I do not agree that publication should be limited in any way. If some details are redacted, it will lead to suspicion in some quarters that there has been a cover-up of some sort. Furthermore, the major point of the exercise is to ensure that the public is aware of the way in which the law has been applied. The conditions I intend to impose on the residence order are a crucial element of my decision and should therefore be known. I do not see any disadvantage for Pipah in the wider public being aware of those conditions. On the contrary, dissemination of the details of those conditions in itself could be a protective feature.

739 Counsel for DCP sought permission for the relevant Minister to be able to comment on any account that was published; however, in my view, once the court gives permission for an account to be published, it is open to any official or citizen to comment as they see fit. Indeed, many people within the family law system crave

greater transparency in order to dispel the myths and misunderstandings that surround this area of law and the way it is applied.[169]

740 Different provisions apply in relation to the proceedings under the CCS Act. Subject to a provision that is not applicable, s 237(2) of the Act places restrictions on publication that would identify Pipah. Those restrictions can be dispensed with by written authorisation of DCP. The CEO of DCP consented to the report that was published earlier in the proceedings. Further authorisation is not required in the circumstances of the present case.

741 This matter highlights the difficulty in achieving a balance between the right of the public to learn of the full background to an important case while ensuring that the best interests of the children involved are protected. Families involved in proceedings in this court normally have their anonymity protected, but for reasons previously stated, the parties here will be exposed to the full glare of public scrutiny. My concern is to ensure that the order permitting publication of the proceedings will not cause further upset to Pipah. The previous invasion of the Farnells' privacy by some elements of the media caused great anxiety and anguish and, in my view, severely impinged on their ability to provide proper care for Pipah.

742 To ensure that Pipah's interests are protected, I will impose conditions on the publication order. Any outlet wishing to publish the story will be permitted to do so only if they do not contact the Farnells, Mrs Chanbua, or their families, and they will be required to use only file footage as part of any story. If the Farnells or Mrs Chanbua wish to comment, they can make contact with the media directly.

743 To give the flavour of what the Farnells have experienced, I have set out part of the evidence of Jane Farnell. This will explain why it would not be in the interests of Pipah for there to be any repetition of the conduct of some parts of the media, which led to the Farnells having to move out of their home during the media frenzy in 2014.

> [BERRY, MR:] Can you just explain what you observed?---They were camped out on the front lawn. … when the media first broke out, I actually wasn't in the country. But when I came home and tried to go to Dad and Wendy's, they ran up to the car and put the cameras right in our face. Actually, my mum and brother picked me up from the airport, and they were at my brother's house in Perth, waiting. And they followed us, I would say chased us, from Perth all the way down to Bunbury, to my brother's house, and ran up the driveway with cameras in our face, until we got into the door, badgering for questions and stuff. And, again, when we would leave the house and got to Dad and Wendy's house, they were camped at Dad and Wendy's house. They were camped outside my brother's house, my mum's house – down the street from my mum's house.
>
> … In terms of your dad's house, are you able to say how many media, roughly, were there?---At the start, I would say there was at least seven

[169] See my judgment in *West Australian Newspapers Ltd & Channel 7 Perth Pty Ltd and Cuzens* [2016] FCWA 6, which is available on the FCWA website. www.familycourt.wa.gov.au.

> SUVs and vans. There were some parked down the street. So maybe there were 10, but there was a lot. With the second media, probably about the same – when the last media outbreak came out, which was March this year, maybe, there was about three. I phoned the police, because they were knocking on the door before 7 am and woke my baby up, and I didn't want to look crazy opening the door and yelling at them.
>
> Okay. So in terms of the impact that that had on you and the household, are you able to describe how it felt to have that degree of intrusion?---It was extremely frustrating, having a newborn baby and having them wake him up all the time. They were banging on the doors, yelling absurd things, banging on the windows – if you would make a noise, yelling through the windows, "I know you're in there. Why don't you answer us? Why did you do this? You know you're horrible people." It was very traumatic.

744 As a result of representations made by DCP, the names of members of the safety network and many of the professionals involved in the matter will be anonymised in the version of this judgment provided for publication in the media.

## Part 13: Referral to the Director of Public Prosecutions

745 I have been invited by Mrs Chanbua to refer the papers in these proceedings to the Director of Public Prosecutions for consideration of a prosecution arising out of what her counsel called the "blatant and pervasive irregularities" in the Farnells' evidence. Counsel for the Attorney General also asked for the papers to be referred, noting that it would then be for the proper authorities to decide whether to prosecute.

746 Although Mrs Chanbua's counsel asserted that the Farnells' perjury extended beyond the story about the identity of the egg donor, it is that untruth which would ordinarily have persuaded me to refer the papers to the DPP. In considering this option, I note that the Farnells only told the truth about the identity of the egg donor after the story broke in the media. However, as Mr Farnell said:

> We still could have carried the lie on … but we chose to tell the truth. Just because something is written in the newspaper doesn't mean that that is 100 per cent correct.

747 This may be correct, but the fact remains that, were it not for the publicity, the court would have been asked to rule on the Farnells' original application without being aware that part of the evidence in support of the application was untrue.

748 While I accept that the Farnells were motivated by what they thought would be in Pipah's best interests, the fact remains that the legal system is founded upon the obligation of parties to tell "the truth, the whole truth and nothing but the truth". This is especially important in a case such as this, where it was expected there would be no contender. The fact that the Farnells told the same lie to their family provides strong evidence of their belief that they were acting in Pipah's best interests, but it provides no excuse for taking the lie one step further by repeating it under oath.

749 The irony of the Farnells telling this lie is that it was unnecessary. In my view, it would not have damaged their case one jot if they had told the truth, since Pipah's best interests clearly called for someone to have parental responsibility for her, and the name-change application would not have been affected by the fact that the egg came from another woman. In my view, what was more serious was their failure to reveal the existence of Gammy and the fact that Mr Farnell was a sex offender. However, they did not lie on oath about those topics – they just omitted to mention them.

750 The Independent Children's Lawyer accepted that the seriousness of the Farnells' conduct should not be minimised and submitted that in proceedings involving children, honesty is especially critical. However, there is much force in the rest of her submissions, which are so important that I repeat them in full (footnotes omitted):

> 106. It is respectfully submitted that [the Farnells'] dishonesty went to matters directly relevant to the Family Court's primary function in child related matters, the safety and wellbeing of children. Their conduct is serious. However, the Family Court is sadly, littered with judicial findings that parties have lied, been deceitful or been "less than candid." Further, it is submitted that the usual penalty or consequence for a lie, is a loss of some kind or, having a cost order made against them. The penalty of a prosecution referral appears, to the Independent Children's Lawyer, to be something that happens in rare circumstances.
>
> 107. In considering whether this is one of those occasions where a prosecution referral should be made, the Court is invited to consider the very emotional and difficult circumstances that [the Farnells] found themselves in while in Thailand and upon their return to Australia. It is clear on the evidence that they have a genuine fear of losing Pipah and the Independent Children's Lawyer submits that this fear may have resulted in their poor decision making.
>
> 108. The Independent Children's Lawyer also invites the Court to consider the impact on Pipah if one, or both of her parents, face prosecution with a possible term of imprisonment.
>
> 109. Given the intense media interest in [the Farnells], the Independent Children's Lawyer is concerned about further media attention if criminal charges are laid against either. In particular, the Independent Children's Lawyer is concerned about the impact on Pipah of being exposed to further media harassment of the kind the family had previously been exposed to, as was described by Jane Farnell in her evidence. Given Pipah's age, she is more likely to now have an awareness of a media presence at the home, particularly if members of the media were to again bang on the doors and windows, call out and thus invade her sense of safety.

> 110. The Court is also respectfully invited to consider whether [the Farnells] have been adequately punished given the vilification they have experienced in the media, in particular as they live in a small town. The impact of the media pressure on [the Farnells] is detailed in the annexures attached to the affidavit of [Ms H]. [Mrs Farnell] spoke with [Ms H] about a photo accompanying a story in the media about Pipah, members of the media contacting customers of Mr Farnell's, neighbours, tenants in the house owned by [Mrs Farnell] and other family members in an attempt to obtain information. Of particular concern, is [Mrs Farnell's] description of feeling scared to leave the home as a result of the media presence on her street.

751 I am concerned about the impact on Pipah of the further stress, expense and public humiliation for her carers that would be the inevitable result of criminal proceedings. Ordinarily, I would not consider this a matter of great relevance; otherwise, parents would be given carte blanche to ignore the law because of the impact on their children of being punished for their wrongdoing. However, in the present matter, the Farnells have already suffered great humiliation and enormous stress for things they did **not** do.

752 In *Malpass & Mayson* (2000) FLC 93-061 at [31], the Full Court of the Family Court of Australia said:

> Despite these authorities, we do not think it necessarily follows that the Court is always under a duty to report the fact of commission of possible offences to the relevant authorities … although it clearly has the power to do so. Questions of degree must be relevant. There are many cases where minor irregularities are revealed in relation to taxation, social security and other issues. We think it unreasonable for the Court to burden itself with a duty to report all of these matters. Different considerations may apply in relation to more blatant and substantial irregularities.

753 In my view, courts refer papers because illegal conduct has come to light in the proceedings that may not otherwise come to the attention of the prosecuting authorities. In this case, the fact that the Farnells lied is already known to the Attorney General, the first law officer of the State. If the Attorney sees fit, it is open to him to ask the DPP to look into the matter.[170] Ultimately, it is not my function to determine who should and should not be prosecuted. I will therefore do no more than direct that the papers be made available for inspection by the police or the DPP on request.

[170] I was advised that the Attorney would make his decision after considering my judgment. For a discussion of the policy considerations and the different approaches adopted to referring papers to prosecuting authorities see Mary Keyes & Richard Chisholm, 'Commercial surrogacy – Some troubling family law issues" (2013) 27 *Australian Journal of Family Law* 105, 127.

## Part 14: Law reform

754 The Independent Children's Lawyer submitted that:

> Whilst urgent action and reform is needed [concerning surrogacy arrangements], these proceedings should not be used to advance that purpose. These proceedings are about Pipah and what care arrangements will be in her best interests.

755 It should be apparent that I have approached this dispute from the perspective of what would be best for Pipah. The decision should therefore not be interpreted as indicating any form of approval of commercial surrogacy. While I accept my orders may be seen as encouragement to other couples to beg forgiveness rather than seek permission, the outcome might have been very different had the dispute come before me much earlier in Pipah's life. At that point, it may well have been decided it was in her best interests to return to live with her birth mother and twin brother.

756 The appalling outcome of Gammy and Pipah being separated has brought commercial surrogacy into the spotlight. Quite apart from the separation of the twins, this case serves to highlight the dilemmas that arise when the reproductive capacities of women are turned into saleable commodities, with all the usual fallout when contracts go wrong. The facts also demonstrate the conflicts of interest that arise when middlemen rush to profit from the demand of a market in which the comparatively rich benefit from the preparedness of the poor to provide a service that the rich either cannot or will not perform.

757 This case should also draw attention to the fact that surrogate mothers are not baby-growing machines, or "gestational carriers". They are flesh and blood women who can develop bonds with their unborn children. It is noteworthy that no evidence was provided about the long-term impact on mothers of giving up children they carried, and there was no evidence of the impact on the children themselves. Nor was there any expert evidence of the impact on the other children of birth mothers who would have seen their mother pregnant, and perhaps felt the baby move in her belly, only to find that the baby never came home from hospital.[171] Did those children wonder who would be the next to be given away? And what of their feelings of grief and loss if they were misled into believing the baby had died?

758 I accept it is for others to decide whether the manifest evils associated with overseas commercial surrogacy can be overcome by importing the problem into Australia, even though such suggestions have been made as a result of what happened to "baby Gammy". It is also for others to determine whether even a "first world" country can provide a regulatory regime sufficiently robust to protect the interests of surrogate mothers and the children they bear. But can any regime anticipate the ingenuity of would-be parents? Who would have contemplated the facts in *Dudley & Chedi* [2011] FamCA 502, where a couple commissioned one surrogate to carry two boys and, at the same time, commissioned another to carry a third boy, with both mothers being induced on the same day so that all three boys would share a birthday?

[171] Many clinics insist on their surrogates having demonstrated their ability to carry a child, and s 17(a)(ii) of the Surrogacy Act also requires the surrogate to have previously given birth to a child.

This arrangement was entered into notwithstanding it constituted an offence in Australia under the existing regulatory regime.

759 The arrangement leading to the births of Pipah and Gammy would never have been put in place had it not been for the fact that a department of the Australian Government provided assurances that the children would receive citizenship and automatic entry to this country. Such assurances could not be provided if the citizenship laws were harmonised with all the other laws of this country. Effective law reform therefore does not have to involve the legalisation of commercial surrogacy to encourage would-be parents to buy locally-grown children.[172] Equally, it could involve amendment of the citizenship laws to align them even more clearly with existing state laws. A fundamental policy decision is required.

## Part 15: The orders of the court

760 For the reasons I have given, I will make orders for Pipah to live with the Farnells, and for them to have equal shared parental responsibility. There will also be orders relating to the two families keeping each other informed about their contact details and for the supply of some of Pipah's artwork and schoolwork to Mrs Chanbua.

761 The application for a protection order will be dismissed on the basis that I will instead impose conditions as set out in the proposed form of orders below. The conditions are not as detailed as those that were sought, since I consider it unnecessary to spell out details already well known to all involved – for example, the purposes of the counselling to be provided to the Farnells.

762 Otherwise, I consider all of the orders I intend to make, and all of the conditions I intend to impose, are in Pipah's best interests. I do not consider it necessary to give further reasons for all of them, but some require further explanation, either because they are very important or because they were controversial.

### The safety plan and the safety network

763 Although I have found that the risk of Pipah being abused in the home of the Farnells is low, I nevertheless consider it important that the existing safety planning process continue indefinitely and that the safety network be maintained.

764 While I agree with the Single Expert's opinion that "even without a safety plan, there are numerous indicators of action and context facilitated by [the Farnells] that would provide safety for Pipah and could be expected to function in the short to medium term", I accept his opinion that safety planning will reduce the risk to Pipah even further. I also accept his opinion that the Farnells will comply with whatever safety plan is in place from time to time.

[172] Tobin and Luke in their submission to the Family Law Council suggested that surrogacy arrangements may involve the sale of a child in contravention of Article 35 of the *Convention on the Rights of the Child*: 'Report on Parentage and the *Family Law Act*' (Family Law Council, December 2013) 88.

765 I agree with the Single Expert that "implementing a safety plan must be balanced against the developmental needs of Pipah and the functionality of the family system", which he described as "extremely healthy and functional". Accordingly, the orders will treat the safety plan and the safety network as evolutionary, responding as required to Pipah's developmental needs.

**The Words and Pictures Story and associated rules of behaviour**

766 The aspect of the safety plan that has caused me greatest concern is the one relating to the use of the Words and Pictures Story. While I accept the validity of the Single Expert's concerns about the impact of the repeated telling of that story to Pipah, in my view, the most compelling reason for it being read to Pipah was given by Mrs Farnell herself, as appears in the Single Expert's report:

> When I interviewed [Mrs Farnell] she was well aware of Mr Farnell's past behaviours and was clear with me that she supported the plans put in place about informing Pipah of Mr Farnell's previous crimes. Notably, [Mrs Farnell] acknowledged the need to put safety practices in place, however, her reasoning is more considered and reflective of developmental thinking than just the issue at hand. For example, whilst she agrees with Pipah being told of her father's past crimes as early as is reasonable, her rationale for this was that she believed it was protective for Pipah at the social and personal level also. [Mrs Farnell] pointed out that the community would be well aware of Mr Farnell's past and they had no intention of hiding or removing themselves from their current living context. Consequently, Pipah would eventually be faced with a community who would make comment and she will need to have an understanding that gives her protection.

767 The Single Expert explained his concerns about the rules of behaviour which will be reinforced by the Words and Pictures Story (original emphasis):

> The main concern I have in DCPFS' suggested safety plan is the lack of developmental consideration. I specifically have concerns in relation to the "*words and pictures*" strategy, where Pipah is exposed to this narrative every three months from the age of 2 until she is 14. I have concerns that have this set of narratives are not balanced out by functional explanations and practices at a later date, a set of norms will be established that may become dysfunctional and put needless pressure on the family system, which will then have negative impact on Pipah.
>
> In essence the narratives presented in the *words and pictures* are rules for behaviour in the family. All families have rules, implied or explicit, that have the purpose of guiding a child so they can predict outcomes and know how to control context for their own specific goals and needs. In essence, these become "norms" about social interaction, interpreting people and developing logical theories of human and social behaviour.

Many of the rules stated in the *words and pictures* will not match Pipah's experience and observations in the future. For example, she will see other father sit in the back of the car with their children, she will see other fathers walk their daughters alone to school or in parks etc. She will need to understand why the rules for her father are different. To do this she will then have to draw on her knowledge of the past behaviour of her father (presented in the "*daddy went away for a long time*" narrative). If she is to continue to receive these strict safety rules *in the absence of experience of her father being a risk* (i.e. she continues having a positive relationship with him) she must then draw conclusions about why these rules are in place and being so regularly presented to her by her caregivers. This could result in her concluding that her father is always unsafe no matter the evidence, his claims or her own experience. This is developmentally concerning as children should question and adapt rules based on experience via communication with caregivers, not blindly follow them in the absence of functional logical evidence. She also could conclude that her father is 'different' and pull away from him as he has a special set of rules that differ him, no matter his behaviour or the quality of their relationship, from other fathers. Her mother's continual reminding of his limited freedoms would reinforce her doubt. Indeed, at worst, she may begin to use these rules in a dysfunctional way, such as a accusing her father of 'tickling' her, or the like, as a way to undermine his authority or misapply the norms she has been given for personal gain. Mr Farnell could then fall away from his parenting role to maintain the safety of his family functioning, even if he knows Pipah to be 'using' the rules as a way to navigate the context that is maladaptive.

In my opinion, the *words and pictures* 'rules' as written are appropriate to her stage of development in the next year or so. However, as she develops these rules must be altered, and the parental and family behaviours adjusted accordingly so that socialization processes can be properly utilised. For example, as Pipah becomes more aware of her boundaries and more able to express herself about pivotal rules regarding privacy and care (e.g. private parts, right roles of children and adults/parents) then the rules about being alone with her father can be loosened and function more in accord with societal norms. It is essential this be considered, as children learn about healthy relationships from interacting dynamically with their parents based on a variety of contextual factors on a situational basis. To follow a rule in spite of evidence and experience to the contrary will create a developmentally problematic context that could be very disruptive to Pipah's understanding of social behaviours but also about logic.

Whilst Pipah's safety is paramount, this cannot be at the expense or ignorance of development processes and I have concerns the *word and pictures* have not considered these dimensions. I think the '*Safety Network*' as outlined by DCPFS is well positioned to make informed decisions about the functional and developmental benefits of these rules. When Pipah's communicative skills are adequate and she shows clear evidence of comprehension of societal standards about safety then I would

> suggest that the rules be altered to better reflect community norms. I would, though, heavily influence Pipah the rules associated with '*private parts*' and normalize a more conservative set of norms in the home where Mr Farnell does not place himself in contexts where such behaviour could occur (e.g. washing, toileting).
>
> The adults in the 'Safety Network' should observe and reflect upon the other concerns of safety associated with Mr Farnell being able to do things such as walk alone with Pipah or sit in the back seat of the car with her, and the like. These family values and functioning are things that adults are better and more appropriately equipped to handle and change on the basis of development, family functioning and values. To make a child sensitive to such rules without grasping their purpose, or being able to see them as dynamic and functional, would be to place an onus and relationship dynamic on the child that is unhealthy.

768 The Single Expert's opinion was that:

> The impact on Pipah for having restrictions in parenting practices without apparent evidence or logic that she can make sense of, will likely have little impact before the age of four, as many children function 'blindly' following rules up until this point. However, as her cognitive development increases and social modelling and experiences expand, it is important that the family is able to function and reflect societal norms as much as possible.
>
> This is not to minimise the issues of safety that should be considered but I believe these can be captured as effectively and functionally by heavily highlighting core societal values associated with personal safety and self-care (e.g. lessons about who can touch her and where). Pipah would then develop with greater awareness than most of this core societal norm, as opposed to focusing more on her father being a risk who must always operate under the assumption of being as such. It seems an unnecessary disruption, and possibly unhealthy dynamic, to foster such a view when the same level of protection for Pipah can be created by teaching her more about personal safety and her rights. Furthermore, the adults who are better prepared and in a more developmentally appropriate position to do so, can take a more cautious view of Mr Farnell and know whether situations may or may not be appropriate. The 'Safety Network' would be able to play this role without placing Pipah's development and wellbeing at risk by causing her to have to view her father in such a restrictive and unusual fashion.

769 I accept the Single Expert's opinion that the Words and Pictures Story and the associated rules of behaviour within the home are appropriate at Pipah's current stage of development, and will continue to be appropriate in the short term. Thereafter, however, I agree with the Single Expert that an adequate level of protection can be established for Pipah by "heavily highlighting core societal values associated with personal safety and self-care", rather than continuing to focus on her father as a special risk. I also accept that rather than expecting Pipah to be "sensitive" to the rules around

Mr Farnell's behaviour, it would be developmentally more appropriate for the members of the safety network to take a "more cautious view of Mr Farnell and know whether situations may or may not be appropriate."

770 My firm impression of the approach taken by DCP is that they do not see any of the current requirements as being set in stone, but rather accept that safety planning is a dynamic process which must take account of the needs and development of the child. I therefore have confidence that, working together, DCP, the Farnells and the safety network will be able to oversee the evolution of the safety plan and the Words and Pictures Story so as to move away from the emphasis on having Pipah regard her father as a risk and move toward her having a good understanding of protective behaviours generally. The pace at which this should occur, and how it should occur, are matters that are better left to those with expertise and the capacity to observe Pipah's development, rather than me attempting to prescribe the outcome by a blunt court order. Although I have confidence that the parties will be able to resolve these matters, I will reserve liberty to return to court for resolution of any disputes.

**Pipah never being left alone**

771 Counsel for Mrs Chanbua was correct to draw attention to the logistical difficulty and undesirability of the requirement for Mr Farnell never to be left alone with Pipah. Although the Farnells are prepared to live with this requirement in the short term, they consider it unnecessary in the longer term. In her oral evidence, Mrs Farnell said that she thought Pipah would be old enough to be left alone with Mr Farnell when she turned 6, even though it was put to her that this was the age of some of Mr Farnell's victims.

772 I consider that Mrs Farnell's views about Pipah's safety generally, and the age at which it would be safe for her to be left alone with Mr Farnell in particular, are more sophisticated and nuanced than might appear from reading the transcript passage recited earlier in which she was questioned about her views.

773 I concur with the opinions the Single Expert expressed on this topic (original emphasis):

> Significantly, due to the risks posed by Mr Farnell, [Mrs Farnell's] capacity for provision of safety and care go beyond those of a normal parent. Indeed, Ms Davis, Acting Director of Country Services of DCPFS … noted, "*it will take time for [Mrs Farnell] to fully understand requirements of her*" and raised concerns about a level of denial in terms of the potential for Mr Farnell to re-offend and understanding of the nature of child sexual abuse. When I spoke with [Mrs Farnell] about her parenting responsibilities and insights it was readily apparent that she had placed a good deal of thought into Pipah's needs and had clearly discussed and reflected on the issues raised by DCPFS and others. Tellingly, [Mrs Farnell] was not simply repeating the advice she had been given by DCPFS workers, she added her own thoughts and strategies given, that showed insight and reflection.

774 Although Mrs Farnell has been the subject of adverse comment concerning her preparedness to trust Mr Farnell, this must be seen in context, as the Single Expert explained:

> [Mrs Farnell's] approach to being open with Pipah, and her logic about safety and protection, is likely influenced by Mr Farnell's approach to re-entering his community after his prison sentence. Mr Farnell chose to be open and upfront about his crimes and past. He did not change his name and whenever it was appropriate that a person know his of his background (e.g. coaches, teachers, parents of Jane's friends) he openly and appropriately informed them of his previous history. …
>
> I also found Mr Farnell and [Mrs Farnell] to be extremely conscious of being compliant with guidelines and advice they are given, I note this has been observed by others who have worked with them, and it appears to be a consistent theme. [The Single Expert then went on to give an example arising out of his own direct dealings with the Farnells, which demonstrated to him their skill in implementing the safety plan and the earlier order of the court that Mr Farnell not be left alone with Pipah even in circumstances where Pipah clearly wished to be left alone with him.]

775 It is also important to recognise that part of Mrs Farnell's thinking has been informed by her appreciation of factors other than her opinion of the likelihood of Mr Farnell offending again. This appears in the following passage from the Single Expert's report:

> [Mrs Farnell] also believes that it is important that Mr Farnell not be exposed to situations where he may be able to offend and was able to give examples of such contexts. However, again her logic is broader than just protecting the children. She is of the opinion it is also important to protect Mr Farnell from the risk of further accusations or gossip.

776 Accordingly, it would be wrong to proceed on an assumption that, when Pipah is 6, or any other age, Mrs Farnell would be cajoled or persuaded by Mr Farnell to leave him unattended with Pipah in circumstances where it would be easy for him to abuse her. In making this observation, I do not overlook the fact that a paedophile can abuse a child given even a fleeting opportunity, but it should also be understood that a child can be surreptitiously molested even while other adults are present.

777 Mrs Farnell is an intelligent, thoughtful woman who has been given far more advice about child protection than would have been received by almost any other person entrusted with the care of a young child. Her continuing statements to DCP and others about the trust she has in her husband must be considered in the context of her desperation to persuade DCP and others that Pipah should not be removed. In my view, Mrs Farnell will be vigilant in ensuring the safety of Pipah. Furthermore, the dynamic between the couple is such that Mr Farnell will defer to Mrs Farnell's requirements about his interaction with Pipah. It is important in this context to recognise that Mrs Farnell's life now revolves around Pipah, not Mr Farnell, and I agree with the Single Expert that Mrs Farnell "will prioritize Pipah's safety and wellbeing at all times and has the skills to do so".

778 Although I consider it unlikely that Mr Farnell would molest Pipah, it is nevertheless appropriate that the safety planning proceed for the moment on the basis that he will not be left alone with her. Future safety planning, however, will inevitably take into account Pipah's evolving maturity and, for example, her response to protective behaviours training, including her response to being read the Words and Pictures Story. In my view, it is likely that a point will be reached in the early years of Pipah's primary school education when it will be appropriate for Mr Farnell to be allowed to spend time alone with her – for example, to walk her to the shop or school.

779 In the meantime, I do not consider the requirement for Pipah never to be left alone with Mr Farnell should be interpreted in the extreme way suggested by counsel for Mrs Chanbua. Thus, for example, if the Farnells were playing a ballgame with Pipah in the house, and the ball escaped down the end of a passage, I would not expect Mrs Farnell to rush after Mr Farnell if he followed Pipah. Similarly, in the event that Mrs Farnell was to be urgently hospitalised, as posited by counsel for Mrs Chanbua, I accept that there could be a short period in which Mr Farnell might be alone with Pipah while arrangements are put in place for alternative supervision. I consider it fanciful, however, to think that in such circumstances Mr Farnell would take the opportunity to molest Pipah. However, until the "never to be left alone" requirement has been lifted, it would clearly be inappropriate for Mr Farnell to be left in a room alone with Pipah with the door closed, and it will always continue to be appropriate for Mrs Farnell to attend to all of Pipah's intimate needs.

780 The orders will therefore recognise that it is a requirement of the safety plan for Mr Farnell not to be left alone with Pipah; however, the orders permit the evolution of the plan and will allow the parties to return to court to resolve any dispute that might arise, such as whether the requirement should be lifted at some point.

**Period of DCP involvement**

781 I am inclined to agree with the Single Expert that the resources devoted by DCP to this matter have been far in excess of what would normally be provided. It is difficult not to speculate that DCP's devotion of enormous resources to the case, and its willingness to accede to the Independent Children's Lawyer's proposal to extend the duration of the protection order, were designed to avoid the possibility of any political fallout that might be associated with not appearing to take a "hard line" in a matter that may attract public outrage about a child being left with a sex offender. In this regard, it will be remembered that when DCP first learned about the arrangements concerning Pipah, it took no action until the media storm erupted.

782 It is nevertheless gratifying that DCP have been able to devote such resources to the Farnell family and remains willing to do so in the future. I accept the arguments of DCP why it would be appropriate for some ongoing therapeutic support and assistance to be provided to the Farnells; however, given the assistance already provided, I propose to request DCP to continue providing such support as may be recommended by the Farnells' psychologists for one year only. This would not prevent DCP from providing assistance at the expiration of one year. On the contrary, I intend that DCP have such ongoing involvement in the safety planning and oversight of the safety network as it sees fit, as well as in facilitating the risk assessments.

**The cost of attendance on psychologists and assessments**

783 The Farnells have asked that DCP meet the costs of the psychologists and the costs of the risk assessments. The Farnells have met what appears to be a significant proportion of the costs to date, but DCP has recognised that this has been a significant impost on them and has made some contribution. DCP is agreeable to making a further contribution, taking into account the Farnells' financial position.

784 I do not consider it is appropriate that I impose an open-ended financial burden on DCP by ordering them to meet all of these costs. I will leave it in the discretion of DCP to make such contribution (if any) as DCP considers appropriate.

785 Although the submissions made by the Farnells following the release of the draft judgment expressed concern about the imposition of this financial burden, I consider their position is adequately covered by the liberty granted to them to apply to vary the relevant portion of my orders. However, I wish to make it clear that it is my expectation that no charge will be rendered for the work done by [Mrs Farnell's psychologist], and that I anticipate that Mr Farnell will not be asked to see Mr A more than quarterly, as this was the regularity proposed by DCP and the Independent Children's Lawyer.

**Action to be taken if the Farnells were to separate**

786 I do not propose to make the order requested by DCP and the Independent Children's Lawyer about where Pipah should live if the Farnells ever separate. While I accept that, at present, it seems likely that Pipah's best interests would be served by living with Mrs Farnell in the event of a separation, I cannot predict the circumstances that might exist at some unspecified future time. It would be inappropriate for an order to spring into existence without any regard to the prevailing circumstances.

787 If the Farnells were to separate, and in the event they could not agree what was to happen to Pipah, an application could be made by either of them and listed before the court urgently. The only safeguard I think necessary to impose is to require both of the Farnells to advise DCP immediately in the event of a separation, and for Mr Farnell's time with Pipah to be supervised (for example by a member of the safety network, such as Jane) pending a court determination based on the facts then existing.

**The Form 2 application of 9 December 2015**

788 My orders will dismiss the Form 2 application of the Independent Children's Lawyer filed on 9 December 2015, which was opposed by both the Farnells and Mrs Chanbua. It sought interim and permanent injunctions restraining the Farnells and Mrs Chanbua from speaking with the media about these proceedings. The application was prompted by the publication of the story in *WHO* magazine mentioned earlier. Now that I have determined that it is appropriate that there be publication of an account of these proceedings, I do not consider it appropriate to restrain any of the parties from commenting on matters arising out of the court's decision.

**Form of orders**

789 For these reasons, and having afforded the opportunity to all parties to comment on their form, I will make the following orders:

1. All existing orders are discharged (save for the order requiring parentage testing).

2. DAVID JOHN FARNELL and WENYU LI ("the Farnells") shall have exclusive equal shared parental responsibility for Pipah Li Minjaroen, born 23 December 2013 ("Pipah").

3. Pipah shall live with the Farnells.

4. The preceding order is subject to the Farnells' ongoing compliance with the conditions contained in the Attachment to these orders (provided that the Farnells and the Department for Child Protection and Family Support ("DCP") shall each have liberty to apply in relation to any dispute concerning the ongoing requirement to comply with the conditions, including but not limited to the content of the Words and Pictures Story and the requirement for it to be read to Pipah).

5. In the event that the Farnells separate or Mrs Farnell becomes unable to provide for the day-to-day needs of Pipah, the Farnells shall forthwith advise the General Manager, Service Delivery Practice Unit of DCP (or its equivalent position from time to time).

6. In the event that Pipah is living with or spending time with Mr Farnell at any time following a separation between him and Mrs Farnell, Mr Farnell's time with Pipah must, until further order of the court, be supervised by a member of Pipah's safety network or by a professional agency or a person nominated by DCP.

7. The Farnells and PATTARAMON CHANBUA ("Mrs Chanbua") shall keep each other informed of their contact details, including an address at which they can receive mail (and email if Mrs Chanbua has the ability to communicate by email).

8. After Pipah commences kindergarten, the Farnells shall send to Mrs Chanbua samples of Pipah's artwork/schoolwork not less than three times per annum.

9. The Farnells may, if they wish, provide to Mrs Chanbua copies of Pipah's school reports; photos of themselves and Pipah; and presents for Pipah's brother, NAREUBET MINJAROEN ("Gammy").

10. There be such electronic and/or face-to-face contact between the Farnells, Mrs Chanbua, Pipah and Gammy, as can be agreed between them from time to time.

11. If Pipah suffers any serious medical issues, the Farnells shall advise Mrs Chanbua at the first available opportunity.

12. The Farnells shall engage Pipah in celebrating important Buddhist festivals and events, including but not limited to, Visakha Bucha and Makha Bucha.

13. Pipah's name be removed from the Watch List in force at all points of arrival and departure in Australia.

14. The Farnells shall be at liberty to travel interstate or overseas with Pipah without the permission of DCP or any other person, provided they give DCP as much written notice as is practicable of their intention to travel outside Australia.

15. The Registrar of Births, Deaths and Marriages ("the Registrar") shall register Pipah's birth, identifying her:

    a) date of birth as 23 December 2013;

    b) place of birth as Bangkok, Thailand;

    c) name at birth as Pipah Li Minjaroen;

    d) mother as Pattaramon Chanbua (nee Minjaroen); and

    e) father as Nid Chanbua.

16. The Registrar, if he considers it appropriate, may note on the registration of Pipah's birth that the Farnells have equal shared parental responsibility for her pursuant to an order of the Family Court of Western Australia and otherwise shall note such other information as is ordinarily recorded in the case of twin births.

17. There be a declaration that it is in the best interests of Pipah to be known as "Pipah Li Farnell", and after complying with Order 15, the Registrar is requested to amend Pipah's birth certificate accordingly.

18. NID CHANBUA ("Mr Chanbua") be joined as the second respondent in these proceedings.

19. Any obligation of any party/intervenor to serve Mr Chanbua with documents previously filed in these proceedings be dispensed with.

20. The solicitors acting for Mrs Chanbua are requested to satisfy themselves that Mr Chanbua has been informed of the outcome of these proceedings.

21. DCP is requested to provide a copy of these orders to each member of Pipah's safety network as soon as practicable.

22. The court grants permission to the parties, the interveners and their legal advisors to disseminate, as they see fit, unedited copies of the court's judgment and orders (in the redacted form authorised by the Principal Registrar).

23. The court grants permission for publication, in all forms of media, of a fair and accurate report of the judgment of the court (in the redacted form authorised by the Principal Registrar), provided that any media organisation wishing to publish such a report:

    a) shall not contact or attempt to contact the Farnells or Mrs Chanbua or their families or associates for comment, but may publish any comment they elect to make personally or by their authorised agent;

    b) shall not publish photographs or film footage of Pipah;

    c) shall not publish photographs or film footage of the Farnells or Mrs Chanbua or Gammy, save for photographs or footage that have been published prior to these orders, unless first having obtained the written consent of the individual involved (or, in the case of Gammy, the written consent of Mrs Chanbua); and

    d) is encouraged but not obliged to state in the report that the full judgment of the court can be found at www.familycourt.wa.gov.au.

24. The Independent Children's Lawyer be discharged at the expiration of three months from the date of these orders.

25. All outstanding applications and responses be dismissed, including the Independent Children's Lawyer's Form 2 application filed on 9 December 2015.

26. The orders above are made on the basis of the court having formally found that the Farnells:

    a) did not abandon Gammy in Thailand;

    b) did not seek to access Gammy's trust fund for Pipah's welfare needs or to meet their legal costs; and

    c) never applied to the court for access to Gammy's trust fund for any purpose.

**Attachment to the Orders**

1. The Farnells shall keep the General Manager, Service Delivery Practice Unit of DCP (or its equivalent position from time to time) informed of their address at all times.

2. The Farnells shall permit a representative of DCP access to their home up to three times per annum by appointment, and at other times unannounced as deemed appropriate by DCP but not more than three times per annum.

3. The Farnells shall maintain such regular communication with any case manager assigned by DCP to monitor Pipah's welfare as DCP shall request.

4. The Farnells shall authorise and provide consent for all general practitioners, paediatricians and other professionals treating or working with Pipah to exchange and pass on relevant information to DCP.

5. The Farnells shall comply with the safety plan dated 12 March 2015 and any updated plan which may be agreed with DCP from time to time. The overarching principle of the plan for the present time is that Mr Farnell shall not be left alone with Pipah, but this principle will be reviewed from time to time having regard to Pipah's age and development.

6. The Farnells shall cooperate with DCP and the members of Pipah's safety network with a view to monitoring the operation and effectiveness of the safety network, including the possible supplementation of the safety network and/or replacement of departing members.

7. The Farnells and the safety network (and DCP if it wishes to be involved) shall review Pipah's Words and Pictures Story ("the Story") from time to time. In doing so, the Farnells and DCP shall:

    - ensure the Story includes information about Mrs Chanbua, Gammy and their family in Thailand; and
    - consider the concerns expressed by the Single Expert about the content of the Story and the circumstances in which it should be read to Pipah.

8. The Farnells shall ensure that the Story is read to Pipah every three months until such time as it is agreed by the Farnells and the safety network and DCP that the story need no longer be read. The Story is to be read by a member of the safety network or by one or other of the Farnells in the presence of a member of the safety network.

9. The Farnells shall maintain a record of when, where and in the presence of whom the Story has been read and shall make that record available to DCP's representative on request.

10. Mr Farnell shall continue to attend on Mr A (or such other psychologist or therapist as may be nominated by DCP) with such regularity as may be recommended by Mr A or such other psychologist as may be appointed.

11. Mr Farnell shall comply with all recommendations made by his psychologist to promote Pipah's safety and wellbeing.

12. Mr Farnell shall authorise his psychologist to provide progress reports to DCP.

13. Mr Farnell shall undertake the following reviews and testing:

    a) commencing in 2016 and each alternate year thereafter, a "management review" to be undertaken by DCP (which is to include the administration of psychometric testing called the "Acute Tool" or its equivalent); and

    b) commencing in 2017 and each alternate year thereafter, a comprehensive risk assessment conducted by Ms G or such other psychologist as may be nominated by DCP,

    with such testing to take place until Pipah is 12 years of age, or until such earlier time as DCP provides written confirmation that the reviews and testing are no longer deemed necessary. The results are to be provided to the Farnells, DCP and such members of the safety network as may be nominated by DCP.

14. Mrs Farnell shall continue to attend on [her psychologist] or such other psychologist or therapist as may be recommended by DCP, and shall comply with all recommendations made by the psychologist or therapist to promote Pipah's safety and wellbeing.

15. Mrs Farnell shall authorise her psychologist or therapist to provide progress reports to DCP.

16. The Farnells shall meet the costs of their attendances on their psychologists or therapists and the costs of the management reviews and risk assessments, subject to any contribution that DCP may elect to make.

17. DCP is requested to arrange such other therapeutic support and assistance for the Farnells or either of them as recommended by their respective psychologists during a period of one year from the date of these orders.

18. Mrs Farnell shall complete any Protective Behaviours Program recommended by DCP.

19. When deemed appropriate by DCP, the Farnells shall ensure that Pipah completes a Protective Behaviours Program, suitable for her age and stage of development.

20. If Mr Farnell is interviewed as a suspect or is charged in relation to any new criminal matters, he and Mrs Farnell shall forthwith advise DCP, and shall comply with all reasonable recommendations made by DCP with respect to Pipah's care.

I certify that the preceding [789] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

*Associate*
*14 April 2016*