

CITATION: *The Minister for Territory Health Services v Whitney Malbunka* [2004]
NTMC 026

PARTIES: THE MINISTER FOR TERRITORY HEALTH
SERVICES

v

WHITNEY MALBUNKA

TITLE OF COURT: Community Welfare

JURISDICTION: Family Matters Court – Alice Springs

FILE NO(s): 20404109

DELIVERED ON: 27 February 2004

DELIVERED AT: Alice Springs

HEARING DATE(s): 26 February 2004

JUDGMENT OF: M Little

CATCHWORDS:

REPRESENTATION:

Counsel:

Minister:	M Biesse
Child:	M Heitmann
Mother:	R Goldflam

Solicitors:

Minister:	Povey Stirk
Child:	M Heitmann
Mother:	NTLAC

Judgment category classification:

Judgment ID number: 026

Number of paragraphs: 27

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

No. 20404109

BETWEEN:

**THE MINISTER FOR TERRITORY
HEALTH SERVICES**

Applicant

AND:

WHITNEY MALBUNKA

Child

REASONS FOR JUDGMENT

(Delivered 27 February 2004)

Ms M LITTLE SM:

1. Whitney Jade Malbunka was born on the 25th of July 2003. An application has been made on behalf of the Family and Children Services that the child be found in need of care. The timing of the application relates to the imminent release from custody of the child's father Keilow Malbunka. He is due to be released from the Alice Springs Prison on the 2nd of March 2004.
2. The Minister, the child and the mother and grandmother were represented at the first mention of the case on the 25th of February 2004. It was adjourned to the 26th of February 2004.
3. On the 26th of February 2004 there was argument before me as to which orders should be made (and here I note that none of the parties present were arguing that no orders be made) on an interim basis. The mother also opposed the making of a declaration that the child be declared in need of care.
4. The father was served personally with the documents in the proceedings on the 20th of February 2004. On the 25th of February 2004 I requested that Court staff

had ascertain whether CAALAS were instructed to appear in this matter. They indicated that they did not have any instructions at this stage. CAALAS had acted for the father in his recent Court of Summary Jurisdiction cases.

5. Issues were raised on the 26th of February 2004 with respect to the father's inability to attend should he wish to. I am mindful that a person in custody would not necessarily find it easy to make appropriate arrangements to ensure that he is either before the Court or being represented before the Court in a proceeding such as this. In particular I note there has been no movement orders requested or made on behalf of Mr Malbunka. In the circumstances of this case I am prepared to make interim orders in this matter in the absence of the father, being satisfied that he has been served and that service was some 4 days before the Court date. As to the length of the orders and the terms of those orders given his present situation and that he was not before the Court or represented, that is a matter which will be subject of further consideration.
6. Five Court of Summary Jurisdiction files were before the Court by way of a summons and all parties have had access to those files pursuant to an order I made on the 25th of February 2004. I propose summarising those files. They all relate to the father in these proceedings, although for the purpose of this summary I will refer to him as the defendant.
7. File number 9927940 is a file which related to an unlawful assault on Elfreda Rontji offence dated the 10th of July 1999. Following a plea of guilty, on the 14th of August 2001 the defendant was given an imprisonment for a period of 5 months from the 4th of June 2001.
8. File number 20008886 is two counts of aggravated assault; Yvonne Lankin, the mother of the child in this matter, is the complainant. These offences are dated the 13th of April 2000 and the 10th/11th of May 2000. Count one is aggravated with an iron bar being used and count two is aggravated by an axe being used. On the 14th of August 2001 the defendant was convicted and imprisoned for 5 months cumulative on file 9927940.
9. File number 20108289 relates to an offence on the 4th of June 2001 when the child Augustine Malbunka (a sibling of the child Whitney Malbunka and the first

child of the mother and father in these proceedings) was assaulted by the father. The child, Augustine, was eight months of age. There is also a charge of aggravated assault as relates to Yvonne Lankin on the same date. On the 14th of August 2001 the defendant was convicted of these offences and imprisoned for a period of 15 months cumulative on file 20008886. On the 3 files, that was a total period of 25 months imprisonment with a non-parole period of 14 months.

10. The offences of the 4th of June 2001 were committed when the defendant had an outstanding warrant on files 9927940 and 20008886. He was remanded in custody subsequent to the offences of the 4th of June 2001.
11. He was released on parole on the 4th of August 2002.
12. File 2030193 relates to an aggravated assault on the 5th of February 2003. The victim of that assault is Yvonne Lankin. On the 7th of February 2003 the defendant was sentenced to imprisonment for a period of 2 months from the 5th of February 2003. By virtue of the term of imprisonment the parole remaining outstanding as at the time of his release was automatically revoked. As stated earlier he is now due to be released on the 2nd of March 2004. He has been in custody since the 5th of February 2003. The child in these proceedings was born while he has been in custody.
13. File 20301977 was also before the Court on the 7th of February 2003. That was an application for a restraining order being brought by Yvonne Lankin as against the defendant Keilow Malbunka. An order was made on that day that for a period of 2 year. Up to and including the 6th of February 2005, the defendant was restrained from assaulting or threatening to assault Yvonne Lankin or acting in a provocative or offensive manner towards Yvonne Lankin.
14. On all occasions the defendant was represented by CAALAS in the 5 proceedings set out above.
15. The father will be released from prison on the 2nd of March 2004 without any parole or suspended sentence conditions. There is a current restraining order which restrains him from assaulting Yvonne Lankin. There are no restraining

orders which relate to the child Whitney Malbunka (or indeed her brother Augustine Malbunka).

16. There are two confidential Family Matters Court reports before the Court and they are dated the 19th of February 2004 and an addendum dated the 20th of February 2004. The Court of Summary Jurisdiction files referred to above are also before the Court in the sense that the changes and dispositions are before me. I do not propose tendering the files in the proceedings before me.
17. The parties present in Court on the 26th of February 2004 proposed various interim orders and I summarise as follows. The Minister is seeking an order that there be an interim declaration that the child is in need of care, that there be joint guardianship between the mother Yvonne Lankin, the grandmother Audrey Rabuntja and the Minister. Further the Minister is seeking that custody of the child be at the discretion of the Minister. They were seeking that the matter be adjourned for 3-4 weeks for a family conference to be held and then for the matter to come back before the Court.
18. Mr Goldflam as duty solicitor on behalf of the mother and the grandmother submitted that there was no need for an interim in need of care order. His clients consented to the joint guardianship order proposed by the Minister. They opposed the making of an order that custody be at the discretion of the Minister. They also proposed that there could be an access order made with respect to access by the father to the child under supervision of specified people.
19. Mr Heitmann, on behalf of the child, supported the Minister's orders save and except that he sought the matter be adjourned until next week in order that the father could have an opportunity to attend Court if he wished once he was released from custody.
20. Based on the material before me which is the two Court reports and the history of the 5 files in the Court of Summary Jurisdiction which I've outlined above, I am satisfied that the child Whitney Malbunka is a child in need of care in that she is at substantial risk of suffering an injury or impairment. (s.4 (3)(a) of the Community Welfare Act). I propose making an order that the child be declared in need of care. I stress that I am also satisfied that the child is currently being more

then adequately cared for and is in good health. The declaration is made solely upon the basis of the risk substantial to the child upon the release of the child's father. The child is currently being cared for by the mother. Given the history of assaults upon the mother by the father and given the child's proximity to the mother, I believe that there is substantial risk that the child will suffer injury or impairment.

21. Submissions on behalf of the mother were that she did not propose cohabiting with the father when he was released. I accept that that is her present intention. Nevertheless I am concerned that events may overtake Ms Lankin's present intention. The behaviour of the father in the past has demonstrated a lack of concern for the welfare of his partner and indirectly his children. Further there is an offence involving the child Augustine at an extremely young age. That assault resulted in very serious injuries to the child Augustine. The father's attitude as outlined in the addendum to the Court report is of real concern. The material before me more than adequately justifies the declaration that the child is in need of care and the need to make interim orders.
22. I share Mr Heitmann's concern as to the father's attitude when considering the prospects of a family meeting. Nevertheless the father is still in custody and may well have a different attitude to the situation upon his release.
23. I propose ordering that on an interim basis the joint guardianship with the Minister, the mother and the grandmother as proposed by all parties. Based upon the present situation, I agree that is an appropriate order.
24. The next question is whether an order is made that custody of the child be at the discretion of the Minister. I am satisfied there should be an order that the custody of the child should be at the discretion of the Minister. The reports which have come through from the prison demonstrate that the father is in a highly agitated state and I am not satisfied that the mother and or the grandmother would be in a position to withstand pressure, whether it be physical or otherwise, from the father in the period upon release and prior to the first family meeting. This will be an extremely sensitive and potentially explosive period.

25. I am mindful of the indication which Mr Biesse placed onto the record as to the current proposal which the Minister makes with respect to the custody of the child. Nevertheless upon the release from prison of the father, the family dynamics may dramatically change. I am of the view that the Minister must be able to act with urgency to place the child in the custody of some other person should she be in any imminent risk of harm or injury. Without such an order there will be the need for consultations with the other joint guardians, which may not be able to take place on an urgent or timely basis. Given the background to this situation I do not propose making an order which requires there to be a consensus of view prior to any change in custody which the Minister deems are in the best interests of the child. The Minister needs to be able to act promptly and I will order the custody to be of the discretion of the Minister.
26. The question now is to the length of the adjournment period. I am of the view that the matter should be adjourned for the period of 4 weeks. I am mindful of Mr Heitmann's suggestion that the matter be adjourned until Wednesday, to enable the father to be able to be heard on any subsequent orders. The father has a right to apply for a variation of any of these orders pursuant to s.48 of the Community Welfare Act. He will be notified of that the bottom of the order made today. A further Court hearing in this matter on the day after the father is released from custody could, in my view, be counterproductive in the long term and I am of the view that the matter should preferable be next heard after the family meeting. Naturally the question of a variation application may mean that the matter is listed by any of the parties prior to that date. The orders I make today is that the matter be adjourned for review on March the 24th 2004 at 9.30am.
27. I formally make the orders as outlined in these reasons.
 1. That the child be excused until further order.
 2. That the child be declared in need of care.
 3. That the child be under the joint guardianship of the Minister, Yvonne Lankin and Audrey Rabuntja for 4 weeks.

4. That the custody of the child be at the discretion of the Minister for 4 weeks.
5. That the matter be adjourned for review on the 24th of March 2004 at 9.30am.

Dated this 27th day of February 2004.

M Little
STIPENDIARY MAGISTRATE