

CITATION: *The Minister for Family and Community Services v KK & JC* [2007]
NTMC 044

PARTIES: THE MINISTER FOR FAMILY AND
COMMUNITY SERVICES OF THE
NORTHERN TERRITORY

v

KK
JC

TITLE OF COURT: Family Matters

JURISDICTION: Family Matters - Alice Springs

FILE NO(s): 9725549, 20504276

DELIVERED ON: 25 July 2007

DELIVERED AT: Alice Springs

HEARING DATE(s): 14 – 16 March 2007

JUDGMENT OF: G Borchers SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Minister: T Young
Children: T Whitelum
Mother: Self Represented

Solicitors:

Minister: Mark Heitmann
Children: Morgan Buckley
Mother: Self Represented

Judgment category classification:

Judgment ID number: [2007] NTMC 044

Number of paragraphs: 55

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

No. 9725579
20504276

BETWEEN:

**THE MINISTER FOR FAMILY AND
COMMUNITY SERVICES OF THE
NORTHERN TERRITORY**
Applicant

AND:

KK
JC
Children

REASONS FOR JUDGMENT

(Delivered 25 July 2007)

Mr G BORCHERS SM:

1. This decision is in respect of an application for a variation of orders dated 31 May 2006 made pursuant to s.43 of the Community Welfare Act and brought by the mother of KK, born 11 November 1997 and her younger half brother JC, born 16 June 2004. The application is under s.48 of the Act.
2. There has been a long history of previous litigation in regard to KK. However the orders sort to be varied are the orders made by Carey SM on 31 May 2006. Those orders resulted from a lengthy hearing regarding a review, pursuant to s.43 (6) of the Act, of an existing order of joint guardianship between the Minister and the mother, made on 10 November 2004 in respect to KK (file 9725579) and an initiating application pursuant to s.42 and 43 (5) (b) for a declaration that JC be found in need of care.
3. The orders made by Carey SM on 31 May 2006 were that the Minister be granted sole guardianship of KK until she attains the age of eighteen years, that JC be

declared to be in need of care and the Minister be granted sole guardianship of him until he attains the age of eighteen years. In addition, orders were made concerning the mother's access to the two children. Subject to KK's desire to attend, the mother was to be granted access to KK on not less than two but not more than four occasions per calendar year. The mother was also granted access to JC on not less than four and not more than six occasions per calendar year at the discretion of the Minister. Access to the children was subject to stringent conditions including the attendance of case workers and strict stipulations concerning the mother's behaviour while in the company of her children.

4. The orders of 31 May 2006 were appealed to the Supreme Court. On 21 July 2006 Olsson AJ dismissed the appeal.
5. Pursuant to the orders of 31 May 2006 the mother has exercised her access right to her children on one occasion, being the 22 December 2006.
6. The application pursuant to s.48 of the Act was filed on 22 November 2006. Section 48 reads as follows:

48. Application for variation of order

(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 request of, the child in relation to whom the application under this Part was made, may apply to the Court for the variation or further variation of an order made under section 43.

(2) An application under subsection (1) shall not be made unless it states that the circumstances that resulted in the making of the order, in some respect specified in the application, have changed significantly since the order sought to be varied was made.

(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 section 43 on the original application.

7. In support of her application the mother provided the following description of her changed circumstances “My current condition is no longer synonymous with the binding diagnosis previously given” and provided an unsworn affidavit together with a copy of a report from Dr Leon Petchkovsky dated 29 November 2006. She asserted that there have been “significant change is within myself... my mentality, my insight, my relations with people and my ability to ... contain... my feelings... much better than I ever probably have in my whole life”.
8. The variation sort by the mother during the hearing is increased access to KK and JC, although her application requested an order that would return her son and daughter to her care. The amount of increased access was not specified in her application and was not revealed in the hearing. Any variation to the 31 May 2006 orders is opposed by the Minister and on behalf of the children.
9. The Minister asserts that notwithstanding that the wording of ss.48 (2) appears, a literal reading, to require only that some changed circumstances be stated in the application, the clear purpose and objective of the provision is to require proof of a significant change in the circumstances that resulted in the order before any variation is made to that order.
10. I agree with this submission and also agree that the provision requires consideration of three factual enquiries, namely:
 - (a) the circumstances that resulted in the making of the orders sought to be varied;
 - (b) whether those circumstances have changed significantly; and
 - (c) whether the changes have occurred since the making of the orders.

Circumstances That Resulted In The Making Of The 31 May 2006 Orders

11. The decision of 31 May 2006 followed a six day hearing in August and September 2005, and the learned Magistrate carefully considered the evidence of a number of experts that dealt with matters that had been previously considered in the decisions of Ward SM on 13 December 2002, and Birch SM on 3 February 2004.
12. In considering the evidence before him, the learned Magistrate paid attention to the orders made by Birch SM which were directed towards the ultimate reunification of the mother and KK. Supervised overnight access was to be trialled and the mother was to complete a parenting course and continue with access.
13. As a consequence of the orders of 3 February 2004 decision the Minister retained Professor Pauline Meemeduma, an Associate Professor of Social Work at Edith Cowan University to conduct an independent review of the Department's response to the decision. Professor Meemeduma recommended the adoption of a case plan involving intensive support of the mother and her children including a plan for the mother to participate in a residential program at the Ngala Centre in Western Australia to improve her parenting skills. Although the mother agreed to this plan it was abandoned after she refused to attend.
14. The Western Australian parenting program was criticised by other experts called to give evidence before Carey SM. The learned Magistrate concluded that "Dr Meemeduma appears to have proceeded on the basis that if the mother were able to be re-educated and trained to be a competent parent then the needs of the children would automatically follow. The effect of this approach is to put the needs of the mother ahead of those of the children. Both the Department and Dr Meemeduma fell into this error for a substantial period of time, at least partly because the mother became adept, because of her familiarity with the workers and her ability to manipulate them to some extent, at having them address her own needs ahead of those of the children..." The effect of that tolerance (by the Department) was to cause harm to the children in circumstances where their protection was paramount.

15. The learned Magistrate heard evidence of incidents that he described as unusual and bizarre and depicting dysfunctional behaviour by the mother during the period from late August 2003 through to late August 2005. He also heard evidence from a number of witnesses regarding the mother's personality disorder. He was satisfied that her behaviour was a manifestation of the severity of the histrionic borderline personality disorder from which she suffers. He concluded that she would never have the ability or develop the skills to appropriately parent the children or either one of them.
16. In making this finding the learned Magistrate found that the attempts to develop parenting skills in the mother had wrongly emphasised her needs. In considering this point on the mother's appeal, Olsson AJ said:

“It seems to me that the expert evidence to the effect that the appellant's problems are permanent and intractable and that she was incapable of properly parenting the children absent a quite unrealistic ongoing level of profession and other support was quite overwhelming.”
17. The learned Magistrate found that the children had suffered harm as a result of the Department's case management plan which emphasised the needs of the mother over the protection of the children. He considered that restoration of the children to the mother “will never be a viable option” and accordingly made the orders of 31 May 2006 in order that the children could benefit from permanent placement which in respect to KK has, due to a lack of permanency has been a major cause of behaviour problems. Permanent placements will, the learned Magistrate observed, assist in the transfer of their primary attachments from their mother to their carers. The mother was to be granted limited access for the purpose of identification.

Evidence Of Significant Variation

18. At the hearing of her application for a variation of the Orders of 31 May 2006 the mother relied in part upon the evidence of Donna Marie Turnbull, a psychologist employed by Central Australian Aboriginal Congress Inc. Ms Turnbull provided a report dated 13 March 2007 in which she confirmed that she had commenced

treating the mother in December 2006. This post dates the date of the filing of the application now before this Court.

19. Ms Turnbull recommended that the mother have increased visitation rights to her children in order to prevent the potential of certain effects upon the children in later years arising from separation from their biological mother. She indicated that the effects she was alluding to, based upon research were, insecurity, and lack of self esteem, feelings of worthlessness, depression and suicide, delinquency and violence sometimes leading to imprisonment, alcohol and drug abuse and/or lack of trust and intimacy.
20. Apart from her interpretation of the relevant research, Ms Turnbull admitted that her recommendation was based upon her work with the mother on a therapeutic level and consequently, the changes she had observed in the mothers' behaviour. She also relied upon her observations of the one access visit, since the orders were made on 31 May 2006, the mother has had with her children, under supervision that took place on 22 December 2006. Notwithstanding her reading of the reasons for decision of the learned Magistrate and the judgement of Olsson AJ delivered on 18 September 2006 and that she had no objective basis for knowing how increased visitations would effect the children she stood by her recommendation. She agreed that her recommendation was contrary to the opinion of Dr Blunt who gave evidence before the learned Magistrate and upon whom he relied. Ms Turnbull's opinion was that increased access would increase the mother's morale and build a strong rapport between the mother and the children.
21. Ms Turnbull asserted that the mother's behaviour and life-style were improving but that in terms of her treatment, it is "early days" in determining whether there is any lasting change. She had observed two lapses in behaviour and noted that the mother appears to have stopped drinking alcohol in late January 2007. One of those observed lapses is important in terms of these proceedings. A Family and Children's Services (FACS) worker arranged with the mother to discuss with her and Ms Turnbull the reasons for the learned Magistrate's and Supreme Court decisions. A date was set for the meeting on 9 January 2007 at Congress and Ms Turnbull was to bring the mother. When they arrived the mother would not get out of Ms Turnbull's vehicle. In fact she was taken to the Alice Springs Hospital. It

transpired from the Hospital notes that the mother was intoxicated from drinking the night before, that her physical state indicated that she may have been taking drugs. Her behaviour in the Accident and Emergency Department was noted as “very dramatic”. Partially, due to this episode Ms Turnbull conceded it was “early days” in respect of the mother’s cognitive behaviour therapy.

22. The mother also relied upon the evidence of Acting Professor Dr Leon Petchkovsky a consultant psychiatrist who is the clinical director of the Central Australian Community Mental Health Service employed by the Department of Health.
23. Dr Petchkovsky authored a report dated 29 November 2006, and an addendum to that report dated 16 March 2007. In addition a letter dated 21 June 2005 written by Dr Petchkovsky to a colleague at the Alice Springs Hospital was tendered in evidence.
24. Dr Petchkovsky noted that he had treated the mother for seventeen years and since April 2006 has seen her regularly, once per fortnight at the Mental Health Services Outpatient Clinic. He did not give evidence before Mr Carey SM
25. Dr Petchkovsky diagnosed the mother as suffering from a severe histrionic personality disorder in June 2005, but by November 2006 he was able say that through maturation and a range of therapeutic interventions he had observed an improvement and an amelioration of her antisocial, histrionic and narcissotic traits.
26. Dr Petchkovsky’s opinion is that while the mother did suffer from a histrionic personality disorder with some borderline traits, and although she still retains some histrionic and borderline traits she now no longer suffers from a diagnosable personality disorder and that her behaviour is within an expected normative range.
27. Dr Petchkovsky arrived at this opinion by observing that the mother, over that last six months, and certainly by the time that she prepared this application on 22 November 2006 demonstrated emotional and psychological maturation, developed adequate controls to impulsive behaviour, developed a greater sense of her own presentation and future and is more accepting of other people’s opinions and feelings.

28. He agreed that the mother has elected for many years to identify herself with certain parts of the Alice Springs indigenous community although she herself is not indigenous. He described that community as consisting of marginalised or transitional adapting indigenous people. He asserted that the mother's behaviour had to be assessed in the context of living in that community. When numerous incidents of police intervention at the request of either herself or her neighbours at the mother's residence were put to Dr Petchkovsky for comment, including incidences concerning drunken behaviour, fighting, yelling and public disturbance, he was not of the opinion that this was evidence supporting a diagnosis that the mother still suffered from a histrionic borderline personality disorder. Similarly he did not find her drinking, which appears to have significantly abated in early 2007, as evidence of a problem. It was his view that her drinking and the behaviour at her home was normative for the community in which she lives.
29. Dr Petchkovsky recommended that the mother be permitted to take KK and JC to a clinic in Melbourne run by Professor Campbell Paul for support coaching and skills development in order to develop her own parenting and nurturing skills. If this was not possible he suggested another clinic with similar professional skills be utilized. He opposed the mother being exposed to "some kind of good hearted but naïve support from local workers". He was at the opinion that if this intervention had occurred some years ago, the mother would not be in the position she is today.
30. Dr Petchkovsky gave evidence that it was his long-held view the because the mother had chosen a lifestyle in which she identified herself with and closely involved herself with indigenous people this made for a very unusual case and one which challenged what he considered to be FACS socio-cultural view of her behaviour. He went so far as to suggest that the mother had been hard done by FACS because her behaviour was an affront to the Department's middle class attitudes.
31. However, having discounted the mother's behaviour in respect of her living arrangements, alcohol consumption, and contact with the police since May 2006 as providing any evidence at a histrionic borderline personality disorder, Dr

Petchkovsky did concede that in his opinion the ultimate custody arrangements allowing for the children to be returned to the mother were “a work in progress” which, in his opinion should be the ultimate objective of these proceedings. At present he admitted that there was no option but to only consider the appropriate access arrangements.

32. It was his opinion that the orders of 31 May 2006 are deeply disruptive to the children, unsatisfactory to the emotional state of the mother and based upon the flawed concept that limited access would assist the children’s understanding of their identity. Either access should have been totally denied or access should have been more liberal and seen as a transitional period during which more frequent interactions were to be encouraged in order to rebuild the mother’s relationships with her children.
33. Dr Petchkovsky’s evidence appeared to suggest that there were two parallel issues confronting the mother. Firstly due to her previous personality problem she had been left with deficiencies in her parenting and nurturing skills. These could be addressed by intensive training at a course similar to that by Professor Campbell Paul. In addition her parenting capabilities would be improved and her parenting skills enhanced by permitting her to have more unsupervised access as this would be mutually satisfying to both her and the children. Secondly the lifestyle choices made by her to identify with the marginalised Alice Springs urban indigenous community and live within that community caused and continues to cause tension, aggravation and “humberging” which is not conducive to raising children. However she is developing an insight into this problem and is gradually addressing it by being more proactive in her engagement with the police and abstaining from alcohol consumption.
34. The Minister called Prudence Walker, team leader of the out of home care team in the FACS Alice Springs office. She prepared a report dated 13 March 2007 which was tendered in evidence. The report sets out the current situation regarding the care of the children, the contact between FACS and the mother and the circumstances surrounding the one access visit that has been arranged since the orders of 31 May 2006.

35. The children are together in long-term foster care, a placement implemented in September 2005 intended to be permanent until they are aged 18.
36. There was no contact between the mother and FACS from September 2005 until 16 June 2006 when the carer of the children reported that on 5 June 2006 the mother had approached her on a public street. The mother made a negative comment about the child JC's hair being cut, took the child from a pram for a cuddle and on returning the child expressed milk from her breast and wiped it over JC's face, particularly around his lips and nose. She asked the child "do you remember this". This behaviour was contrary to the learned Magistrate's orders.
37. Apart from the incident on 5 June 2006 and a 20 minute telephone communication with the children on 6 July 2006 and only access the mother has had with her children was on 22 December 2006, one month after the mother filed her application under s.48 of the Act. The access was supervised in accordance with the orders. Although Ms Walker expressed some concerns about certain aspects of the access visit, overall she thought that the visit had gone satisfactory. It was, however, reported to her that after the visit the older child exhibited some behavioural difficulties.
38. Ms Walker is of the opinion that the mother does not accept that the children have been placed in long term care and that they will not be returned to her. She believes that the mother lacks insight into the emotional damage caused to KK as a result of exposure to the mother's past behaviour and has little or no insight into the purpose of the learned Magistrate's orders placing the children into long-term care.
39. The mother gave evidence to the effect that at the conclusion of the evidence heard by the learned Magistrate in September 2005 she felt emotionally drained and left Alice Springs to get some perspective on what was happening in her life and insight into her problems. She started to make changes in her life through becoming more focussed, less self-centred and more reflective of other people's attitude towards her. Although this improvement was not sustained particularly for a couple of months after she returned to Alice Springs in April 2006 when she felt lonely, she felt noticeable improvements in late 2006 and particularly since

commencing working with Donna Turnbull in December 2006. She also marks the date when she stopped drinking alcohol, being late January 2007 as the date from when more intense positive improvements have taken place.

40. She admitted however that while in Adelaide sometime between December 2005 and April 2006 she was living on the streets and drinking which led her to being arrested on at least one occasion and being admitted to sobering up shelters.
41. She also admitted that subsequent to filing her application she continued to drink and had drinkers living at her house which led to the police being called to a number of disturbances.
42. The mother disputes that KK suffered a disorganised attachment to her as a result of the mother's behaviour. It is her opinion that the difficulties experienced by KK occurred as a result of KK being removed from the mother's care as a baby and suffering further distress when she was again removed from the mother's care as a 4 year old.
43. The Minister points to a number of incidents that have occurred since the hearing of evidence before the learned Magistrate as evidence of behaviour that is consistent with his findings. In particular this Court's attention is directed to 29 occasions between 8 May 2006 and 26 January 2007 when the police were either contacted by the mother or came to her residence as a result of other people complaining about behaviour at that address. In addition the Minister points to:
 - (a) the period between December 2005 and April 2006 when the mother was away from Alice Springs at times living in Adelaide on the streets and being admitted to sobering up shelters;
 - (b) an incident on 17 September 2006 when police were called to her home by a neighbour whom she had, whilst intoxicated, threatened to kill;
 - (c) an incident at the Gap View Hotel, Alice Springs on 17 November 2006 when the mother was evicted by security staff for being

intoxicated on licensed premises, abusive, aggressive and smashing a window;

(d) her admission to the Alice Springs Hospital on 9 June 2006 whilst drunk and in an unstable distressed state;

(e) her further admission to the Alice Springs Hospital on 14 June 2006 after being assaulted whilst intoxicated; and

(f) her behaviour on 9 January 2007 when arrangements were made by FACS to discuss the reasoning behind the Orders of 31 May 2006 and the subsequent decision of Olsson J on the appeal

Conclusion

44. The circumstances that surrounded the making of the orders of 31 May 2006 were not confined to a diagnosis of the mother's mental state. They included more significant issues including the mother's ability to parent her children, which of course was partially determined by her mental state and the effect her parenting has had upon the welfare of the children. There were however other factors, albeit of less importance that were considered by the experts who gave evidence before the learned Magistrate.
45. I do not find that there is any evidence that supports a finding that the circumstances upon which the learned Magistrate's orders were based have significantly changed. There is evidence that the mother is making some progress in respect of many aspects of her life as a result of the cognitive behavioural therapy she is receiving from Ms Turnbull. I am not satisfied however that her capacity to parent the children has so significantly changed that that the orders in respect of her access to KK and JC should be varied in such a manner that she be granted increased access.
46. While the concerns that Ms Turnbull holds for the future welfare of the children are no doubt genuine they are not based upon any analysis of the current placement or an understanding of the children's welfare. Her concerns are based on what might happen in the future based upon a literature review. I find that Ms

Turnbull's recommendation that the amount of access afforded to the mother to be another example of assistance being granted to the mother, which in itself is necessary and hopefully beneficial, but which in respect of her relationship with her children, placed her needs before those of the children.

47. I reject that suggestion by Dr Petchkovsky that the mother should be given increased access as she will learn nurturing and parenting skills through experiencing mutually satisfying access visits. I also reject his suggestion that those skills will be enhanced if she is permitted to take the children to some professional nurturing and parenting course. Those experiments have been tried and they have failed. To repeat the experiments would only to ascribe to the mother an emphasis on her needs that is unwarranted and has been rejected in the past.
48. While rejecting the submission from the Minister that Dr Petchkovsky is to some extent an advocate for the mother it is illuminating that without offering any supporting evidence he was of the opinion that past contact between the mother and the children had not damaged them. This is contrary to the evidence accepted by Carey SM.
49. Is there evidence that the circumstances resulting in the making of the orders of 31 May 2006 have changed significantly since those orders were made?
50. Donna Turnbull is of the opinion:

“Over the past 4 months, the mother has demonstrated positive behaviour change on a number of levels. Marked differences have been noted on her level of personal hygiene and appearance, conduct with Congress staff, motivation to obtain and accept assistance and her willingness to follow treatment recommendations. Of late, the mother appears to have a more positive outlook on life and is employing coping strategies to better deal with threatening or stressful situations. However, further cognitive behaviour therapy is required to fine tune this process, which she has committed herself to.”

51. In her evidence Ms Turnbull agreed that it is “early days” in determining whether there will be lasting improvement as a result of the cognitive behavioural therapy.
52. Dr Leon Petchkovsky does not agree that the mother was suffering from a severe histrionic borderline personality disorder at the date of the learned Magistrate’s orders. The learned Magistrate found the lack of ability of the mother to adequately parent the children to be “a direct result of the severity of the histrionic borderline personality disorder from which she suffers”. Dr Petchkovsky was not called to give evidence before the learned Magistrate and did not give evidence on the appeal. In evidence Dr Petchkovsky described the improvements he had observed in the mother as being in a positive direction, slowly improving and with “some distance to go”.
53. I find that there is not sufficient evidence to support the proposition that there has been significant change to the circumstances resulting in the orders dated 31 May 2006.
54. Finally I observe that while access on 22 December 2006 was occasioned without significant incident, it has been the only personal contact the mother has had with KK and JC in accordance with the orders of 31 May 2006 since September 2005. In many respects the mother’s evidence was that she was not ready to have physical access with her children until December 2006. This application would appear somewhat to be pre-empting of her rights to further access which she can exercise pursuant to those orders.
55. The application is dismissed.

Dated this 25th day of July 2007.

Greg Borchers
STIPENDIARY MAGISTRATE