

CITATION: *David, Elliot and Kyle* [2011] NTMC 051

PARTIES: CEO FOR CHILDREN & FAMILIES

TITLE OF COURT: Local Court

JURISDICTION: Family Matters

FILE NO(s): 21110344, 21110349 and 21110351

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HEARING DATE(s): 21 November 2011

JUDGMENT OF: Hilary Hannam CM

**CATCHWORDS:**

*Care & Protection of Children Act*

**REPRESENTATION:**

*Counsel:*

CEO:	Terrill & Associates
Children:	Margaret Orwin
Mother:	Withnalls

Judgment category classification:

Judgment ID number: [2011] NTMC 051

Number of paragraphs: 32

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 21110344, 21110349 and 21110351

BETWEEN:

**CEO FOR CHILDREN & FAMILIES**

REASONS FOR JUDGMENT

(Delivered 21 November 2011)

Ms Hilary Hannam CM:

1. This matter concerns three children, David (four years), Elliot and Kyle (both two years). In my view, for reasons that I will later give, I should also be considering Janelle, the boys' sister, who is six.
2. All of these children, together with their older brother Bradley, are children of Kate who is currently serving a term of imprisonment. The father of the three younger boys is Peter. As I am satisfied that the children would be in need of protection, but for the fact that they are currently in the CEO's care, I am now considering the appropriate protection order to make in the circumstances. As I have indicated, I am also satisfied that the child Janelle is in need of protection, but I do not have an application before me.
3. The law states that I may make the protection order as is proposed by the CEO which I have been informed is now a long-term order of parental responsibility or any other order I consider appropriate. Prior to that recent change of mind, the order to which all parties had consented was an order, including a direction known as a short-term parental responsibility direction giving parental responsibility for the children to the CEO for two years. The children's lawyer and the lawyers for each of the parents consent to this order being made. In this court however, an order is not simply made

because all the parties agree to it, as the court is empowered to make a protection order specifying whatever direction allowed under the Act as the court considers appropriate. The law says that when a decision involving a child is made, the best interests of the child are the paramount concern. The issue for me to determine is whether a short-term order of parental responsibility is appropriate.

4. The directions specified in a protection order are a supervision direction which can require a person to do or not do a specific thing in relation to the protection of the child and/or require the CEO to supervise the protection of the child, a direction giving daily care and control of the child to a specified person, a short-term parental responsibility direction giving parental responsibility for the child to a specified person for a period up to two years or a long-term parental responsibility direction giving parental responsibility for the child to a specified person for longer than two years and up until the child reaches the age of 18.
5. Although the CEO now opposes a short-term order, the CEO supports what is known as a reunification plan which appears to have the goal that the children will be “reunified” with their maternal grandmother and aunt in the short-term, but that they would ultimately be restored to their mother’s care prior to the end of a two year period. Although the expression reunification plan is not used in the Act, s 8 of the Act when referring to the role of the family does refer to eventual return of children who have been removed from their family in certain circumstances and it appears to me that a consideration of the appropriate direction and in particular its length and the notion of reunification or eventual return should be considered together. The first reason that these issues should be dealt with together is because s 10, which specifies that the best interests of the child are the paramount concern, also specifies that consideration should be given to a number of matters in determining the best interests of a child, including the child’s need for permanency in the child’s living arrangements and the likely effect

on the child of any changes in the child's circumstances. Further, in deciding which is the appropriate direction, s 130(1)(c)(iii) requires the court to consider the needs of the child for long-term stability and security. In other words, the court must consider whether on all of the evidence before it the best interests of the child are met by a direction that supports reunification which, as I have stated, itself depends upon reunification being consistent with the best interest of the child.

6. Some of the other matters to which consideration should be given in determining the best interests of the child, such as the capacity and willingness of the child's parents or other family members to care for the child and the need to protect the child from harm and exploitation involve a consideration of the reasons why the child or children came into care in the first instance.
7. There has been a long history of involvement of the Department of Children and Families or its predecessors in the lives of the mother's children. Long before the birth of the younger children, there were concerns about the level of care given to Bradley, with 18 notifications being made from September 2000 when Bradley was nine months old. A number of these were substantiated, in particular, in relation to the lack of supervision of Bradley who as an infant was found on many occasions without adult supervision and there were concerns about the mother's use of illicit drugs resulting in neglect and emotional maltreatment. On occasions Bradley appears to have been cared for by his maternal grandmother. Following the birth of Janelle, the mother was described as erratic, verbally abusive and under the influence of alcohol and drugs and Bradley and Janelle were both taken into care on the basis that they had been emotionally and physically abused and neglected. According to the mother's own affidavit, at this stage she had a marijuana addiction. The children were taken into care initially for 12 months and according to the Department, the mother did not engage

consistently with psychological appointments and a further 12 month order was granted.

8. David was born in February 2007 and one month later, the order in relation to Bradley and Janelle was amended to a joint guardianship order which in November was extended another six months. In other words, the Minister had some form of parental responsibility or guardianship as it was then known over Janelle and Bradley for two and a half years. Family support was provided in 2008 and between August and December 2008, there were three further notifications of neglect by inadequate supervision. In January 2009 Elliot was born and the mother says that her relationship with the father, Peter, broke down due to physical violence and mental abuse. In her affidavit she stated that she had, in total, three domestic violence orders protecting her from Peter and that the last order expired when David was one year of age. Peter, on the other hand, states in his affidavit that he was a hands-on dad to David and was in a stable relationship with the mother. At around this time, in June 2009, Bradley went to live with his father interstate for a period of 18 months. The youngest child Kyle was born in November 2009 and according to the mother, when Kyle was about six months old she developed a morphine addiction. According to the father's affidavit, he was at home looking after the children at this stage.
9. In April 2010 when she was almost five, allegations were first made that Janelle had been sexually harmed by Peter which has subsequently been found to be substantiated by the Department. It is possible, but by no means clear, that Peter has been charged with respect to this conduct. It was around this time that the mother says she became addicted to morphine and despite the fact that the mother said that her relationship had broken down previously, it appears that she was still in a relationship with Peter, although it appears on her version to have been a very coercive one.

10. The evidence in relation to Janelle is, in my view, extremely disturbing, especially in light of the lack of action taken by the Department against a child who on their own investigation, fell within the definition of being in need of protection under the Act. In paragraph 33 of the affidavit of the Department's Officer dated 29 March 2011, it is stated "to ensure no future risk of harm to Janelle as Kate remained in a relationship with Peter, it was agreed that Janelle would be cared for by her maternal grandmother". It is not clear why action was not taken under the Act or how this agreement was meant to protect Janelle when there is other evidence to indicate that Janelle remained in her mother's care and by inference, unprotected from Peter until at least September 2010. For the following nine months, in addition to the mother's addiction to morphine, there were regular very concerning reports of neglect of the children, including Janelle who was six and David who was four being unsupervised in a pool while the mother was sleeping (at a stage when the Department seemed to indicate Janelle was meant to be in the care of the grandmother), the mother sleeping throughout the day being unable to get out of bed, being verbally abusive towards her children, the school aged children not attending school and from February 2011 Bradley, who had just turned 11 being involved, to a very large extent in caring for the younger children.
11. Although the mother was said to have signed another agreement for Janelle to remain in her grandmother's care in September 2010, it appears that Janelle remained with the mother and the siblings for many months whilst there was a great deal of evidence that the mother was neglecting all of the children. In January 2011 further allegations were made of sexual harm by the father against David, but the children were not taken into care.
12. In September 2010 the mother had committed a drug related offence and had her three year old with her, while the five year old and the babies who were less than 12 months were home alone at the time. Although the Department became aware of this offence on 13 September and aware that Kate had been

charged on 21 September, no further action appears to have been taken, even though in the view of the DCF officer, the mother minimised the serious effect the incident could have had on the children. Despite the very concerning notifications about neglect, verbal abuse, failure to respond to significant concerns of drug use, non-attendance at school and Bradley being involved in caring for the younger children, the children were not taken into care until 18 March 2011. By this stage, the mother had been remanded in custody in relation to her charges and the maternal grandmother had agreed to care for all of the children. Bradley had started to abscond from school and had been found on the streets at night and finally on 15 March 2011, the maternal grandmother and aunt admitted that they could not cope with caring for the children with the exception of Janelle.

13. The mother has remained in custody and is now serving a sentence. The court has not been provided with the remarks on sentence or the sentencing order, although a Departmental Officer, has stated in her affidavit of 22 September, that the mother is hoping to be released on parole in early 2012.
14. In summary, at the time that the children were taken into care, the following matters relating to protection of the children were identified:
  - (1) that the mother has had significant substance misuse problems for many years which have significantly affected her capacity to care for her children;
  - (2) that on a day to day basis, the children have been neglected, particularly in relation to them being inappropriately supervised for much or all of their lives;
  - (3) that there was a risk that at least two of the children had been sexually harmed by Peter;
  - (4) that the children had been exposed to domestic violence perpetrated by Peter against their mother;
  - (5) that the children had been subjected to verbal abuse by their mother;

(6) that from 25 February 2011 when the mother was remanded in custody there was no-one to care for the children.

15. The evidence also reveals that since the children came into care, further notification has been received alleging sexual harm by Peter against one of his step-children. Further details emerged indicating sexualised behaviour of one Peter's natural children and whilst the matter has been under investigation, suggestions have been made that Peter had told the child not to talk about "something rude". The mother, in her affidavit, does not refer to the allegations in relation to sexual abuse, although in one of the affidavits of a Departmental Officer relating to conversations she had with the mother in custody, the mother is said to have told police that she witnessed the father behaving in a manner with the children that she felt was not appropriate and that one of the children told her that his father had touched him on the penis. The mother's affidavit also reveals serious concerns in relation to her relationship with Peter who she describes as physically violent and mentally abusive and controlling and causing her to be very isolated.
16. The evidence before the court in relation to the insight that the mother has into her own failures to adequately care and protect her children, together with the steps that she has taken to address those issues, causes me a great deal of concern. It is particularly concerning that the CEO has formulated a reunification plan in these circumstances. There is no acknowledgement in the mother's affidavit that severe neglect, in particular in relation to inappropriate supervision of all of her children has persisted throughout their lives. Although the mother refers to a morphine addiction from September 2010 and admits that she previously had a marijuana addiction in 2005 which resulted in her then two children being removed from her care, she does not appear to have undergone any rehabilitation for her substance misuse other than simply abstaining whilst in custody. She commenced on the suboxone program in September 2010 at around the same time that she



committed the offence and was undergoing some sort of treatment which does not appear to have been effective until she was incarcerated and the children were taken into care. Not surprisingly, she states that she has not taken any substance since her incarceration and simply states “shall continue in the future to stay clean”. Bearing in mind the history of her substance misuse difficulties, it seems that simply an intention to “stay clean” without addressing that substance misuse in any other way is, in my view, overly optimistic.

17. The evidence in relation to lack of supervision of the children, especially in the months immediately preceding their being taken into care, such as leaving them unsupervised in the pool while she was inside the house sleeping and being asleep and unable to be roused for the large part of the day, is not addressed at all in the mother’s affidavit. It is also noted that issues in relation to supervision of all of her children have been known to the Department since her 11 year was a small child.
18. Many issues in relation to parenting also appear to have been problematic for the mother for many years. She describes completing “the positive parenting program when Janelle and Bradley were small and undergoing counselling with a psychologist to address parenting issues at that time”. However, there remained serious issues after that time in relation to the parenting of her younger children and nothing further has been undertaken by the mother to address these deficits. She states in her affidavit that she will do a parenting program called “One, Two, Three Magic”. Once again, unfortunately I am of the view that it is overly optimistic to believe that the serious issues in parenting revealed in this case can be resolved in a two day program whilst in custody.
19. There is no acknowledgement by the mother, nor do I have evidence before me of the likely psychological harm her children are likely to have experienced as a result of their exposure to violence and having been

isolated. Whilst the mothers refers to the impact that these circumstances had upon her and her desire not to continue in a relationship with the children's father, there is no recognition of the impact that these circumstances have had upon her children. There is likewise no recognition of the impact that sexual abuse may have had on her children, nor in relation to any responsibility that she takes in failing to protect her children from likely sexual abuse from their father/step-father, even though it appears she had at least some sense that it may have been occurring.

20. The mother's affidavit does address the issue of housing following her release, although it is by no means clear that a house will become available. She also addresses the issue of work upon release. The submissions made to me are based to a large extent of the mother's willingness as opposed to her capacity. I have no doubt at all that the mother does deeply regret many issues in relation to her own actions in relation to her children over the last couple of years, in particular, that she does have a real desire to parent her children, summed up in the submission that the mother wants to live with and raise her children. Under s 90 however, the Court is directed to regard the best interests of a child as paramount in the family matters jurisdiction and s 90(2) specifically states that the court must give priority to the child, if the rights of the child conflict with the rights of an adult.
21. Understandably, as it is the CEO's plan to reunify the children with their mother, but recognising that the mother is not yet ready to take care of them, the plan by necessity is to restore "the children to the care of the maternal grandmother and aunt in the short-term and then the mother in the longer-term".
22. Having regard to some of the other matters specified in s 10 in determining the best interests of the child, I am concerned about the capacity of this reunification plan to meet the children's needs for permanency in their

living arrangements, their need for stable and nurturing relationships and the likely effect on the children of any changes in their circumstances.

23. Whilst I have not been provided with any evidence concerning the children's placement and stability or otherwise since coming into care (other than Bradley who is not the subject of this application having already had a care order made), I do not know about the children's current circumstances. However, it is clear from the affidavits filed that the maternal grandmother and aunt had not previously assisted the mother in caring for her children, except for one occasion when the eldest two were small, even though it appears there were very clear signs that the mother was not coping and the children's care was being compromised. Perhaps this is to some extent explained by the isolation that the mother describes in her affidavit. It is also concerning that although the Department agreed that Janelle would be cared for by the maternal grandmother in April when the allegations of her sexual harm by Peter first came to light and although the mother signed an agreement for Janelle to remain in the grandmother's care in September 2010, Janelle in fact remained in her mother's care right up until the time that all of the children went to live with the maternal grandmother in late February 2011.
24. I am particularly concerned that a couple of weeks later the maternal grandmother and aunt admitted that they could not cope with any of the children except Janelle and that Bradley, who was only 11 was not being controlled at all by either of them and had started to abscond, was found on the streets at night and was becoming involved in criminal activity.
25. Apart from the fact that the maternal grandmother said that one of the reasons that she couldn't cope was due to a problem which is said to soon be alleviated by surgery, it is not clear to me at all on what basis the Department concludes that the maternal grandmother is able to care for these children who have had such highly disruptive and dysfunctional lives and

who no doubt will have particular emotional and psychological needs to be met. Once again, the whole arrangement appears to be overly optimistic in light of all of the evidence.

26. In addition to the fact that I am not satisfied that the mother adequately understands her own difficulties in relation to the care and protection of her children, nor has she adequately addressed those which she does understand, it is unclear whether the mother will be released from custody in 2012 as she hopes. It is simply not known at this stage whether any of the plans which are hoped to fall into place following that release would be able to be implemented. As I have also indicated, in my view it is overly optimistic on all of the evidence and not in the interests of the children for them to be returned to the care of the maternal grandmother and maternal aunt in the short-term, nor is it, in my view, in their best interests on all of the available evidence for them to then be returned sometime during the next two years, even when the mother is released.
27. Although the reunification plan proposed by the Department envisages the children being returned to their mother and maternal relatives, the father has also consented to a two year order of parental responsibility to the CEO on the basis that he will be available to care for the children after that stage. There are, in my view, many concerns about the capacity of Peter to care for his children and meet their needs for stable and nurturing relationships.
28. There appears in particular to be very real concerns that Peter has sexually harmed at least one of his natural children and at least one of his step-children. The submissions made by the father's legal representative are that the allegations of sexual abuse have to be determined one way or the other within two years, which is submitted is the appropriate length of time. In my view, decisions made as to whether or why the father has or has not been charged and ultimately whether or not he is found guilty beyond reasonable

doubt are not particularly weighty in a jurisdiction which is concerned with the risk of harm on the balance of probabilities.

29. There is also uncontradicted evidence given by the mother that there have been a number of domestic violence orders taken out for her protection against Peter and there is very concerning uncontradicted evidence of his violent, emotionally damaging behaviour perpetrated by him against the mother. There is widely varying evidence about the exact involvement Peter had in the day-to-day lives of his younger children, but there is plenty of evidence to indicate that it was very apparent that the mother was not coping and yet it does not appear that the father took sufficient action to protect them. In my view, the submission that other than the allegations of sexual harm, the father is willing and able to care for the children, is not acceptable on the evidence before me.
30. Another aspect of the way in which the Department has approached this matter that I find very concerning is that even though the first notification of sexual harm by Peter against Janelle was made on 5 April 2010 and was substantiated by the Department to the extent that they felt it necessary to make arrangements to protect the child, the Departmental officers continued to discuss and negotiate aspects relating to the care of the children with Peter since that time and it appears possibly up until the present.
31. In the affidavit of the Department's Officer of 18 August 2011, the Department became aware of further notifications of sexual harm in June 2011 and in July, it appears that Bradley, (although it is not entirely clear) also made allegations that Peter had sexually harmed him. In that affidavit, the Departmental officer also referred to other allegations of sexualised comments and behaviour by the children and conversations that she had had with the mother as to the inappropriateness of the father's behaviour. In conclusion, the officer stated that the Department had significant concern in relation to the possible sexual abuse of two of the children and formed the

view that one of the children was likely to have suffered harm or exploitation because of the actions of his father. However, since that date, Departmental officers, despite their own conclusions and being informed that the police would be charging Peter, continued to engage with Peter in relation to the future care of his children, facilitated contact and seemed to, at least entertain the possibility of Peter resuming the care of the children. It is not stated for example in any affidavit that return of the children to the care of Peter is opposed and it is not clear to me why a quite high level of contact with him, which may be more consistent with reunification than a long-term order of parental responsibility to the CEO is being facilitated. Although supporting the two year order, the children's representatives seem to acknowledge that there are many unknowns in relation to what will happen to these children in the future. To the extent that those submissions are based on, of the child's representative's experience of what occurs to children in the CEO's care in the usual case and that there is not guarantee of stability, in any event, I attach no weight to them. The only question at this stage for me to determine is whether a short-term order of parental responsibility is in the children's best interests.

32. Having regard to the history of child protection concerns relating to these children, the lack of insight by the mother and lack of steps taken to address concerns in relation to her, the very concerning evidence regarding likely harm to have been perpetrated by the father, the unrealistic reunification plan does not, in my view, meet the best interests of the children. In these circumstances, it is not in my view, appropriate to make the order sought by the parties other than the CEO, as it is not the order that is the best means of safeguarding the wellbeing of the children.

Dated this 21<sup>st</sup> day of November 2011

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Hilary Hannam  
CHIEF MAGISTRATE