

CITATION: *Minister for Territory Health Services v KK* [2004] NTMC 025

PARTIES: MINISTER FOR TERRITORY HEALTH SERVICES

v

KK

TITLE OF COURT: Family Matters Court

JURISDICTION: Family Matters Court – Alice Springs

FILE NO(s): 9725549

DELIVERED ON: 20 February 2004

DELIVERED AT: Alice Springs

HEARING DATE(s): 18 February 2004

JUDGMENT OF: M Little

CATCHWORDS:

REPRESENTATION:

Counsel:

Minister: M Heitmann
Mother: R Goldflam
Child: T Whitelum

Solicitors:

Minister: M Heitmann
Mother: NTLAC
Child: Morgan Buckley

Judgment category classification:

Judgment ID number: 025

Number of paragraphs: 14

IN THE FAMILY MATTERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 9725549

BETWEEN:

**MINISTER FOR TERRITORY
HEALTH SERVICES**

Applicant

AND:

KK

Child

REASONS FOR JUDGMENT

(Delivered 20 February 2004)

Ms M LITTLE SM:

1. Subsequent to the decision of Mr Birch SM on the 28th of August 2003 (reasons published on the 3rd of February 2004) there have been two s.48 Community Welfare Act applications to vary the orders made in this matter. The first application to vary was filed by the mother and was filed on the 9th of January 2004. She has filed two separate hand-written additions to that application namely 5 pages of hand writing which was handed to the Court on the 28th of January 2004 and a further page which is dated the 11th of February 2004. The whole of the order is sought to be varied by the mother. On the 5th of February 2004 an application for variation of the access order was filed by the Minister's solicitor.
2. Both of these applications are now set for hearing commencing on the 1st of March 2004 in the Family Matters Court.
3. I have been advised that the decision of Mr Birch SM on the 28th of August 2003 was appealed by two of the parties to the proceedings namely the child's representative and the mother. I have been advised by Mr Whitelum, the child's solicitor, that he was about to file a notice of discontinuance of that appeal. I have

also been advised by Mr Goldflam, who was acting as duty solicitor on behalf of the mother, that the mother will be reconsidering her position in light of the reasons handed down by Mr Birch SM and the decision by the child's representative to discontinue their appeal.

4. All parties to these proceedings have indicated that they see no bar to the continuation of the hearing of the applications for variation notwithstanding the appeals which have been lodged.
5. I have also been advised by Mr Goldflam that he will not be appearing on behalf of the mother at the hearing of the proceedings and that the Northern Territory Legal Aid Commission will not be representing the mother. This means the mother will in all likelihood be representing herself.
6. There was an agreed position which was put forward that the hearing of the applications for variation would proceed with the Minister's office giving their evidence first. That is, notwithstanding the fact that the Minister's application was lodged second in time, that their application would proceed first. I am in agreement with that proposition and would ask the parties to prepare on that basis.
7. As to the question of which Magistrate will be conducting the hearing, none of the parties have asked that there be an application for Mr Birch SM to disqualify himself. He has a detailed knowledge of the case. It has also been noted that he has specifically ordered that the review of the matter on the 30th of June 2004 be heard before himself. It is his order that parties are seeking to have varied. The Deputy Chief Magistrate has disqualified himself from hearing further contested matters in this case. It will be the Deputy Chief Magistrate's decision as to who will be conducting the hearing on the 1st of March 2004 and at this stage such an allocation has not taken place.
8. The hearing is listed for one day. I have been asked by the parties to ascertain whether further time is available, possibly on the 2nd and 3rd of March 2004. I have made inquiries with the List Clerk and there is some possibility of some time during those days although it is not possible to allocate a further two whole days for the continuation of the hearing of this matter on the 2nd and 3rd of March 2004. The original request was for a listing for one day and since that time the listing

has become more congested. As stated earlier there is a possibility that whoever is hearing the matter will be able to spend some time subsequent to the 1st of March 2004 hearing the matter (that is in the following days).

9. There has been an application made by Mr Goldflam on behalf of the mother for the expert witness A/Professor Leon Petchkovsky to give evidence by way of video link, as he no longer resides in the Northern Territory. There was no opposition to that application and I see no difficulty with granting the application. Accordingly, I grant leave for the evidence of A/ Professor Leon Petchkovsky to be by way of a video link.
10. The Minister sought an interim variation of the access in terms of their application prior to the hearing. I do not propose making a variation of the orders of Mr Birch SM on an interim basis. The reasons for my decision are set out below. I have the following material before me in making this decision: Family Matters Court report dated the 11th of February 2004 signed by Ms Fogerty and Ms Walsh, a psychological progress report by Ms Delahunty and Children's Contact Centre notes from the 23rd of January 2004. On behalf of the mother I have a report from Dr Leon Petchkovsky, locum senior consultant psychiatrist.
11. The child's life has been the subject of protracted litigation in her short life. The hearing in this matter is listed to be heard on the 1st of March 2004, that is a very early date. Given the significant changes which have occurred in the child's life in recent times, and in particular with the change of her primary care giver, it is my view that the status quo should be maintained (as near as possible) prior to a full hearing of the matter. I note that access is due to increase as from the 1st of March 2004(order 6 of Mr Birch SM). The hearing date will conveniently dovetail with that change.
12. The material before me does not demonstrate a pressing need for a variation of the access order on an interim basis. Nor do I see that there is any reason to make a variation on an interim basis on a precautionary basis in the best interests of the child. I am of course aware that the child has expressed a wish that access be reduced. I note that the child was upset when access did not take place on the 9th of January 2004. I also note that, notwithstanding the distressing access visit on

the 23rd of January 2004, access on the 31st of January 2004 went well. At the hearing, following the opportunity for the parties to challenge the expert material, a decision will be made based upon the evidence. The child's wishes will be one factor to take into account at that time.

13. I have been advised that access did not take place on the 14th of February 2004 due to the mother having a rash which she had concerns may have been contagious. She expressed those concerns to the case worker and it was agreed, as a matter of precaution, that access not take place in case the rash was contagious and there was any risk to the child. This is an important matter when considering the interim application made by the Minister. The cancellation of access has demonstrated that the mother is not seeking access to the child in accordance with the orders without due consideration of the child's best interests. She has not sought to promote her right to access, in accordance with the orders made, without considering the best interests of the child.
14. The missed access on the 14th of February 2004 also means there has been a two week period since the previous access. In all the circumstances of the case, including that an interim order would mean that one access visit would not take place prior to the hearing, I do not make the variation on an interim basis as sought by the Minister. I also note that the Minister has power granted by order 15 of Mr Birch SM's orders to suspend access in certain circumstances. That order can be invoked, if the Minister deems necessary, in the period prior to the hearing (or part thereof). In all the circumstances I am not persuaded that there are grounds for an interim variation.

Dated this 20th day of February 2004.

M Little
STIPENDIARY MAGISTRATE