

CITATION: *CEO, Department of Children and Families v KM* [2015] NTMC 011

PARTIES: Chief Executive Officer, Department of
Children and Families

V

KM

TITLE OF COURT: Local Court

JURISDICTION: Family Matters

FILE NO(s): 21453194

DELIVERED ON: 14 May 2015

DELIVERED AT: Darwin

HEARING DATE(s): 20 February 2015, Applicant's submissions 8
March 2015, Respondent's submissions 17
March 2015, Further submissions 14 May 2015

JUDGMENT OF: Ms Elisabeth Armitage SM

CATCHWORDS:

Child care and protection – protection order – supervision directions – best means of
safeguarding wellbeing – drug use – rehabilitation - breastfeeding
Care and Protection of Children Act (NT) sections 8, 10, 123, 138 and 139.

REPRESENTATION:

Counsel:

Applicant: Ms Brown
Respondent: Mr Strong

Judgment category classification: C
Judgment ID number: 011
Number of paragraphs: 26

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

No. 21453194

BETWEEN:

**Chief Executive Officer, Department of
Children and Families**
Applicant

AND:

KM
Respondent

REASONS FOR JUDGMENT

(Delivered 14 May 2015)

SM: Ms Elisabeth Armitage

1. Between 2003 and 2014 the Respondent mother gave birth to 5 children. This application concerns her youngest child born on 14 November 2014.
2. The Chief Executive Officer (CEO) of the Department of Children and Families (DCF) has applied for a short term (18 month) parental responsibility direction on grounds that the child is in need of care and protection because the child is likely to suffer harm due to the acts or omissions of the mother.
3. The mother does not concede that the child is in need of protection. The mother submits that the child is not likely to suffer harm in her care noting that under section 15 of the Care and Protection of Children Act (the Act) harm is defined as a “significant detrimental effect” to the child.
4. The identity of the child’s father is not known to the CEO and he has not participated in the proceedings.

5. The issues for the court to determine are:

- (i) Is the child likely to suffer harm because of an act or omission of the mother, and if so,
- (ii) What order is the best means of safeguarding the wellbeing of the child.

Is the child likely to suffer harm because of an act or omission of the mother?

6. The child was removed from the mother shortly after birth and returned to her daily care and control on 17 November 2014 subject to directions and orders under sections 138(4) and 139 of the Act during the proceedings.

Pursuant to section 138(4) the court directed that the mother:

- (i) Not possess or consume illicit drugs or substances or alcohol,
- (ii) Complete random breath or urine testing as requested by DCF,
- (iii) Attend all counselling as requested by DCF,
- (iv) Comply fully with all DCF requests including allowing unannounced house visits,
- (v) Actively maintain twice weekly contact with the DCF appointed case worker (later reduced to once weekly contact), and
- (vi) Maintain her current residential address and comply with all requirements of the Housing Department.

Pursuant to section 139 the court ordered:

- (i) The CEO prepare a report as to the mother's level of compliance with the section 138(4) directions, and
- (ii) There be no direct or indirect contact between DC (the mother's recent partner) and the child.

7. The child has been in the care of the mother since those orders. There is no evidence that the child has suffered harm whilst in the care of the mother while she has been subject to those court orders and directions.

8. However, the CEO maintains that without a protection order the child is likely to suffer harm. In support of its application the CEO relies on evidence of the mother's lifestyle since about 2003. The CEO argues that given the lengthy history of the mother behaving in ways that caused harm to her older children, it unfortunately remains likely that the mother will relapse or revert to those past behaviours, and if so, it is likely that she will harm this child.

9. The mother contends that she has changed. In particular she relies on evidence of her:

- (i) being drug free for over one year,
- (ii) engaging with counselling,
- (iii) successfully completing parenting courses,
- (iv) securing and retaining a residential tenancy, and
- (v) terminating a domestically violent relationship.

The mother submits that the changes she has made substantially mitigate any risk of harm to the child.

10. Although the parties did not agree on several particulars, in my view the evidence was reasonably clear and consistent. I was satisfied of the following:

- (i) Between 2004 and April 2014 the mother accumulated 39 entries on her criminal history, the majority were for stealing, but there were also convictions for breaching court and domestic violence orders, assaults, and trespass.
- (ii) Between 2004 and April 2014 there was evidence the mother engaged in significant illegal drug use (particularly cannabis, "speed" and "ice"), however, there was also evidence of periods of her abstinence from drug use. In my view the evidence of the mother's illegal drug use is consistent with, and largely explains, her accumulated criminal history.

- (iii) Relying on police records, between 2003 and 2013 the mother was involved in 16 incidents of domestic violence. This evidence was largely consistent with evidence from the Domestic Violence Legal Service that between April 2011 and June 2014 the mother attended the service for legal advice on domestic violence issues on 9 occasions.
- (iv) I received an affidavit dated 17 November 2014, prepared by Ms Cassandra McCauley's, a DCF Child Protection Worker. It contained evidence, which I accepted, that the mother's four older children were from time to time neglected, verbally and physically abused, or exposed to violence. The harm caused was largely associated with the mother's alcohol use, drug use, and violent domestic relationships. Some examples of the types and circumstances of harm caused to the older children include:
 - (a) An occasion when three children, aged 7, 4 and 1, were left alone at home at night for an extended period. The children called for help and police attended. Neglect was substantiated.
 - (b) An occasion when a 1 year old child swallowed a poisonous substance and the mother removed him from the hospital against medical direction, placing him at significant medical risk. Neglect was substantiated.
 - (c) An occasion when the mother was on a drug and alcohol "bender" such that she could not care for her children and she relinquished their care to extended family members.
 - (d) Occasions when the children were exposed to domestic violence or inappropriate physical punishment by the mother's partner (the father of two of the children).
- (v) The three eldest children were taken into DCF care in mid-2011 when the mother admitted she had neglected them due to excessive drug and alcohol use. In an affidavit dated 19 April 2012 the mother admitted regularly consuming alcohol and consuming "ice" and "speed" during 2008 – 2009 and being "not in a good state" in 2011. In her affidavit the mother said she "ceased using drugs since late November 2011 (and cannabis in December 2011)". The mother said she was engaging in relationship counselling at Catholic Care and drug and alcohol counselling at Amity. The mother said "I wish to and intend to sustain this abstinence". The mother admitted "I fully understand that my past actions in relation to my children, including in relation to drug taking (and to a lesser extent alcohol use) have had a detrimental effect upon my ability to properly and adequately care for my children".

- (vi) In September 2012, at about the time the fourth child was born, the three older children were returned to the mother's care as there was evidence that she had been sober for about one year, was demonstrating insight into her harmful behaviours and was making positive changes to her lifestyle.
- (vii) However, the mother continued to complain of domestic violence by her partner (now the father of three of the children). The mother apparently separated from her partner in March 2013 but resumed the relationship in about September 2013. A safety plan for all of the children was agreed to between the mother and DCF staff in September 2013 when it became known that she had returned to the volatile and potentially violent relationship.
- (viii) Following further reports of child abuse and neglect, DCF staff attended the family home on 17 December 2013. DCF staff witnessed an abusive domestic argument between the mother and her partner and the mother admitted she had recommenced using illegal drugs ("intravenous ice"). The four eldest children were taken into care or placed with extended family, and in January 2014 the court granted parental protection orders in respect of each child to the CEO for a period of 2 years. DCF care plans prepared for those children indicated that reunification with the mother was to be pursued during the two year orders. I note that not all DCF staff working with the family supported this plan.
- (ix) After the four children were taken into care, the mother continued to use illegal drugs and she presented at the Royal Darwin Hospital emergency department on 7 March 2014. Hospital records indicate the mother reported that she:
 - (a) was concerned she was pregnant,
 - (b) believed she had been assaulted during the night, and
 - (c) admitted voluntarily using intravenous "crystal meth".
- (x) Tests confirmed the pregnancy and the mother re-attended the hospital on 10 March 2014 for advice and referrals in the interest of the wellbeing of her unborn child.
- (xi) On 13 March 2014 the mother entered the Banyan House residential rehabilitation program to address her alcohol and cannabis use. She was exited from the program on 24 March 2014 as she was not following the programs policy and procedures. However, there was no evidence of any further drug use.

- (xii) On 22 April 2014 the mother entered the Sunrise residential drug and alcohol rehabilitation program. She was exited from the residential program on 22 May 2014 due to interpersonal conflicts (including abusive language and manipulative behaviours towards residents and staff) and non-compliance with policies and procedures. However, the mother continued attending the day program. The mother was exited from the day program on 26 June 2014 for similar problems of non-compliance. However, weekly urine and breath testing between 22 April and 23 June 2014 all returned with negative (clear) results.
- (xiii) Whilst at Sunrise the mother:
 - (a) completed the Positive Parenting Program,
 - (b) obtained a first aid certificate, and
 - (c) attended a suicide prevention workshop.
- (xiv) On 3 July 2014 the mother was sentenced for stealing (for offences dating from August 2013). She was placed on a suspended sentence of imprisonment for 18 months with conditions including that she:
 - (a) enter and complete the FORWAARD rehabilitation program,
 - (b) not consume illegal drugs or alcohol, and
 - (c) submit to testing as directed.
- (xv) In accordance with that order the mother entered the 8 week FORWAARD rehabilitation program, and successfully completed it on 8 August 2014.
- (xvi) The mother obtained a two bedroom unit from Territory Housing in September 2014 and currently maintains that tenancy.
- (xvii) The mother has been engaged with domestic violence and general counselling at Catholic Care since June 2013. Although at times her engagement has been sporadic, lengthy periods of engagement have also been achieved. However, it is noted that the mother's 2013-2014 drug relapse occurred in spite of her history of engagement with counselling.
- (xviii) The mother was a client of Danila Dilba during her pregnancy and continues as a client post-natally. As at 11 December 2014 her doctor noted that the four week old child (the subject of these proceedings) was thriving, the mother was demonstrating confident and competent mother crafting skills, and there was good attachment and bonding. The doctor said "in my opinion there are no immediate concerns in

relation to (the child) and his physical and general well-being in the care of his mother”.

(xix) As at 3 February 2015 the mother had engaged in nine drug and alcohol counselling sessions with Amity. Her Amity counsellor reported that the mother is “gaining insight through reflective learning and living a drug and alcohol free lifestyle”.

(xx) In February 2015 Community Corrections reported that the mother was engaging well with supervision and a good working relationship has evolved. The mother had requested a nil alcohol sign on her residence and was reported as being “determined to stay drug and alcohol free”. All drug and alcohol testing has returned negative (clear) results.

(xxi) The mother has had a five year contraceptive device implanted. Her stated intention is to “focus on the children I have” and “do some further study”.

11. There is ample evidence for me to be satisfied that for the past year the mother has demonstrated her current commitment to rehabilitation and appropriately caring for her young child. Whilst the mother is to be commended on her recent efforts, her history sadly demonstrates that past similar periods of stability have floundered even in spite of DCF involvement and access to counselling. On at least two such occasions, the most recent being January 2014, the mother’s relapse has caused additional harm to her older children resulting in their removal into care. I also note that the four older children are yet to be reunified with the mother. Accordingly, it remains unknown whether the mother will succeed in maintaining her current stability if she resumes the care of all five children.

12. In my view, insufficient time has passed for me to be confident that the mother’s recent progress and stated intentions can be sustained over the longer term. Given the mother’s lengthy history of poly-substance and intravenous drug abuse, and her history of relapse including from late 2013 – March 2014, in my view further relapses into illegal drug use or into physically abusive relationships remain likely. Should such a relapse

eventuate, the risk of significant harm to this child by neglect or exposure to drug use and violence is real. I note that the child is 6 months old and is entirely dependent on its mother for all its needs. While I sincerely hope the mother proves me wrong, at this point in time and on the currently available evidence, I consider that it remains likely that the child will suffer harm because of an act or omission of the mother. Accordingly I am satisfied that the child is in need of protection.

What order is the best means of safeguarding the wellbeing of the child?

13. The CEO seeks an order for parental responsibility for 18 months. The CEO submits that such an order is necessary and the best means of safeguarding the wellbeing of the child.
14. I note that although the CEO has not filed a care plan, should parental responsibility be granted to the CEO, the plan is for daily care and control of the child to remain with the mother under DCF supervision and with DCF support. However, the CEO argues that without a parental responsibility order, early interventions necessary to best promote the child's wellbeing and prevent harm might be missed because mandatory reporting is only required once harm has been or is likely to be suffered. Further if a situation of urgency arises, the CEO argues it should be able to remove the child immediately, without any delay that might be occasioned by the need to apply for further court orders.
15. The mother submits that if it is determined that the child is in need of protection and an order is required, the best and least restrictive means of safeguarding the wellbeing of the child is by a supervision order.
16. In support of her submission, the mother points to her demonstrated compliance with the courts current orders and directions, the fact that there is no evidence of harm to the child while the mother has been subject to those directions, and the progress she has made in her rehabilitation.

17. The mother further contends that when these proceedings were commenced, the CEO made decisions that were not in the best interests of the child. In those circumstances the mother submits that the court should be circumspect about the CEO's assurances that DCF staff will act in the best interests of the child.
18. As to the last point, the CEO removed the child from the mother in hospital shortly after birth on 14 November 2014. It was the CEO's intention to prevent breastfeeding and early attachment because at that time the CEO intended to apply for a long term protection order until the child turned 18. The child was taken into temporary protection shortly after birth in spite of:
- (i) Correspondence between the mother's lawyer and the CEO's lawyer in which the mother was assured no action would be taken until the matter could be heard in court on 17 November 2014, and
 - (ii) The mother having communicated to the CEO her intention to breastfeed the child. (I note that when the child was removed the mother expressed breast milk for the child, however later discovered that even this was not provided to the child. No justification was provided for this decision.)
19. The mother points to evidence tendered in the proceedings from an experienced midwife as to the significant benefits, both physical and emotional, of breastfeeding a newborn child. When the mother gave birth all the available evidence demonstrated that she had been drug and alcohol free for over 6 months. The CEO's decision to prevent the mother breastfeeding in hospital in all the circumstances seems largely unjustified and not in the best interests of the child.
20. Further, the CEO's original intention to seek an order until the child turned 18 is at odds with the orders sought for the four older children, in which reunification within two years was the stated goal. Other than a difference of opinion among DCF staff, no other explanation or justification has been provided for the divergent approaches. Ultimately the application for a

long term order was not pursued, so the stated justification on removal, the prevention of bonding, became otiose. Indeed, the CEO's current stated plan is for the mother to continue with the child's care and control. Accordingly, it is clear, albeit in hindsight, that the CEO's initial decision to remove the child from its mother shortly after birth was not in the child's best interests.

21. Section 8(3) of the Act provides that;

A child may be removed from the child's family only if there is no other reasonable way to safeguard the wellbeing of the child.

A complaint to the CEO was lodged on behalf of the mother. By letter dated 23 January 2015, the CEO conceded that the determination to prevent breastfeeding and remove the child was "premature" and acknowledged that alternate proposals for safeguarding the child suggested by the mother's lawyer were not properly considered. It appears that on this occasion the CEO failed to properly apply the principle outlined in section 8(3) of the Act.

22. In my view the evidence about the child's removal demonstrates poor decision making by the CEO and I accept that the removal of the child in the circumstances discussed must have been extremely traumatic for the mother. However, in my view the evidence concerning that decision has limited relevance to the primary question, namely, what is the most appropriate order to best secure the child's wellbeing into the future.

23. As to the primary question, the principles set out in sections 8(3) and section 10 of the Act should be upheld so far as is possible. Given the mother's efforts towards rehabilitation and her demonstrated compliance with court orders and directions since the birth of her child, I am not satisfied that a short term parental responsibility order is either necessary or the best means of safeguarding the wellbeing of the child. Rather,

taking into account the mother's capacity to comply and the CEO's capacity to supervise and intervene if problems arise, the evidence persuades me that the best means of safeguarding the wellbeing of the child is by supervision directions. Further, it appears to me that supervision directions have the advantage of better promoting the child's best interests particularly with regards to strengthening the child's relationship with its mother and extended family, and promoting permanency in its living arrangements.

24. Accordingly, pursuant to section 123(1)(a)(i) of the Act I order that the mother:

- (i) Must refrain from possessing or consuming alcohol or illicit drugs and must submit to breath or other testing as requested by the CEO or DCF staff,
- (ii) Must attend all counselling or other programs as requested by the CEO or DCF staff relevant to drug and alcohol rehabilitation, developing healthy relationships, and parenting skills,
- (iii) Must ensure the child receives medical check-ups and treatment as recommended by medical staff at Danila Dilba or other medical professional,
- (iv) Must ensure the child is not exposed to physical or verbal violence or abuse,
- (v) Must maintain her current residential address and may not move except with the prior permission of the CEO or DCF staff, and
- (vi) Must inform the CEO or DCF staff if any adult stays or resides at the residential address.

Pursuant to section 123(2)(a) I order that DC (the mother's previous partner and father to three of her older children) is not to have any direct

contact with the child except when a DCF staff member or a person approved by the CEO is present. In respect of this order the CEO may approve the mother, if that is considered appropriate.

Pursuant to section 123(1)(a)(ii) of the Act I order that the CEO supervise the protection of the child in respect of these orders.

25. I note that section 134 of the Act sets out further obligations relevant to the mother and the CEO in respect of these supervision directions.

26. As to the length of the order in my view the following matters are particularly relevant:

- (i) The mother's lengthy history of drug use and relapse and her recent history of being drug free for approximately one year, and
- (ii) The planned reunification with her older four children.

The order should be long enough to minimise risks associated with the mother's potential for relapse and the reunification process. It is planned that her older children will be reunified within the term of their two year protection orders which expire in January 2016. All being well, the mother will reach her second "drug free" anniversary on 22 April 2016. In my view an order of one year from today will ensure supervision until both goals are achieved and will minimise the risk of harm to the child. On the currently available evidence I am not satisfied that there is any sufficient justification in support of a longer order. Naturally, if problems arise, circumstances change, or there is non-compliance with the supervision directions, an application for extension, variation or revocation may be made.

Dated this 14th day of May 2015

Elisabeth Armitage SM