CITATION:	*Minister for Health & Community Services v MDEW* [2008] NTMC 056
PARTIES:	MINISTER FOR HEALTH & COMMUNITY SERVICES v MDEW
TITLE OF COURT:	FAMILY MATTERS COURT – ALICE SPRINGS
JURISDICTION:	Alice Springs
FILE NO(s):	20819014
DELIVERED ON:	25 August 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	16 July, 17 July & 23 July, 6 August 2008
JUDGMENT OF:	M Little SM

CATCHWORDS:

Community Welfare Act

REPRESENTATION:

Counsel:

Minister:	Mr Whitelum & Ms Raine
Child:	Mr Stirk

Solicitors:

Minister:	Morgan Buckley
Child:	Povey Stirk

Judgment category classification:	
Judgment ID number:	[2008] NTMC 056
Number of paragraphs:	58

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

No. 20819014

[2008] NTMC 056

BETWEEN:

MINISTER FOR HEALTH &
COMMUNITY SERVICES

AND:

MDEW

REASONS FOR DECISION

(Delivered 25 August 2008)

Ms Melanie Little SM:

1. Before the Court on 16 July 2008 was an application by the Minister that the child, MDEW be found to be a child in need of care. The Family Matters Court report sought a two week adjournment of the matter pursuant to s 44(1) of the *Community Welfare Act*.

2. The parents had not been served with the application. The child's whereabouts were unknown. MDEW was born on 6 June 2005, making him three years and one and a half months at the time of the application. The child is in no position to independently care for himself. The Minister and the child were represented.

3. The Court report contained serious issues with respect to the immediate health and welfare of the child. The report outlined a history of prior notifications with respect to this child and an older child born to the same parents. A holding order was made for a period of 14 days from 24 April 2008. For reasons set out below, this holding order ceased to have any

practical effect four days later. Following discussions and representations, further orders were sought.

4. On 16 July 2008, the Court made the following orders:

> 1. Pursuant to section 39(3) of the *Community Welfare Act* appoint Mr John Stirk as child representative in the matter.
>
> 2. Proceed in absence of parents pursuant to section 37(3) of the *Community Welfare Act*.
>
> 3. Pursuant to section 43 and section 47 of the *Community Welfare Act* make an interim declaration that the child is in need of care.
>
> 4. Pursuant to section 47 of the *Community Welfare Act* order that the Minister is the sole guardian of the child for 2 months.
>
> 5. Pursuant to section 43(7) of the *Community Welfare Act* find that no other order would adequately provide for the welfare of the child.
>
> 6. Adjourn to 17 July 2008 at 2.00pm before Little SM for mention.
>
> 7. This order to be authenticated and be available to be handed to the parties by 12.30pm today due to the urgency of the case.
>
> 8. Direct transcript of today's proceedings be typed up and provided to solicitors and parties.

5. As the parents have not been served, the orders are made on an interim basis. The reasons for the making of orders 2, 3, 4 and 5 will now be published. Later orders were made and they are also referred to in this decision.

Order that the matter proceed in the absence of the parents pursuant to s 37(3) of the *Community Welfare Act* (order 2)

6. The parents of the child were not able to be located. They were not served with the application. There was a possibility that the parents may have been in the Yuendumu community. They spent time at Little Sisters Camp in

Alice Springs. It was thought that the child was with the parents. There was no recent information as to the parents' precise location or whether the child was with his parents. The Minister's Office had made enquiries as to the location of both the child and the parents. The family had travelled from Yuendumu to Alice Springs for the Alice Springs Show and had not returned to Yuendumu. The Show was on the first Friday in July. The last interview between FACS and the child's mother was on 19 June 2008. Following that meeting, the mother agreed to attend at the Yuendumu Clinic regularly and have the child fed regularly. On 27 June 2008 the Yuendumu Clinic reported that the mother had not been attending the Clinic. Prior to this, several agreements made between the parents and the Minister's Office were not kept by the parents.

7. On 24 April 2008 a holding order was granted for a period of 14 days. The child was released from Hospital on 28 April 2008. The parents agreed to stay with the child in Alice Springs until plans were put in place to return to Yuendumu. These plans were intended to ensure that the child was provided with an environment which would ensure that the child gained weight. An arrangement was made for a meeting at the FACS Office in Alice Springs on 29 April 2008 and the parents failed to attend. It was later ascertained that the family had taken the child to Yuendumu on that day without discussions with FACS. The child was located by FACS again when he was evacuated on 17 June 2008 from Yuendumu to Alice Springs Hospital. The Court report raises serious matters relating to the health and welfare of the child. The child's whereabouts were unknown as at 16 July 2008. The parents failed to abide a holding order relating to the child two months prior to the date of the hearing.

8. In all of the circumstances of the case, an order was made that the Court proceed with the hearing of the application, notwithstanding that the parents of the child were absent from the Court.

The making of an interim declaration that the child is in need of care (order 3)

9. The material before the Court revealed that the first notification with respect to the mother and father related to an older sibling of the child (CE) and occurred in 2002. Following an investigation the notification was substantiated with a finding that the child CE was suffering neglect. The first notification with respect to the child MDEW was on 8 September 2006 when he was approximately one and a quarter years of age. The notification was that the parents were failing to meet the child's nutritional needs and that the child was failing to thrive. The matter was investigated and it was determined that the child had lost 500 grams in the past month. Agreements were made with respect to the taking of the child to the Clinic and the Childcare Centre and discussions occurred with respect to monies for food. On 8 January 2008, the Department received information from the Alice Springs Hospital that the child was in Hospital and that he had lost 200 grams in the previous three months. On 11 March 2008 information was received that the family did not have any money to buy food for the child. The Department subsequently arranged for food to be provided to the family. Concerns were reported with respect to the child's continuing lack of weight gain.

10. Doctor Andrew White, Consultant Paediatrician, Remote Health Services, Central Australia reported to the Medical Officer at the Yuendumu Community Clinic on 11 March 2008. This written report was subsequently forwarded to FACS. Doctor White had seen the child on 10 March 2008. The problem list with respect to this child includes a number of factors, but the first one is of immediate concern to the Court - growth faltering and malnutrition. The report is a detailed one listing various admissions to the Alice Springs Hospital and includes findings on examination. He reports that the child had had no food on the day of examination and no food the previous day. He reports there was no money for food.

11. Dr White reported that the child's weight is well below the 3rd centile, that the child has had very little weight gain in the last five months and that he is small and thin. In Dr White's assessment and recommendations, he reports that he is "very concerned about the child", that "the child is very underweight", that "the child needs to be in an environment where he is gaining weight very well" and that "he needs food everyday and he needs to be monitored closely". Later, Dr White reports as follows:

> "The child and his family need to be followed very closely. *The child is at significant risk*. FACS needs to monitor closely" (my emphasis).

Dr White then sets out a set of very specific directions with respect to the child's care, including how much weight the child should be gaining every week, how often he should be fed, supplements he should be provided with after being fed and treatment he should receive.

Dr White reports that:

> "if the child gets unwell, there should be a *low threshold for transfer to Hospital*" (my emphasis).
>
> He recommends a DMO follow up and paediatric review at the next visit to Yuendumu.

12. The Court does not know when this report was forwarded to FACS, but it seems that it may have been on or around 23 April 2008. There is no explanation for this delay. On 23 April 2008, FACS received a notification with respect to the child. They were notified that the Australian Government Intervention Team (AGI) had seen the child approximately one month prior to that date and had diagnosed that he was suffering from severe failure to thrive and his brain was not growing. The child's weight was 9.95 kg which was well below the 3rd centile for his age. There is no explanation for the delay between seeing the child and notifying FACS. As a result of the child's medical condition, the Congress Medical Centre in Alice Springs requested that the family take the child to the Alice Springs Hospital to

address his health condition. The family refused to take the child to the Alice Springs Hospital, voicing concerns that the child would be removed from their care if they took the child to the Hospital.

13. On 23 April 2008 FACS visited the family at Little Sisters Camp in Alice Springs and raised child protection concerns with the family. The mother agreed to take the child with FACS to the Alice Springs Hospital for assessment. The child was admitted to the Hospital for tests. The mother was hesitant about leaving the child at the Hospital, saying he did not need to be in Hospital as he was not sick and that the family did provide the child with a lot of food. The child was left at the Hospital following discussions and with the agreement of the mother. The child was admitted to the Alice Springs Hospital on 23 April 2008 and discharged on 28 April 2008.

14. On 24 April 2008 a holding order was granted for a period of 14 days.

15. The paediatric discharge summary from the Alice Springs Hospital set out that there were long standing concerns about the child's growth. The child's weight had been less than the 3rd centile since nine months and there had been no significant increase in the child's weight since he was 18 months old. The test results indicated moderate malnutrition. His length is on the 3rd centile and his head circumference is below the 3rd centile. He ate well in Hospital and needs to have food available for six meals a day. The summary concludes that the child was discharged into the care of FACS, who were intending to have a meeting with family after the child left the ward.

16. After the child left the Hospital on 28 April 2008, FACS workers met with the family. The regime with respect to the child's meals was reiterated. The family assured FACS that they were able to provide the child with enough food, but stated that they found it difficult to get the child to the Clinic. Arrangements were made for transport. The family agreed to stay in Alice Springs until plans could be put in place to ensure that the child was

provided with an environment which would ensure he gained weight. The family agreed to return to the Alice Springs FACS Office on 29 April 2008 for a further meeting. They did not attend at that meeting. It was later established that the family returned to Yuendumu with the child without FACS' agreement or any discussion.

17. On 17 June 2008 FACS received information that the child had been evacuated from Yuendumu to the Alice Springs Hospital due to further weight loss and diarrhoea. The Hospital advised upon discharge that the child was not suffering any ongoing medical condition, but that his weight continued to indicate that his family were failing to provide him with adequate nutrition. FACS workers spoke to the mother on 19 June 2008 with respect to this issue. She did not provide FACS with any reasons as to why the child had not been provided with enough food. The Clinic advised that they had been spending a great deal of time locating the family, seeking to provide support and education with respect to the child's needs. The mother agreed to attend the Yuendumu Clinic on Tuesdays and Fridays of every week. FACS reiterated the need for regular food. On 27 June 2008 FACS contacted the Yuendumu Clinic who advised that the mother had not been attending the Clinic with the child. Clinic staff attempted to locate the mother and child. The clinic was advised that the family were in Alice Springs for the Show. On 11 July 2008 advice was received that the family had returned to Yuendumu on that day. Attempts were made to contact the Clinic at Yuendumu. These were unsuccessful as at the time of the Court report.

18. The medical evidence is that there is no medical condition which is causative of the child's malnutrition. The child's malnutrition is caused by lack of appropriate nutrition. The Court report concludes that the child's failure to thrive is likely to have a significant impact upon his physical and emotional wellbeing. This being the case, further Departmental intervention is required.

19. Based upon a finding that the child is suffering maltreatment, I found that there was material justifying orders being made on an interim basis. Section 4(3) of the *Community Welfare Act* sets out the definition of maltreatment. I find that paragraph (c) of that definition is the relevant aspect of maltreatment in this case. Sub-paragraph (c) sets out (inter alia) that a child shall be taken to have suffered maltreatment where he or she has suffered serious physical impairment evidenced by severe bodily malfunctioning, because of his or her physical surroundings, nutritional or other deprivation. I find maltreatment is proven on an interim basis.

20. I am satisfied that an order declaring that the child is in need of care will ensure that the standard of care of the child as a result of that order will be significantly higher than the standard presently maintained in respect of the child. There is evidence before the Court that there has been regular intervention by FACS workers, the Clinic in Yuendumu, the Congress Health Service and the Alice Springs Hospital. There have been attempts to ensure that the child receives adequate nutrition. That intervention has not resulted in an improvement in the child's situation. Dr White has specified that the child receive particular attention and that has not been provided by the parents.

21. Pursuant to s 43 and s 47 of the *Community Welfare Act*, an interim order was made that the child is in need of care.

Pursuant to s 47 of the *Community Welfare Act,* order that the Minister is the sole guardian of the child for two months (order 4)

22. There is a long history of involvement between FACS and the family in this case. The family have access to support services. Those support services have actively pursued the family in an effort to provide support and assistance to ensure this child's nutritional needs are met. There is little evidence before the Court that the parents have taken a positive or active role in ensuring the child's nutritional needs are met. The parents have

resisted taking the child to Hospital, to the Clinic or engaging with the Clinic or FACS workers with respect to the child's welfare. The evidence is that at present the Minister is the appropriate person to be the guardian of the child on an interim basis. An order was made for a period of two months that the Minister is the sole guardian of the child.

Pursuant to s 43(7) of the *Community Welfare Act*, I find that no other order would adequately provide for the welfare of the child (order 5)

23. The Court can only make an order directing the transfer of the sole rights in relation to the guardianship of the child to the Minister if it is satisfied that no other order it may make will adequately provide for the welfare of the child. (s 43(7) of the *Community Welfare Act).* The report before the Court demonstrates that this child is at significant risk. Dr White said so in his report dated 11 March 2008. The child's situation has not improved since that date and arguably, it is even more perilous. Attempts at working with the family in a co-operative fashion have not resulted in an improvement in his situation. The situation for this child is extremely urgent. There are likely to be significant negative impacts on his wellbeing without immediate intervention. An attempt was made to work together in April 2008 and that was not successful. An order was made that the Minister is the sole guardian of the child for a period of two months. I found that no other order would adequately provide for the welfare of the child.

Adjournment of the matter and addendum Court report

24. The Court adjourned the matter to 17 July 2008 to ensure that the child was located and placed into the care of the Minister. He was not placed into the care of the Minister by 17 July 2008 and the matter was further adjourned to 23 July 2008. A Court report dated 22 July 2008 was filed. It was reported that Police had not been able to provide the assistance that FACS required to ensure that the child is taken into the custody of the Minister, due to a high level of unrest and violence at the community. The child was in Yuendumu.

On 21 July 2008, FACS contacted the Yuendumu Clinic and requested assistance in locating the child. At that stage the Clinic had not seen the child since 30 June 2008. On 22 July 2008, the Yuendumu Clinic reported that the child had been located. The child presented with pneumonia and had lost 300 grams since last seen. The Clinic staff had requested the mother bring the child to the Clinic on 23 July 2008. They regarded the child as "borderline" in regards to evacuation to the Alice Springs Hospital for medical attention. FACS requested the child be evacuated. This was declined by the Clinic, stating there were no medical grounds to have the child evacuated at this time.

25. This decision appeared to the Court to run counter to Dr Andrew White's opinion that, if the child gets unwell, there should be a low threshold for transfer to Hospital. A presentation of pneumonia with a three year old child who is a resident in a remote desert community in freezing mid-winter conditions, that child having recently been diagnosed with malnourishment and who had lost a further 300 grams since last seen by the Clinic (three weeks before), would seem to the Court to be within the meaning of Dr White's "low threshold" for transfer to Hospital. Concerns for the child's immediate welfare heightened.

Application for a Warrant

26. On 23 July 2008 the Minister submitted that the Court had an implied power to issue a warrant for the apprehension of the child to be brought back to the custody of the Minister. The Minister applied for such an order. This application was supported by the child's representative. As the parents had still yet to be located and served, the parents were not present at the hearing of the application on 23 July 2008. An order had previously been made to hear the matter in the absence of the parents and that order was continuing.

27. The child had not been excused from attendance at the hearing of the application pursuant to s 41 of the *Community Welfare Act*. Three Court

dates had taken place without the child being present at Court and without the Court knowing precisely where the child was. Section 41 of the *Community Welfare Act* stipulates that the child, the subject of an application, must attend the Court in person and remain in attendance during the hearing of the application, unless the Court makes an order that the child is not required to attend the hearing. The child had not been excused from attendance in this case.

28. There is no express provision in the *Community Welfare Act* empowering the Court to issue a warrant for a child to be apprehended and placed into the custody of a guardian or custodian if the child is in the Northern Territory. It was argued by the Minister that there was an implied power under the *Community Welfare Act* for such a warrant to be issued. There are specific powers with respect to a warrant for the return of a child to the Northern Territory from an interstate jurisdiction. (See s 50A - 50D of the *Community Welfare Act)*. Form 9B sets out the form of an interstate warrant. Form 4 sets out a form of warrant with respect to the issuing of a warrant pursuant to s 37(2) of the *Community Welfare Act*. This section relates to the parents, guardians or persons having custody of a child failing, without reasonable excuse, to attend the hearing of an application. In this case, there has been no service on the parents and so consideration of s 37(2) of the Act did not come into play. These are the express powers with respect to warrants in the *Community Welfare Act*.

29. The material before the Court in respect of the child demonstrated the child's welfare was at significant risk. Notwithstanding the Court orders made on 16 July 2008, the child had not been brought into the custody of the Minister as at 23 July 2008. The Court was of the view that the child was at significant risk of his welfare deteriorating. There were also long term concerns as to the child's health and wellbeing.

30. The Northern Territory Supreme Court case of *Trew v The Minister for Family and Community Services* is reported at 16 NTLR 209 and relates to the Family Matters Court. In that decision Justice Southwood set out as follows:

> "The Family Matters Court is a specialist Court that is created by statute for the purpose of hearing and determining applications about children who are in need of care and making orders which will secure the proper care and welfare of the children who the Court declares to be in need of care. The Family Matters Court is created by section 24 of the *Community Welfare Act*. It can only exercise the jurisdiction and powers expressly or impliedly granted to it by the *Community Welfare Act*". (para 7)

31. The Court continued "subject to the *Community Welfare Act* and the *Justices Act* (to the extent that the later Act is made applicable by s 28 and 50(2) of the *Community Welfare Act*), the Family Matters Court becomes seized with jurisdiction to declare that a child is in need of care and to make ancillary orders for periods of up to 12 months to secure the proper care and welfare of a child, when an application is duly made to the Family Matters Court by the first respondent or some other party with the leave of the Family Matters Court". (para 8)

32. Accordingly, the Supreme Court has held that the Family Matters Court has implied powers. These implied powers ensure that the jurisdiction granted to the Court can be effectively carried out. The Family Matters Court is created to ensure orders are made to secure the proper care and welfare of children who are declared to be in need of care.

33. The Minister submitted that there was an implied power to issue a warrant for a child to be apprehended and placed into the custody of the guardian. In particular, the Minister pointed to s 41 of the *Community Welfare Act*. That section has been set out in part in paragraph 27 of this decision. The Minister submitted that if there was no implied power to ensure a child's attendance at Court, s 41 of the Act could not be enforced. In practice many

children are excused from attendance before the Court. After considering the current circumstances of the child and the issues which are raised in s 41 itself, a child may be excused. There was no application for this child to be excused from attendance and the child was not excused from attendance. Accordingly, s 41 of the *Community Welfare Act* required the attendance of the child before the Court during the hearing of the application. Both the Minister and the child's representatives submitted that s 41 of the *Community Welfare Act* carried with it an implied power that the Court could make an order ensuring the child did attend before the Court. This could include the power to issue a warrant.

34. The parties also referred the Court to s 96 of the *Community Welfare Act* which creates an offence for a person who, without reasonable excuse, removes or causes to be removed a child from the custody of a person with whom or from a place which the child has been placed under the *Community Welfare Act*. The parties submitted that if there was no implied power to apprehend a child and place a child into the custody of the person to whom the Court had made an order, Court orders could easily be defeated.

35. Counsel for the child also referred the Court to section 30(2)(c) of the *Community Welfare Act*. Subsection 30(1) of the *Community Welfare Act* sets out that, subject to ss 2, the jurisdiction of the Court of Summary Jurisdiction under the *Justices Act* ceases to exist. Subsection 2 sets out that nothing in ss 1 derogates from the power of a Justice of the Peace to take an information or complaint (a), issue a summons (b), grant issue or endorse a warrant (c) or grant bail. Accordingly, s 30(2)(c) of the *Community Welfare Act* envisages the issuing of a warrant. There is no guidance as to when that may occur.

36. The *Community Welfare Act* came into effect in 1984. The power to issue a warrant for the return of a child to the Territory can be enforced under the *Service or Execution of Process Act* (Cth 1992). The need to have express

powers in respect to interstate warrants was seen in 2002 when the division was inserted into the Act.

37. It may be argued that, as there is no express power to issue a warrant for the apprehension of a child, the Court should not imply a power. The Court would not lightly imply such a power. The legislature saw fit to include powers with respect to the return of a child to the Territory in 2002. The fact that there is an express power with respect to interstate warrants does not mean that there is no implied power with respect to a warrant being issued for enforcement within the Northern Territory. Based on the submissions made with respect to sections 30, 41 and 96 of the *Community Welfare Act* and the intent of the legislation, I found that there was an implied power to issue a warrant for the apprehension of a child under the *Community Welfare Act*.

38. An order was made by the Family Matters Court which had not been able to be carried into effect. Despite the fact that the child's whereabouts could fairly easily be ascertained, he was still not in the Minister's custody. The Minister saw no other option but to seek a warrant. The Minister, as guardian of the child, was not being treated as the guardian entitled to custody of the child – but rather as an agency who, while working in the best interests of the child, in fact had no standing. This was not the case. The Minister was the guardian, as the Court had ordered. Notwithstanding this, other agencies apparently continued to treat the parents as the guardian of the child.

39. The Court is mindful that, notwithstanding the pressing need for the child to be placed into the care of the Minister, the implementation of such an order may lead to further trauma and distress for the child. It is regrettable that any order the Court makes may lead to further trauma. In all the circumstances of the case and based upon the fundamental principle that the

welfare of the child is paramount, the Court found the making of the order was justified.

40. On 23 July 2008 the Court issued a warrant to apprehend the child and to bring the child back to the custody of the Minister. The child was not excused from attendance on 23 July 2008.

41. Upon application of the child's lawyer, orders were made pursuant to s 45 of the *Community Welfare Act* as follows:

> Order the Commissioner of Police to furnish the Court with a report as to why police officers have failed to assist the Minister of Families and Children in ensuring compliance with the order made on 16 July 2008 and in particular that the child be in the sole guardianship of the Minister.
>
> Order that the Chief Executive Officer of the Department of Health (NT) report to the Court as to why staff at Yuendumu Clinic have failed to comply with the order made on 16 July 2008 and in particular that the child be in the sole guardianship of the Minister and also to report to the Court as to whether a doctor or paediatrician assessed the child's condition on 22 July 2008 as to the question of medical evacuation and whether such an assessment was made in light of Dr Whites recommendation of Number 11 of his report 11 March 2008. (Line 11 of the report relates to the statement by Dr White that if the child gets unwell there should be a low threshold for transfer to hospital). These reports are to be provided to the Court by close of business on 5 August 2008.

42. Following the hearing of the matter on the morning of 23 July 2008, the matter was called back on in the afternoon with respect to an inquiry by the Court Registry as to the appropriate documentation for the warrant. There was nothing in the *Justices Act* which assisted the parties in ascertaining the form of a warrant. The parties referred the Court to the form of the warrant in Form 9B, namely the interstate warrant. That is the only relevant or like document in the legislation and was used as the precedent for the warrant. The document was headed warrant and the Commissioner of Police in the Northern Territory, the Officers of the Police Force of the Northern Territory, the Sheriff or Sheriff's Officer of the Northern Territory or a

special member of the Australian Police Force were named as the warrant holders. The details of the child and the date of the Family Matters Court order were inserted into the form. The warrant ordered as follows:

> "You are therefore commanded to apprehend MDEW and return him to the care of the Minister for Family and Community Services of the Northern Territory of Australia".

The case was adjourned to 6 August 2008.

Adjournment Date 6 August 2008

43. Prior to 6 August 2008, the mother was served with the application. The father is yet to be served. The parents' names were called at the Alice Springs Court House. There was no appearance by the parents at Court on 6 August 2008. The child had been placed in the custody of the Minister on 1 August 2008. A Court report dated 6 August 2008 set out the circumstances leading to the child being taken into custody of the Minister. Police Officers from Yuendumu and Alice Springs became involved. Ultimately the mother was located by the Alice Springs Police on 1 August 2008 travelling towards Alice Springs with the child. FACS workers had travelled to Yuendumu and then travelled back to Alice Springs to be handed the child. The mother stated that she understood the reasons why the child was being taken into the care of the Minister. There were 17 days between the making of the order and the child being taken into custody by the Minister. It was reported that there were many unsuccessful attempts to co-ordinate a response between the Minister's Office and the Northern Territory Police. The child was taken to the residence of an approved foster carer. The paediatrician at the Alice Springs Hospital has allocated a time for the child to be examined in the very near future. The child's pneumonia and general health appears to be improving.

44. Responses came from the Northern Territory Police and the Remote Health Services with respect to the orders made pursuant to s 45 of the *Community Welfare Act*.

45. In respect to the response by the Police, it is noted that the Police formed the view that to remove the child from the family on 17 July 2008 would likely lead to a riot, in that the family would likely resist such removal. Two members of FACS had attended at the Yuendumu Police Station on that day to arrange the child to be taken into their custody. It was agreed between the FACS workers and the Police that an extraction operation should be undertaken.

46. FACS later reported a series of unsuccessful negotiations with the Northern Territory Police as to how the child would be placed into their custody. Ultimately there was an operation involving Alice Springs Police, which resulted in the child being placed into care. On 6 August 2008, Mr Svikart appeared on behalf of the Commissioner for Police. He appeared with leave and attended only this part of the hearing. He indicated that the Police were of the view that they had not failed to assist the Minister with respect to ensuring compliance with the order of the Court. He pointed to the internal memorandum with respect to this issue and the concerns which related to the possibility of a riot in the community. Investigations had revealed that there had been a PROMIS entry made with respect to this order, but there may have been some break-down in communications with respect to the need for Police involvement, or in any event, the extent of their involvement. It was proposed that a Divisional Superintendent could be the first point of contact in the NT Police Force should circumstances such as this arise in the future.

47. There are protocols with respect to the workings as between the Northern Territory Police and the Minister's Office in such a situation. The Court is not aware of those protocols. It was suggested that it may be time to look at the protocols and consider whether there are any changes to the protocols

needed. Parties agreed that the fact that the child was not taken into the custody of the Minister for 17 days was not an ideal situation. The Court does not propose making any findings of fact on this question. Based on the paucity of material before the Court that is not possible. There has been an agreement to look at these questions and nothing more was pressed by the child's representative.

48. With respect to the request pursuant to s 45 of the *Community Welfare Act* directed to the Department of Health, a response was received on 5 August 2008 from the Director of the Remote Health Services. There was also an email which related to the request. The information indicates that the decision not to evacuate the child on medical grounds was made with Dr White's letter of 11 March 2008 being available. The correspondence from Remote Health Services sets out some recent weights of the child which may need to be checked in the future. In particular, it is reported that he had gained half a kilogram in three days and that may need to be double checked. The Court is satisfied that the child received appropriate medical attention when seen by the Clinic.

49. The Clinic continued to liaise with the child's mother and had apparently been treating her as the guardian of the child after 16 July 2008. The ongoing interaction between the Clinic and the child's mother does not seem to have recognised the change in status of the guardian of the child from a practical point of view. Guardianship encompasses urgent or routine health needs of the child, as well as the responsibility for the long term welfare of the child including the general health of the child (s 4 *Community Welfare Act*). This case raises an opportunity for the two arms of the Department to consider their respective roles in these circumstances.

General Observations

50. It is acknowledged that each of the agencies and organisations involved in this case have heavy case loads with limited personnel and resources.

Remoteness stretches these resources even further. Communication difficulties exist which may be hard for those from an urban setting to comprehend. It is also acknowledged that the child was in a highly mobile family situation, being moved between vast distances. In particular, he was being moved between Alice Springs, Little Sisters Camp in Alice Springs and Yuendumu. In a good vehicle, such as a well serviced four wheel drive motor vehicle, it is approximately three to four hours by road between Alice Springs and Yuendumu. In a sedan or a vehicle in poor repair, it can take a lot longer than that. Yuendumu does not have a regular plane or transport service. The parents are not residing in homes where there are telephones and other communication difficulties exist. Little Sisters Camp is a town camp in Alice Springs with limited resources. It is a camp which is often subject to violence and unrest. Both Police and Clinic personnel in remote communities are mindful that they need to work with the community. Trust is needed to work effectively.

51. The Yuendumu community was volatile at the time and there were concerns that there may be flare ups at any time. This of course reinforces the need for urgent attention with respect to a child in a situation such as this, as whilst there may be a flare up if the child was to be removed, equally there may be violent situations arising from any number of other causes. The fact that the Police felt the safety of their personnel could not be ensured if they sought to place the child into the custody of the Minister reinforces to the Court the potential for the child being at further risk in his living conditions. That is quite separate to his risk as a consequence of maltreatment.

52. The Minister's Office and other agencies have spent long periods of time seeking to promote the welfare of the child within the parental environment. Both financial and human resources have been ploughed into this case. The child's condition has not improved. A holding order was made on 24 April 2008 and the parents disobeyed that holding order. Serious consideration could have been given to making an application to the Court at this stage.

The application was lodged on 15 July 2008. There are other apparent delays in this matter which have not been explained to the Court. There was a period of one month between the Australian Government Intervention Team making a diagnosis that the child was suffering from severe failure to thrive and that his brain was not growing and this notification being forwarded to FACS. Dr White's assessment from 11 March 2008 was subsequently reported to FACS but the Court has no idea as to when this report was forwarded to FACS. It appears that it may not have been until 23 April 2008.

53. The Family Matters Court must look at the best interests of the child. This is the focus of any case before the Family Matter Court.

54. From an operational point of view, cases of maltreatment involving neglect are different to other cases. Notifications with respect to maltreatment and neglect can be difficult to particularise and can be occurring over a long period of time without there being any date or place where a particular allegation arises. Clinic records and paediatric assessments become extremely important in cases such as this. If a situation has been ongoing for some time, there is the possibility that agencies may not see the need for any particular urgency in dealing with a case. The potential for serious and permanent injury and harm to a child as a consequence of neglect is ever present. Regrettably, children in the central region in this position are not rare and are far more common than is generally known. It is arguable that consideration needs to be given to adopting a different approach at earlier stages of these cases. Often parents or guardians are given chance after chance to remedy a situation. This is done in an effort to ensure a child remains within the family setting. While there is evidence to support the importance of family placements, if the neglect continues, a different strategy is needed.

55. The information which has been collated in this case demonstrates the need for concerted action by the relevant authorities. Processes and assessments are in train. The Court will monitor the progress of the child and will hear from the parties, including the parents, if they elect to take an active part in proceedings, as to any orders it will make in the future. As always, the decision will be based upon the best interests of the child.

56. The matter is now adjourned to 10 September 2008 at 09.30am for application in the Alice Springs Court. An order is made that pursuant to s 45 of the *Community Welfare Act*, that the Alice Springs Hospital provide a paediatric assessment of the child on or by 10 September 2008.

57. In hindsight, there could have been an order calling for an assessment as to the child's cognitive and other developmental milestones such as language and motor skills. Parties may wish to apply for such an assessment at the next mention of the case. Due to the serious risks to the child's physical health, that matter was overlooked. The Court will also be seeking advice from the Minister as to how s 69 of the *Community Welfare Act* is being implemented in this case.

58. I publish these reasons and will direct that the file is returned to the Alice Springs Registry.

Dated this 25th day of August 2008.

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Melanie Little
STIPENDIARY MAGISTRATE