

CITATION: *Re: Lily* [2012] NTMC 029

TITLE OF COURT: Local Court  
JURISDICTION: Family Matters  
FILE NO(s): 21143518  
DELIVERED ON: 2 August 2012  
DELIVERED AT: Darwin  
HEARING DATE(s): 12 July 2012  
JUDGMENT OF: Hilary Hannam CM

**CATCHWORDS:**

*Care and Protection of Children Act*  
*Annabel* 2012 NTMC 013

**REPRESENTATION:**

*Counsel:*

CEO: Martin Fisher  
Child: Margaret Orwin  
Mother:  
Father: James Stoller, NAAJA

Judgment category classification: A  
Judgment ID number: NTMC 029  
Number of paragraphs: 18

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

No. 21143518

REASONS FOR JUDGMENT

(Delivered 2 August 2012)

Chief Magistrate Hannam:

1. This matter concerns Lily who is four. Lily has been in the care of the CEO of the Department of Children and Families (DCF) since 28 November 2011; first under provisional protection, then under a Temporary Protection Order and while this application for Protection Order has been pending. On 12 July I made a Protection Order having been satisfied Lily was in need of protection. I gave brief reasons for my decision, but indicated that I would publish the detailed reasons today.
2. DCF have had concerns about Lily and her siblings for some time, though I understand this is the first time an application has been made to the Court for a Protection Order. The application for a Protection Order was made because Lily and her two siblings were homeless and living in the “long grass” in Darwin with family members, including their mother who was abusing alcohol. DCF became aware of this situation at the beginning of September 2011 and despite extensive enquiries, Lily and her mother were unable to be located for a couple of months. When Lily’s mother was found, the Department assisted her with obtaining accommodation, but after a few weeks, it became clear that Lily was living on the streets again with her mother, was suffering from scabies, had a poor diet and was being exposed to domestic violence between family members.

3. On 28 November 2011 Lily's mother was found to be intoxicated and asleep and Lily, who was three, was running around unsupervised in a park and had not been given any food for at least a day. Lily was also found to be suffering from scabies and from an untreated dental condition which was causing her pain. Lily was taken into provisional protection. Lily's father, Geoffrey, was at the time living in a remote community and when the Department told him about Lily's circumstances, he said that Lily's mother had stolen her from his care and that he would like to care for her again with the help of family members.
4. At this time, it was suggested by a community welfare worker that it was not culturally appropriate for Geoffrey to raise Lily as a child from another marriage with his current wife, but this subsequently appears to have been incorrect information. At that time, Geoffrey also told DCF that he would like Lily to be cared for by his sister, who lived in another remote community and following a visit to that community, it appeared to DCF that Geoffrey's sister would be an appropriate carer.

### **The application**

5. The CEO initially sought a Protection Order with a short-term parental responsibility direction giving parental responsibility to the CEO for a period of two years. The first care plan provided to the Court appeared to contemplate reunification of Lily with her mother during the currency of or at the expiry of the two year Protection Order, as all of the matters in relation to reunification under the care plan refer to supporting the mother in finding suitable housing, adequately addressing alcohol issues and adequately developing parenting capacity. This seems at odds with the application which was brought on the ground that Lily was in need of protection, as she had suffered harm because of the act of a parent which in this case, was her mother.

6. The mother has not engaged in these proceedings in any way. Lily's father, on the other hand, engaged in the proceedings initially by instructing a solicitor and later by filing evidence in the matter himself. Initially, the father said that the Court could not be satisfied that Lily was in need of protection, but subsequently conceded that Lily would be in need of protection, but for the fact that she is currently in the CEO's care.
7. As I said on 12 July, I am satisfied that Lily would be in need of protection, but for the fact that she is currently in the CEO's care because of the circumstances in which she was living before being taken into care. I am satisfied that Lily had suffered physical neglect, as her mother did not provide her with housing, supervision, medical attention and care that showed an understanding of Lily's needs which amounts to harm within the meaning of s 15 of the Act.

**Is the Protection Order the best means of safeguarding the wellbeing of the child?**

8. The Protection Order now sought is an order with a short-term parental responsibility direction giving parental responsibility for Lily to her father for two years and a supervision direction preventing the mother from removing Lily from her father's care and directing the CEO to supervise Lily's protection by ensuring that Lily's daily care and control remain with her father, that the father continues to protect her and that the father ensures that any other care givers are appropriate. The father and Lily's legal representative both agreed with the order being sought by the CEO.
9. As indicated, the CEO initially sought a Protection Order with short-term parental responsibility to the CEO for two years and reunification with the mother at the end of that order. It is clear that initially the CEO was opposed to Lily being returned to her father. The CEO had earlier in 2011 removed Lily and her siblings from the care of her mother due to similar child protection concerns and had placed the children in the father's care.

Under this arrangement, however it is described, Lily's father agreed in writing to DCF "placing" the children into his "primary care", agreed to monitor their welfare and safety and notify the Department if he had any concerns. When Lily's mother took care of her again, her father did not notify DCF contrary to this agreement. Therefore, when Geoffrey at first sought to have Lily returned to his care on this occasion, DCF were opposed to this plan, as he had not, in their view, behaved sufficiently protectively.

10. Subsequently, Lily's father Geoffrey filed an affidavit setting out his personal circumstances, the fact that he has, together with his partner, care of two of his other children and his partner's children and details of their attendance at school and his and his partner's full-time employment. He also explained the circumstances in which his three children, including Lily were taken into care earlier in January 2011 and then returned to him. He said that after being returned at that time, he made an arrangement with his sister to care for Lily. He explained that Lily was taken from his sister in about the middle of 2011 and he later learnt that his former wife had taken her to Darwin. He said that he did not know what to do at the time and did not think that he could call the Police because Lily was with her mother. At first he believed that Lily would be safe with her mother and maternal grandmother, but later learnt that Lily was not being cared for properly.
11. Geoffrey also set out in his affidavit how he would take care of Lily and in particular, that she would attend pre-school when he went to work and the value he placed on education which his other children were receiving. He also explained that there are extended paternal family members in his community who wanted to be involved in Lily's care and he wanted Lily to be raised within her culture and language. In that affidavit, Geoffrey also shows a good understanding of family law advice that he has been given about the steps that he can take to ensure that his former wife does not remove Lily or how she can be returned if this were to occur.

12. After that affidavit was filed and DCF had an opportunity to assess the situation, Departmental Officers then decided that Lily should be reunified with her father. Affidavits filed indicated that the CEO had no concerns in relation to Geoffrey's ability to care for Lily, not only on the basis of the affidavits he filed, but because of enquiries made within the health clinic, Police and school in the father's community where no matters of concern were raised. In these circumstances, the Department amended its application to the order currently sought.
13. In similar circumstances to the present, in other matters that I have encountered, the CEO has sought to withdraw the application on the basis that a suitably protective parent had been located and the child was, in those circumstances, in the CEO's opinion, no longer in need of care. In my view, as I have previously said in re: *Annabel* 2012 NTMC 013, this is an incorrect understanding of s 20(a) of the Act, which provides that a child is in need of protection if harmed by the act or omission of a parent. The fact that the other parent is able and willing to protect a child, does not mean that the child is not defined as 'in need of protection' under the Act.
14. Alternatively, in similar circumstances to this where a family member is available to care for a child removed from a parent, DCF sometimes follow a practice known colloquially as "family-way placement". Under this practice, DCF reaches a (usually unwritten) agreement with the family where a child is removed from a parent and placed with another family member, as a substitute for bringing an application for a Protection Order before the Court. As I noted in re: *Annabel*, this practice has been criticised, both for its legality and implications for the adequate and appropriate care of children.
15. In this case, on the evidence of the CEO, "family-way placements" had previously been tried in relation to Lily (see paragraph 67 of the Case Manager's affidavit dated 20 December 2011) when child protection

concerns arose in January 2011 and Lily and her siblings were, for a short time, taken into the care of the CEO. At that time, the concerns about the children's care related again to the mother and her partner and rather than making an application to the Court for a Protection Order, the children were then "placed" by DCF with their father. As is noted quite correctly in the initiating affidavit, this form of "placement" was not a successful means to safeguard Lily's wellbeing, as it did not prevent Lily's mother from removing her from the father's care without consent and from causing Lily to be harmed again by the mother's acts and omissions.

16. As family-way placements or similar arrangements have not been a successful means to safeguard Lily's wellbeing, but the CEO is still satisfied as to Geoffrey's capacity to act protectively, it is appropriate in my view, that on this occasion, the Department has brought an application for a Protection Order as a means of ensuring Lily's wellbeing rather than relying on an informal arrangement that operates outside the law.
17. The proposal for Geoffrey to be given parental responsibility for Lily is consistent with the role of the family set out in s 8 of the Act and more importantly, I am of this view that it is consistent with s 10, the best interests of Lily. The Court order giving Geoffrey alone parental responsibility and the supervision order will be a safeguard to address the child protection concerns which arose when Lily's mother removed her. In these circumstances, the supervision direction directing the mother to refrain from removing Lily from her father's care and directing the CEO to supervise Lily's care under the parental responsibility of her father are appropriate and together with the parental responsibility direction, the best means of safeguarding Lily's wellbeing.
18. In making this decision, I was unable to consider Lily's wishes due to her age and have only been able to consider the wishes of her father Geoffrey. I am of the view that there is no other person, other than her father, who is

better suited to be given parental responsibility. Although this is a short-term order and upon its expiry, parental responsibility will revert to both parents, Geoffrey has a clear understanding of steps he can take if necessary at that stage to seek Family Law Orders or have Lily returned to his care if removed by her mother to ensure her safety. In these circumstances, I am satisfied that this order meets her needs for long-term stability and security and accordingly, make the order with directions in terms proposed by the CEO.

Dated this 2<sup>nd</sup> day of August 2012

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**Hilary Hannam**  
CHIEF MAGISTRATE