CITATION: *Minister for Territory Health Services v CC & KK* [2004] NTMC 028

PARTIES: MINISTER FOR TERRITORY HEALTH SERVICES

v

CC

AND

KK

TITLE OF COURT: Family Matters Court

JURISDICTION: Family Matters Court – Alice Springs

FILE NO(s): 9725549

DELIVERED ON: 3 February 2004

DELIVERED AT: Alice Springs

HEARING DATE(s): 14/15 May, 24/25/26/27 June 2003

JUDGMENT OF: JWA Birch

CATCHWORDS:

Family matters; care application; application to vary order.

REPRESENTATION:

Counsel:

Applicant:	A Young
First Respondent:	R Goldflam
Second Respondent:	A Whitelum

Solicitors:

Applicant:	Heitmann
First Respondent:	NTLAC
Second Respondent:	Morgan Buckley

Judgment category classification:	
Judgment ID number:	028
Number of paragraphs:	101

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

No. 9725549

BETWEEN:

MINISTER FOR TERRITORY HEALTH SERVICES
Applicant

AND:

CC
First Respondent

And

KK
Second Respondent

REASONS FOR JUDGMENT

(Delivered 3 February 2004)

Mr JWA BIRCH SM:

Introduction

1. This matter is a hearing of two proceedings arising under the Community Welfare Act. (The Act). Firstly, the review of an order made on the 29th of May 2002 pursuant to s.49 of the Act. Secondly, an application by the Minister for Family and Children's Services for a variation of the order made on the 29th of May 2002 pursuant to s.48 (1) of the Act.

2. Section 49 of the Act provides "that the Court shall review the circumstances of a child in relation to whom an order under s.43 (4) is made containing a direction referred to in s.43 (5) (d) –

(a) where the sole rights in relation to the custody of the child are vested in the Minister – at intervals not exceeding 2 years."

3. Section 48 of the Act provides for the application for variation of an order as follows:

"(1) The Minister or the parents, or the persons who were, immediately before the order, the guardians or persons having the custody of a child, or any other person who has an interest in the welfare of, or acting on behalf of and at the requested of, the child in relation to whom the application under this Part was made, may apply to the Court for the variation as further variation of an order made under s.43.

(3) On an application under subsection (1), the Court may vary or revoke the order, or make any other order it could have made under s.43 on the original application."

4. These proceedings involve the care of KK who was born in Alice Springs on the 11th of November 1997. She is now 6 years old and is currently in foster care and has been so, on and off, since her birth. Throughout the proceedings the child's mother, CC, has been present with her legal representative. K's father, AK, is an Aboriginal man who was not present or represented during these proceedings. He has taken little or no interest in the entire Court proceedings involving his daughter since her birth. Although from time to time he did have some contact with FACS.

5. Section 37 of the Act envisages the importance of 'parents, guardians or persons having the custody of a child in relation to whom an application is made" attending Court. After considering the various reports and other material relating to the care of K I commenced the hearing in the father's absence. Due to his almost complete lack of interest in K it would, in my view, be unreasonable to require his attendance in these proceedings and I did not do so.

6. On the 29th of May 2002 Mr Ward SM made the following finding and consequential orders:

1. Sole guardianship to be with the Minister 12 months.

2. The mother to have access to K for a continuous 24 hour period each week, the days to be the same each week, to be agreed between the Minister and the mother. The start and finish times to be the same.

3. Access in 2 (above) is to take place only under the supervision of a person approved of by the Minister.

4. The present access arrangements between the mother and child are to continue until the commencement of the access referred to in 2 and 3 (above), except that the access is to be one single four-hour access visit per week."

7. On the 22nd of August 2002 CC applied for a variation of orders made on the 29th of May 2002 and on the 16th of October 2002 the Minister also applied for a variation of these orders. His worship Mr Ward SM dealt with both applications in his judgment of the 13th of December 2002 and dismissed each one. Accordingly, the orders of the 29th of May 2002 continued unchanged.

8. On the 5th of February 2003 the Minister made a further application for variation of the order. Interim orders were made, and as I understand the Magistrate's orders, the orders of the 29th of May 2002 were varied and the orders of the Court were:

   1. Sole guardianship to be with the Minister for 12 months.

   2. The mother to have access to K for one two hour access visit each fortnight. The start and finish times to be the same.

   3. Access in 2 (above) is to take place only under the supervision of a person approved of by the Minister.

9. It is orders 1-3 made pursuant to s.48 and the review of the orders made on the 29th of May 2002. Which are the subject of these proceedings. CC opposed the Minister's application for variation made on the 5th of February 2003 and as a

consequence of his Worship Mr Ward's decision of the 7th of March 2003 the s.48 application fell to a hearing.

10. The review and hearing of the s.48 application proceeded jointly before me. The matter commenced on the 14th of May 2003 and continued on the 15th of May 203 and the 24th, 25th, 26th and 27th of June 2003. I received written submissions from the parties in July 2003 on the 28th of August 2003 I found K to be in need of care and made consequently orders. The Minister had the matter relisted before me on the 3rd of September 2003 to clarify the issue of supervised access and I amended the orders made on the 28th of August 2003.

11. The orders I made on the 28th of August 2003 and the 3rd of September 2003 are:

> "1. K is a child in need of care.
>
> 2. Sole guardianship to be with the Minister for a period of 2 years from today.
>
> 3. The mother is to have access to K for a period of 2 hours per week on a day and at a place that is mutually agreed between the Minister the mother. Such access to be at the same time each week and access is to be supervised by the Minister or delegate of the Minister.
>
> 4. The access in 3 (above) is to begin during the week commencing the 1st of September 2003 and is to continue on the basis of 2 hours per week until the 30th of November 2003.
>
> 5. On and from the 1st of December 2003 the mother is to have access to K for a period of 2 hours one week and 4 hours the following week, which is to be repeated until the 29th of February 2004. Such access is to take place on the same day and at the same place as agreed to in 3 (above) and access is to be supervised by the Minister or delegate of the Minister.
>
> 6. On and from the 1st of March 2004 the mother is to have access to K for a period of 4 hours per week up to and including the 30th of

April 2004. Again such access is to take place on the same day and at the same place as agreed to in 3 (above) and access is to be supervised by the Minister or delegate of the Minister.

7. On and from the 1st of May 2004 the mother is to have access to K for a period of 4 hours one week and 24 hours overnight access the following week. Which is to be repeated until the 30th of June 2004.

8. The 24-hour overnight access is to take place at the mother's residence on a day and time as is mutually agreed between the Minister and the mother. Such access is not to interfere with K's schooling.

9. Access in 7 and 8 (above) is to take place only under the supervision of a person to be approved by the Minister or the Court. Parties granted leave to apply on 7 days notice to the others and the Court.

10. Present access arrangements are to continue until the 1st of September 2003.

11. Mother is to complete the parenting course if she has not already done so.

12. Mother is to continue counselling with Ms Coughlan or such other qualified counsellor/psychologist based in Alice Springs for the period of this order.

13. The Minister may, at his discretion, provide such reasonable direct or indirect financial assistance to the mother to enable her to continue counselling.

14. The Minister or his delegate and the mother are to meet weekly at a time and place as may be mutually agreed. The mother may attend the meeting with her counsellor or support person (as is approved in 9 above).

15. The Minister may, at his discretion, suspend access for a period not exceeding two weeks should the mother become ill or unable to continue access for that period. Should either the Minister or the mother seek to extend the period beyond two weeks an application shall be made to the Court on 48 hours notice to the Court and other parties.

16. Adjourned to the 30th of June 2004 at 10am for a review before me.

17. Application for variation is dismissed."

12. I stated my reasons for decision would be delivered at a later date and I now do so. In taking this somewhat unusual course, it was obvious to me, after hearing the evidence in this matter and observing all parties, a Court based plan was immediately necessary to ensure the welfare and best interests of K were maintained. To delay my orders for the delivery of reasons was unjustified in the circumstances of this case.

History

13. Since K's birth in 1997 this case has probably become the most litigated family matter in the Northern Territory Courts. This is perhaps not surprising when the interests of the parties are considered. But to put the present proceedings into perspective it is necessary to revisit some of that history. Particularly, having regard to Mr Goldflam's submissions about the material this Court should consider in its deliberations.

14. Exhibit A – Chronology was tendered by Mr Young setting out the events relating to the litigation of this matter since K's birth. It is as follows:

11 November 1997	Kayliah born.
24 November 1997	Kayliah found to be in need of care and interim orders made.
27 February 1998	Order that Kayliah be placed under sole guardianship of the Minister for 6 months.

19 September 1998	Mildren J allows mother's appeal against orders. Child returns to mother.
18 October 2001	Application that Kayliah be found in need of care.
19 October 2001	Ward SM makes interim finding and interim order for joint guardianship of mother and the Minister.
6 December 2001	Hearing commences.
7 December 2001	Hearing continues. Matter adjourned.
30 December 2001	Further hearing. Matter adjourned at request of counsel for mother. Kayliah with foster carers and mother having access.
7 February 2002	Father served with notice of the proceedings.
2 May 2002	Hearing resumes.
3 May 2002	Hearing continues.
13 May 2002	Hearing continues. Father appears.
14 May 2002	Hearing continues. Matter adjourned.
29 May 2002	Mother and the Minister reach a settlement of the matter.

Ward SM finds child in need of care and makes following orders by consent:

1. Sole guardianship to be with the Minister for 12 months

2. The mother to have access to Kayliah for a continuous 24 hour period each week, the days

to be the same each week, to be agreed between the Minister and the mother. The start and finish times to be the same.

3. Access in 2 (above) is to take place only where the supervision of a person approved of by the Minister.

4. The present access arrangements between the mother and the child are to continue until the commencement of the access referred to in 2 and 3 (above), except that the access is to be one single four-hour access visit per week.

22 August 2002 Mother makes application pursuant to s.48 (1) Community Welfare Act for variation of the orders on the grounds that:

1. Her personal communication skills, confidence and ability to cope have improved substantially, largely due to counselling,

2. Her home environment has changed dramatically and is now a safe and favourable home for Kayliah,

3. 24 hour access has failed to occur,

4. 4 hour access has been very successful but FACS is unwilling to increase the access time/allow unsupervised access, and

5. Kayliah expresses a desire to live with her mother.

16 October 2002 Minister cross-applies to vary orders of 29 May 2002.

18 October 2002	Bradley CM makes interim orders on application of Minister to remove order 2 and amend order 4 to 2 hours a fortnight.
11, 12, 13, 14, 15 November 2002	Hearing
13 December 2002	Applications of mother and Minister dismissed. In the result the order of 29 May 2002 stand.
9 January 2003	Mother appeals decision of 13 December 202.
5 February 2003	Ward SM on application of the Minister varies orders of 29 May 2002 on interim basis by reducing access from 4 hours a week to 2 hours a fortnight.
7 March 2003	Ward SM on application of the Minister varies on interim basis orders of 29 May 2002 to eliminate provision for 24-hour access.
17 April 2003	Decision of Thomas J dismissing mother's appeal.
14, 15 May 2003	Proposed hearing dates of Minister's application.

15. In his decision of the 13th of December 2002 Ward SM also dealt with the history of the matter as it stood to that date. His worship made the following observations of the "History of Care Application to Date":

> "1. On 11/11/97, the very day that K was born, an application was made to the Family Matters Court for a holding order under the provisions of the Community Welfare Act subsection 11 (4). The child was, at least notionally, taken into custody by the Minister under subsection 11 (1).
>
> 2. At a subsequent hearing, a Magistrate declared K to be a child in need of care on 24/12/97. He then made an interim order placing the child under the guardianship of the Minister. He then adjourned the

matter until 23/2/98 for further consideration. Further evidence was taken, and on 27/2/98, the Magistrate again found that the child was in need of care and he ordered that the child be placed under the sole guardianship of the Minister for a period of six months.

3. On 19/9/98, His Honour, Mildren J allowed an appeal against all the above orders. The child was returned to the care of her mother.

4. On 18/10/01, a fresh application was lodged for K to be declared a child in need of care, and for consequential orders. On 19/10/01, I made an interim finding based upon a report of the same date that the child was in need of care and on interim order for joint guardianship by the mother and the Minister.

5. The hearing of these issues was commenced on 16/12/01, continued on the 7/12/01, and then adjourned for further hearing to 30/1/02. It was pointed out on 6/12/01 that the father of the child, AK, had not been given any notice of the current application. Unsuccessful attempts had been made to give him notice. On 30/1/02, it became apparent that AK had still not been given notice. The Minister and the mother had been, up to that point, working together to try to come up with a mutually agreeable solution to the matter. However, on 31/01/02, the Minister took a completely different tack in the matter, based upon two very large reports just obtained, recommending a “parentectomy” (ie that K be totally and forever removed from her parents C and AK).

6. I adjourned the proceedings at the requested of counsel for the mother, but also so that the father could be made aware of these proceedings. By this time, the mother and father had parted company and had gone their separate ways. In accordance with the interim orders made in October ’01, and continued in 12/01, the child was, by now, with foster carers. The mother was exercising access to the child.

7. Some attempts had been made to give notice in writing of these proceedings to AK, both before the 12/01 hearings and the hearing of 30/1/02.

8. Interim findings and interim orders based thereon were continued from time to time while service on AK was attended to, and various interlocutory matters took place.

9. AK was served with notice of the proceedings on 7/2/02. An appearance was made on his behalf by a legal representative on the 15/2/02. Hearing of the substantive application commenced again on 2/5/02. At that stage, there was no appearance by or on behalf of AK. The case was further heard on 3/5/02. The next available date for hearing was the 13/5/02. AK appeared in Court on that date, and evidence was given by his brother EK, and EK's wife. Further evidence was taken on 14/5/02. The matter was adjourned for further hearing to the 29/5/02, 30/5/02 and 31/5/02.

And

13. After some further interlocutory activity, the mother's application was heard from 11/11/02 through to the 15/11/02, and decision upon it was reserved to 13/12/02. The Minister has made a cross-application, to delete condition 2 of the order made in May 2002, and modify order 4. In October, the Chief Magistrate made an interim order in accordance with the Minister's application.

14. Although given notice of the hearing in November, AK elected not to attend, and the hearing proceeded in his absence."

16. With that history in mind, in determining the issues relating to the review and application that this Court has to deal with once again, and having regard to the matters pertaining to K's welfare and what are in her best interests, the history to date is relevant.

<u>Child in Need of Care – Review. Can further finding be made?</u>

17. Section 43 (4)(a) provides for declaring a child in relation to whom an application is made to be in need of care. Such an order was made by His Worship Mr Ward SM on the 29th of May 2002 and upon review, after considering the circumstances of the child this Court may vary or revoke the order of the 29th of May 2002.

18. It is the Minister's submission a further finding that K is in need of care is unnecessary as there has not been any significant change in the child's circumstances since the finding of the 29th of May 2002; the finding of the 29th of May 2002 was not an interim finding for 12 months but was to last until K was 18 years of age and; but "for the sake of abundant caution" consideration should be given to making a further order. This is so having regard to the case of VJ v Owens and Others [2001] NTSC 64 at pp 95 117.

19. Mr Goldflam for CC submits that as a s.49 review is a hearing into 'the circumstance of the child' by implication it is a hearing de novo. Accordingly, unlike an application for variation of an order, there is no presumption that the orders continue and the Court is bound to consider all matters afresh in the review.

20. The child's representative Mr Whitelum has submitted that a review pursuant to s.49 of the Act "is a re-hearing of the issue as to whether or not the child remains in need of care".

21. In VJ v Owens and Others (supra) Her Honour Thomas J considered a submission from counsel that on a proper construction of the Act there is no provision for a re-finding or a new declaration that a child is in need of care. Her Honour did not accept the submission and having regard to the provisions of s.43 (2) and 49 (3) of the Act stated at 34:

> "The Community Welfare Act provides for "the protection and care of the children and for the protection of family welfare and for other purposes". It makes good sense that there be provision in the Act to vary or revoke an order that a child is in need of care… the act is designed to enable there be an adequate response to such changes. The purpose of the Act is not about punishing parents but about doing what

is in the best interests of the child. I consider the Magistrate did have jurisdiction to make an order declaring the child in need of care."

22. Mildren J in the matter of Minister for Territory Health Services (NT) v LG (1998) 146 FLR 396 held that an order that a child is in need of care could be an interim order. Perhaps it is truly the case all orders made pursuant to s.43 (4) are interim orders, albeit final interim orders as they are always subject to review within the time frame specified by s.49 (1) (a) or (b) of the Act.

23. I accept the submissions by Mr Goldflam and Mr Whitelum, that for the purpose of the review and a finding that the child is in need of care, it is a re-hearing and this Court is not bound by earlier findings. Nevertheless, the findings made by His Worship Mr Ward SM must be given appropriate weight in the overall circumstances of this matter.

Burden of proof in a review and application for variation

24. Section 42 provides for the burden and standard of proof in child in need of care matters. The Minister has the burden of proving that the child is in need of care on the balance of probabilities.

25. The Act is silent in relation to applications for variation pursuant to s.48 but given the nature of the proceedings and general principle, the party bringing the application bears the onus of establishing that the circumstances that resulted in making the order have changed significantly since the order was made. Such proof must be established on the balance of probabilities. It is the Minister's application and it is the Minister therefore who bears the onus in the application.

26. It is Mr Goldflam's submission that as there is no provision within the Act which establishes the burden of proof for consequential orders which may be made pursuant to s.43 of the Act, it is the Minister who bears the onus. This is so, having regard to a purposive construction of the Act; and that the policy of the Act is that State intervention should only occur when absolutely necessary. (Minister for Territory Health Services of the NT of Australia v LG & HB Bradley NTSC No 35 of 1998 per Mildren J, Bailey v Barker (unreported 22/7/95) per Thomas J). I agree with Mr Goldflam's submission particularly when one has

regard to the construction of s.43 and its relationship to s.42 of the Act. But I also agree with Mr Young's submission that if CC wishes to challenge the findings of His Worship Mr Ward SM or Her Honour Justice Thomas it is CC who must bear the onus of establishing that the findings should no longer be accepted.

The Evidence in this Matter.

27. The Minister and CC called a number of witnesses in this matter as well as tendering numerous reports and other documents (exhibits A-Y). The parties each made oral and written submissions, referring me to earlier decisions and transcripts of previous proceedings. I have, as well as considering the specific evidence in this matter read and considered the material to which I was referred by the parties.

28. The Minister called three witnesses, Susie Owens (Senior Home Care Supervisor), Amy Fogerty (Social worker) and Jo Delahunty (Clinical Psychologist). These witnesses, together with their notes and reports formed the basis for the Minister contention that KK was a child in need of care. The evidence of the witnesses is as follows:

29. Susie Owens

Ms Owens is responsible for the work of Care Workers in her capacity as the Senior Out of Home Case Supervisor. M/s Owens prepared the Court report of the 14th of May 2003 and the addendum report of the 24th of June 2003. Both reports are marked Exhibit B.

30. It is M/s Owens evidence it was initially the Ministers position to share the care of KK with CC but following the Single Report and advice of Jo Delahunty the Ministers position by the 30th of January 2002 had changed to one of complete removal.

31. In relation to the application for variation and the review it is still the Minister's position that overnight access and/or unsupervised access was apposed for the reasons highlighted by Ms Delahunty and the conduct of the mother referred to in Exhibit B. It is also the Minister's position that access should remain at 2 hours per fortnight.

32. The recommendation of the Minister and case plan do not provide for reunification. But as M/s Owens stated in her evidence at the meeting with CC on the 17th of March 2003, reunification had not been totally discarded by the Minister. The Minister's position therefore is not totally clear. I am sure much depends on what the Minister considers the mothers ability to properly care for KK to be.

33. It is Mr Whitelum's submission for KK that:

> "It can be strongly inferred from the tone of her evidence, the fact that at a meeting on the 21st of May 2003 with the mother she informed the mother of the requirement for her to undergo psychotherapy and from her direct evidence that the foster carers were "committed", that it is the Minister's view there should not be reunification at this time."

Although, this is one possible inference from M/s Owens evidence it is not the only one and in my view of her evidence the question of reunification and the Minister's preferred position is very much at large.

34. It is also of some relevance in M/s Owens evidence that little or no assistance had been given by the Minister through available services to the mother which may assist so far as the reunification issue is concerned.

35. I was impressed by M/s Owens as a witness. She presented as a person much concerned for KK's welfare.

36. Jo Delahunty

M/s Delahunty is a qualified Clinical Psychologist. She gave evidence about the impact of CC's behaviour on KK, Dr Meredith's report and the issue of CC's borderline personality disorder. I propose to deal later with the conflict in the expert's evidence and BPD.

37. It is M/s Delahunty's opinion KK may develop some personality disorder if she is left with her mother due to CC's frightening behaviour, her unpredictable nature and the lack of certainty in the mother/child relationship. Dr Tabart also

expressed a similar opinion in his report of the 6th of November 2002 – see Exhibit H.

38. It is M/s Delahunty's view there are strong emotional feelings between mother and daughter. She is unsure what impact reduced access would have on that bond but rejected the assertion on CC's behalf that the bond has not improved because of the reduced access. It is her opinion what needs to happen is an improvement in the quality of contact and not the amount of time during which it takes place. M/s Delahunty considers weekly access for two hours to be more favourable to the maintenance of the bond between mother and daughter but is also of the opinion the bond would remain by fortnightly access supplemented by a letter and phone contact as well as a gift from time to time.

39. M/s Delahunty is of the opinion no significant change has taken place in CC's ability to parent KK and unsupervised care was inappropriate. It is also her evidence and opinion that should the current foster parents became unavailable, which was likely at one stage during the proceedings, KK should remain in the sole guardianship of the Minister again ensuring unsupervised contact didn't take place.

40. Although M/s Delahunty was engaged and called by the Minister, she presented as an impartial professional who was able to deal appropriately with the competing interests of the Minister and CC weighed against her professional assessment of KK.

41. Amy Fogarty

M/s Fogarty is the case worker responsible for KK and has been since October 2002. She is a qualified social worker. Also, M/s Fogarty is the co-author of the Court reports of the 14th of May 2003 and addendum 24th of June 2003 which are marked Exhibit B.

42. A number of issues were raised with this witness namely the relationship between the Minister and CC, and the Minister's reaction to that relationship, the reduction in 24 hour access and reunification. M/s Fogarty was of the view that

reunification was always open and not based solely upon the access or otherwise of the reduced fortnightly access.

43. The reduction in access and application to vary was based upon the Court report of the 4th of February 2003 – Exhibit D. It is M/s Fogarty's view the application was based on the fact that the last four access visits were "bad". CC remained deficient in matters such as self-control, putting her needs before KK's and her punctuality was poor. M/s Fogarty agreed CC had improved in some areas like her household presentation, conduct during access but these things were only part of the improvement required for the Minister to consider unsupervised access.

44. M/s Fogarty gave evidence that it was her understanding following the orders of the 29th of May 2002 and CC's application for variation of the 22nd of August 2002, that CC would make her own arrangements for counselling and parenting programs. It would not be the responsibility of the Minister. M/s Fogerty agreed no arrangements had been made for CC by the Minister for any form of counselling or parenting programs.

45. Apart from counselling and parenting programs M/s Fogarty also confirmed that on the 21st of May 2002 Susie Owens spoke to CC about psychotherapy (for BPD) stating it was necessary before the Minister would consider the return of KK to M/s Cintana. M/s Fogarty, as a result inquiries made by her, found out that intensive psychotherapy was not available in Alice Springs and inquiries were being made in Darwin and Adelaide. CC's borderline personality disorder is a primary concern for the Minister and from M/s Fogarty's understanding of the disorder psychotherapy is the only appropriate way to address it. M/s Fogarty has this opinion based on the reports of M/s Delahunty who also relied upon Dr Tabart's report.

46. In the mother's case the following witnesses gave evidence Mary Playford, Dr Meredith, CC and Fran Coughlan.

47. <u>Mary Playford</u>

Mrs Playford belongs to the Church of the Rock and has known CC for about 5 years. Her relationship with CC was intermittent and disrupted up to April 2003.

The strongest aspect of the relationship is through the church. Mrs Playford stated she and others can provide lifts to CC for church activities and attendance at the Rangers on Friday evenings for KK if she was with her mother.

48. There have been occasions during her association with CC when she has been concerned about CC's behaviour. M/s Playford gave evidence of an occasion outside the Alice Springs post where she observed CC bent down telling people to "f…. off". Mrs Playford gave CC a towel to wipe her face.

49. Mrs Playford with her husband facilitate a parenting course – "Growing kids Gods way". The course is designed to help parents with their children. CC did the preliminary course in February 2003 for 6 weeks. CC at the time of Mrs Playford's evidence had commenced that next stage of the parenting course. Mrs Playford stated she had successfully completed the first seven weeks of the 18 week course. Each session was of 2 hours duration consisting of homework presentation, discussion and watching a video.

50. Mrs Playford has noticed a marked change in CC since her involvement with the church and through the parenting course. Whereas CC was forlorn about KK and their separation she now has "a spring in her step and personality".

51. Mrs Playford presented as a forthright caring person who is supportive of CC and who is prepared to provide CC with as much assistance as she is able.

52. <u>Dr Stephen Meredith</u>

Dr Meredith practices in Alice Springs as a psychologist/counsellor and has experience working as a school psychologist. He also worked as a counsellor in the Family Court of Australia providing reports in relation to children's needs in the context of the Family Law jurisdiction.

53. Again, I intend to deal with the issue of Dr Meredith's ability to give expert evidence in the area clinical psychology and the diagnosis of psychological disorders later in my reasons.

54. For the purpose of these proceedings Dr Meredith prepared a report (Exhibit N) in which he set out his recommendations for KK's care. It is important to note that at

the time of giving evidence and preparation of the report Dr Meredith was unaware of CC's dealings with police and ambulance services over the proceeding years. Further, he had a limited opportunity to observe KK.

55. Nevertheless, it is Dr Meredith's view KK was managing well, although she was confused and emotionally disturbed within normal limits. If she is not returned to CC on a full time basis the confusion KK feels will continue. Dr Meredith agrees that a full return should be with appropriate supports. It is Dr Meredith's opinion a child should be removed from family only if there is danger of sexual, physical or psychological abuse and no other option is available.

56. Dr Meredith considered a complete return would enable the bond between mother and daughter to strengthen. It is a more stable placement (than in foster care), her aboriginal identity and contact with her father's family could be maintained. He also emphasised the need for frequency of contact as apposed to longer when considering the maintenance of a bond between mother and daughter.

57. Dr Meredith was a candid witness who, in an objective manner, addressed the issues required of him within the limits of the information provided to him.

58. Carolyn Cintana

CC was frank that in the past her parenting was inadequate and that she needed help with parenting skills. In May 2002, with the assistance of the Minister she undertook 3-4 sessions of a parenting course with Pam Tracey but M/s Tracey moved from Alice Springs. In 2003 in connection with the Church of the Rock and the Playfords she undertook the parenting course 'Growing kids Gods way'. This program has taught her a number of things resulting in her being much more communicative with KK during access.

59. In an effort to further change her life CC has been receiving counselling sessions with Fran Coughlan on a weekly basis. These sessions are about 1 ½ hours duration. CC feels these sessions have helped her. (See later evidence of Fran Coughlan).

60. If KK was returned to her care CC gave evidence that some neighbours and friends could assist. Although at the time of giving evidence she had not spoken

to them. Also a M/s Boland and M/s Wilson, who had supported her during the proceedings, and who are members of the Church of the Rock, could support and assist her.

61. CC gave evidence the ‘episodes’ (relating to BPD) she has are caused by her reparation from KK. She made efforts to seek professional help for psychotherapy and in October 2002 she had counselling sessions with Dr Tabart. Dr Tabart’s report (Exhibit H), amongst other things set CC’s proposals allowing for KK’s return. But in evidence CC stated that the plan was not, in her view, a prerequisite for KK’s return. Anyhow, in February 2003 Dr Tabart told her he didn’t need to see her any further.

62. So far as the incidents involving police and ambulance officers are concerned CC does not consider them to be serious. She does consider the incident of the 31st of January 2003 with the Private Hire Car driver as serious but her perspective relates to the conduct of the driver rather than herself.

63. CC is an articulate person who was frank and credible in giving her evidence. Her demeanour was that of a mother putting her cause forcefully for the return of her daughter.

64. <u>Fran Coughlan</u>

M/s Coughlan is a qualified social worker employed as a counsellor with congress. She had a number of counselling sessions with CC and although she did not produce a report for Court her file notes have been marked as Exhibits V and W.

65. The counselling sessions, in M/s Coughlan’s view, have developed a relationship of trust with CC. The sessions are designed to talk about and deal with problems by providing options and goals. In particular trying to put in place mechanisms which will assist in changing poor and detrimental behavioural patterns.

66. It is M/s Coughlan’s evidence that CC is learning to manage her feelings and can identify what works and what doesn’t work in her life. The counselling needs to continue and confirmed it is Dr Tabart’s view he would not instigate any different type of counselling for CC.

67. M/s Coughlan stated she was not a champion of CC's case and it was her view all parties concerned were 'worn out' by the entire process (legal process) and an independent review of the case through the Minister should occur. M/s Coughlan was an impressive witness who stated the situation exactly how she saw it. I accept she is not a champion for any cause except for KK.

The Expert Evidence

68. The Minister relies principally upon the evidence of M/s Delahunty together with a number of reports. Likewise CC relies upon the evidence of Dr Meredith and the opinions expressed by him. Both psychologists are well qualified. Messrs Young and Whitelum submit that were their evidence is in conflict I favour the evidence of M/s Delahunty particularly in regard to the psychological impact of CC's behaviour on KK. Mr Goldflam submits I should accept the evidence of Dr Meredith.

69. Firstly, based upon their qualifications and experience in the field of psychology I am satisfied both Dr Meredith and M/s Delahunty are capable of giving expert opinion within that field. The issue for my determination is that, as M/s Delahunty is a clinical psychologist and Dr Meredith is not, she is able to give relevant evidence about psychological disorders affecting KK and Dr Meredith is not.

70. M/s Delahunty detailed her training and experience as a clinical psychologist. Also, that much of her work with children and adults deals with the diagnosis of psychological disorders. I am satisfied, having regard to her qualifications as a clinical psychologist M/s Delahunty is qualified to make the diagnosis she has concerning KK and BPD.

71. Dr Meredith is not qualified as a clinical psychologist and does not hold himself to be so. He conceded, in cross-examination by Mr Young, he did not have experience in clinical psychology and he was not an expert in the diagnosis of psychological disorders of which BPD is one. Furthermore, Dr Meredith was unaware, if he was qualified in the Northern Territory to diagnose BPD or any other disorder as there are no specialist categories of psychologist in the Northern Territory.

72. I am satisfied on the evidence before me that Dr Meredith is not qualified to express an opinion on the issues of BPD and the impact of CC's disorder upon KK. Where he has done so and it is in conflict with the evidence of M/s Delahunty or the reports and evidence of Dr Tabart, Dr Walton or M/s Single, I reject his evidence and rely upon the evidence of M/s Delahunty and others.

73. M/s Delahunty gave evidence concerning KK's poor behaviour during access with CC and on other occasions (as detailed in her report – Exhibit G). It is M/s Delahunty's opinion these incidents demonstrate KK's coercive behaviour, which results from CC's frightening and inconsistent behaviour which has manifest itself in KK having a disorganised attachment. It is a recognised risk (Mayne study 1996) that disorganised attachment is a response to a parent's BPD. Disorganised attachment from early life mistreatment and organised forms of insecure attachment states are also further disorganised attachment risks referred to (Mayne study) and identified by M/s Delahunty as present in this mother/daughter relationship.

74. It is M/s Delahunty's opinion that CC's behaviour has led to psychological damage to KK and if she continues to be exposed to CC's frightening and inconsistent behaviour KK will continue to suffer psychological mistreatment/damage. If CC's behaviour continues and continues to impact upon KK, M/s Delahunty is of the opinion KK may not develop BPD but may, suffer some other type of personality disorder.

75. In support of her opinion M/s Delahunty relied on Dr Tabart's report of the 6th of November 2002 – Exhibit H. It was Dr Tabart's view there was an increased risk of KK suffering a personality disorder should the mother's behaviour continue to impact upon KK.

76. Clearly, CC's BPD has severely impacted upon KK giving rise to disorganised attachment manifested in her behavioural problems.

<u>Borderline Personality Disorder</u>

77. It is accepted by all parties as I understand the evidence, that CC suffers a severe personality disorder namely BPD. CC has suffered from the disorder for a long

time (see decision Ward SM 13/12/02 para 47 – report of Heath Banting Psychologist dated 17/2/98).

78. M/s Delahunty is of the opinion that BPD is pervasive and is long term. But with age people suffering the disorder do improve. There is little evidence which indicates CC's BPD has improved. Obviously, if she could undergo intensive treatment and regulate other behaviour and emotions that would be in KK's best interests.

79. It is M/s Delahunty's evidence treatment such as intensive psychotherapy would help as well as a live-in program teaching life skills. The combination of the two (the Marshall Behaviour Model) is the more appropriate as there are safety nets and residential programs seem to be more effective.

80. Unfortunately, residential programs are rare. Alice Springs has none and it would seem there are none in the Northern Territory. Here, it seems on the evidence before me, for CC to have treatment other than what she has already commenced it is necessary for her to move interstate. Such a move would be for a year at least according to M/s Delahunty's evidence.

<u>Submissions on Behalf of the Minister</u>

81. It is the Ministers position that the sole guardianship of KK continue for 5 years with CC having supervised access for 2 hours per fortnight. The Minister seeks a review in 2 years. In support of the Ministers position Mr Young relies on the following matters:

1. The mother suffers from BDP.

2. Dr Tabart in his report of the 6th of November 2002 set out a number of pre-conditions for the mother prior to resuming care. It was her earlier case that she accepted these pre-conditions be met. But it is now her case, based on Dr Meredith's evidence, these pre-condition were merely suggestions. But having regard to Dr Tabart's evidence on the 11th of November 2002 that certainly is not the case. Furthermore, the only inference to be drawn from Dr

Tabart's absence as a witness for the mother is that he would not have assisted her case.

3. It is the mothers case she has made "reasonable attempts" to comply with the pre-conditions put forward by Dr Tabart. But the fact remains, much of Dr Tabart's plan has not been complied with. The result is that the mother's behaviour has not changed to such an extent so one could say she is putting KK's needs before her own or that she could adequately care for KK. It is not enough for the mother now, to only say, she has made reasonable attempts to comply with Dr Tabart's plan. The onus is still on her to demonstrate she has and is complying with the plan.

4. Although, the mother has made some progress (attendance at parenting course) she still has an inability to control her moods and her behaviour remains disturbing. Dr Meredith agreed that if KK is returned to her mother constant emergency respite care would be needed because of CC's inability to control her mood and behaviour.

5. At the present time KK is in a relatively stable foster care environment and it is in her best interests for this stability to remain. A return to the mother's care would see that stability destroyed.

6. The Minister accepts access is important and should continue on the current limited basis. The evidence of M/s Delahunty supports the need for limited access which is sufficient to maintain the bond between mother and child. Accordingly, the Minister no longer considers reunification a realistic option.

<u>Submissions on Behalf of the Child's Representative</u>

82. Mr Whitelum supports the submissions of the Minister upon all essential matters including implementation of the present interim orders with a review in 2 years.

83. It is in the best interests of KK, having regard to the evidence of M/s Delahunty and M/s Single, permanent separation be maintained.

Submissions on behalf of the Mother

84. The mother seeks this Court to make the following orders:

> "a. The child be in the joint guardianship of the Minister and the mother.
>
> b. The child be in the custody of the mother for three days per week, subject the mother taking reasonable steps to comply with the Tabart plan.
>
> c. The Minister take reasonable steps to facilitate compliance by the mother with the Tabart plan.
>
> d. The child otherwise be in the custody of the Minister.
>
> e. This matter be further reviewed in 3 months, and that Professor Pauline Meemeduma be requested by the Minister to further review the case."

In support of making these order it is submitted:

1. The mother has made reasonable attempts to comply with the 8 requirements in Dr Tabart's plan. CC has not been able to fully comply due to the intervention of the Minister. Efforts have been made by CC to development support networks and she is prepared to use respite care from FACS. By her continued counselling with M/s Coughlan she is complying with Dr Tabart's plan of supportive psychotherapy. Accordingly, CC has made substantial progress in complying with Dr Tabart's plan.

2. The mother accepts the finding that she suffers from BPD. She has undertaken the therapy recommended by Dr Tabart.

3. Dr Tabart's absence from these proceedings in explained on two bases. Firstly, his report and evidence have been tendered.

Secondly, he has seen CC only twice since November 2002 and would have nothing further to add.

4. The Court should not adopt the extreme view in this matter expressed by M/s Delahunty but accept the opinion of the case worker regarding the likelihood of reunification.

5. The experts do not agree, and therefore, the Court cannot be satisfied no other order than sole guardianship will properly provide for the welfare of KK.

85. In detailing the submissions of the parties I have not dealt with every individual submission made by each of them. I have considered all the submissions placed before me, including Mr Goldflam's submissions marked appendix A – dated the 22nd of November 2002 and the submissions prepared by CC forming part of 'Mothers submission in reply to submissions of the Child's representative'. If a submission has been made and not mentioned, it should not be concluded it has been given less weight than those I have mentioned, because it has not.

The Application for Variation

86. On the 7th of March 2003 His Worship Mr Ward SM set out his reasons for making of the interim order varying his previous orders. Amongst other things His Worship said:

> " The Minister has now brought an application to review the order made by me in December. The application seeks an indefinite restoration of the order made interim in 10/02, which would have the effect of allowing the mother only two hours access to K each fortnight. The mother herself has appealed the decision made by me in December '02. She opposes the present application. The contest on this issue is set for hearing on the 14/5/03 and 15/5/03.
>
> On the 5/1/03, I varied the order made on the 13/12/03 on an interim basis until the hearing in May '03 by reducing the access from 4 hours per week to 2 hours per fortnight. I did this at the requested of the Minister, the mother opposing any such reduction. I did that because

> the child's interests are paramount, and I had material to support such a reduction, and I had no other evidence.
>
> The Minister now asks that I make a further interim order deleting clauses 2 and 3, and modifying clause 4 of the order. The mother opposes such an interim order……….
>
> The report dated the 4/2/03 contains a number of factual assertions concerning the unacceptable behaviour by the mother during supervised access visits. Ms Delahunty in her report expresses the opinion that K's behaviour has deteriorated and that the extended access is the cause. If the mother behaves in such manner during short supervised access visits, it is likely that she would behave in like manner during a more extended 24-hour access. Part of the problem is the suggestion that the mother spends part of the time during access undermining the carer, and if this is so, it cannot be tolerated. The only evidence I have is these two reports. I must act on an interim basis as if they might be true. The interests of the child are paramount. I propose deleting from the order the reference to 24-hour access."

It is important that His Worship made the variation based upon the two reports tendered by the Minister in support of the application.

87. An application for variation made pursuant to s.48 (1) of the Act can only be granted if the party making the application can establish 'that the circumstances that resulted in making the orders, in some respect, have changed significantly since the order was made' – s.48 (2).

88. The Minister relied on two matters which are said to constitute significant change, the first is KK's changed behaviour, which deteriorated between the period of the 3rd of January 2003 and the 31st of January 2003. M/s Delahunty attributed this change as a reaction by KK to CC's behaviour. Secondly, CC's behaviour has continued to be inappropriate by the occurrence of further incidents which have already been referred to. It is Mr Goldflam's submissions that for the mother's behaviour to remain inappropriate cannot signify any change, because it is the same. I agree with Mr Goldflam, particularly now I have had an opportunity to

hear all the evidence in this matter. The increase or decrease in CC's erratic behaviour is something to be expected from a BPD sufferer and can hardly be regarded as "significant change' when inappropriate behaviour occurs.

89. I accept M/s Delahunty's evidence as to her observations of KK during the period (report – Exhibit D) and the reason for the child's deterioration. Regardless, of the history of this case I am firmly of the view any change to KK is significant and needs to be addressed quickly by the Minister. Hence the application for variation.

90. Unfortunately, the history of the matter also indicates, apart from recommended case plans and the limited discretion of the Minister for KK's care, whenever things start to go wrong, the Minister can do little except bring such applications. In that context I am satisfied on the balance of probabilities that CC's behaviour caused a significant change warranting a change in the orders.

91. But the evidence before me does not fully support such a radical change in the access. Other options were available with the ability of the Minister to put in place. I am also of the view that these proceedings have been subsumed in the review proceedings. Accordingly, in the exercise of my discretion I make no orders on the application and it is dismissed.

<u>The Review</u>

92. Having regard to the evidence and submissions of the parties the dispute is not centred on whether the child is in need of care but the consequential orders which flow from such a finding. The Minister says KK is a child in need of care as she has suffered maltreatment. Section 4 (3) (b) of the Act provides:

> "he or she has suffered serious emotional or intellectual impairment evidenced by sever psychological or social malfunctioning measured by the commonly accepted standards of the community to which he or she belongs, because of his or her physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he or she is living or where there is a substantial risk that such

surroundings, deprivation or environment will cause such emotional or intellectual impairment;"

93. In regard to this primary issue I have the evidence of M/s Delahunty, M/s Single and Dr Tabart before me. The only conclusion available on the evidence is that KK has suffered serious emotional impairment and to leave her in her surrounding as they were would expose her to continued substantial risk of further emotional impairment. I am therefore satisfied on the balance of probabilities KK is a child in need of care. On this issue, I do not accept Dr Meredith's evidence where it is in conflict with the other experts.

94. Having made a finding that KK is a child in need of care. Orders may be made by the Court to include the matters set out in s.43 (5) of the Act in conjunction with the matters set out in s.43 (1) of the Act.

95. At this stage of the proceedings the only parties who seemed concerned with the care of KK are her mother and the foster carers through the Minister. Previous attempts to place KK with extended Aboriginal family have failed and KK's father has had such little interest in these proceedings, so as to warrant the comment, that he just doesn't care.

96. CC is not in my opinion able to make proper decisions for the care and welfare of KK. This is strongly supported throughout the evidence in this case. To place KK in a joint guardianship arrangement will not be to her benefit as KK could not be relied upon to place her daughter's interest first or engage with the Minister to promote KK's interests. Accordingly, after considering the evidence and submissions I can only conclude that no other order, other than sole guardianship, will adequately provide for the welfare of KK. Due to her age and the progress CC is making in her life I am not prepared to make an order until KK's eighteenth birthday. With those matters in mind I am only prepared to make the order for a period of 2 years.

<u>Conclusion</u>

97. Much has been made of what has become known as the Minister's erraticism. This is particularly so from the mother's point of view. It is her contention that this

erraticism has caused her to “jump through hoops”, “the goal posts have been moved” and she is never able to comply with the Minister’s demands. I agree with Mr Young this is only one of many side issues in this case.

98. A consideration of the evidence does not in my view support the mothers contention. The history of the case since KK’s birth is one of change. The changes in the child’s age, carers, KK’s emotional state and the mother’s behaviour. The Ministers change of approach, case plan and so on merely reflect a reaction to the changing needs of KK. What is clear from the history of this matter and evidence before me is that the Minister needs greater flexibility in dealing with the changes or events of inappropriate behaviour by the mother. CC also needs some flexibility with access arrangements particularly when under stress and BPD is causing mood and behavioural changes that impact upon KK.

99. I accept Mr Goldflam’s submissions and CC’s evidence that she has made considerable changes in her life both recently and generally since KK’s birth. It is clear, on the evidence, there is still a long way to go. But if CC is able to put in place the skills learnt at the parenting course, continue with counselling and interact effectively with FACS there is in my view still the possibility of reunification. This is of course dependent upon KK’s ability to cope with full time care as well as an evaluation as to the best interests for her welfare at such time.

100. It is Mr Young’s submission reunification or increased access is out to the question for the reasons highlighted above. Mr Young submits his view is supported by the evidence. Clearly, M/s Delahunty considers the current access arrangements are sufficient to maintain the bond between mother and daughter. She does not rule out reunification. She is obviously concerned with the impact of CC’s behaviour upon KK. M/s Fogarty has not ruled out reunification neither has M/s Owens. After considering the evidence the only inference to be drawn is that reunification is still a viable option. This is so having regard to the purpose and effect of the Act namely, ‘to provide for the protection and care of children and for the promotion of family welfare’.

101. The evidence in my view justifies a graded increase in access with supervision by the Minister coupled with increased flexibility for the Minister to assist and deal

with those periods in which CC is under stress and not behaving appropriately. The Minister also needs a clear statement from the Court as to what is required of CC in caring for and re-establishing an appropriate relationship with her daughter. In such a case "reasonable attempts" to comply with the Court orders will not be enough.

Dated this 3rd day of February 2004.

____

JWA Birch
STIPENDIARY MAGISTRATE