THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

CONFIDENTIAL

JUDGE J B PHELAN

MONDAY 14 OCTOBER 2002

v THE DEPARTMENT OF COMMUNITY SERVICES

CLOSED COURT

JUDGMENT

HIS HONOUR: This is an appeal from the decision of the Children's Court on 17 May 2002, allocating parental responsibility of to the Minister to age eighteen.

The child was born on 2000, on the 25 May 2000 a care application pursuant to section 2 of the **Children (Care and Protection) Act** (1987) was filed at the Children's Court on the ground that the child was being, or likely to be abused.

On 26 May 2000 the child was placed in the Director's care on the basis of abuse and risk of neglect. That order was made in the absence of the mother.

On 11 December 2000 the court ordered that the child be made a ward for one year. The child in the interim had remained with her mother and continued to do so until 12 October 2001. The Magistrate made no note on the result sheet as to why the findings were made, save by an oblique reference to a finding made on 14 August 2000 that the child was in the need of care. However, the result sheet for that date contains no detail, though on

6 June 2000, when the mother had appeared in person, risk of abuse and neglect was noted.

On 12 December 2000, in the absence of the mother, the order noted above was made. In the Department's chronology and summary of evidence the following appears:

> "Miss giving undertakings
> (1) to establish and maintain a therapeutic relationship with an appropriate psychiatrist.
> (2) that she maintain a positive relationship with her own mother .
> (3) progress be monitored regularly by Early Childhood nurses.
> (4) she accept the supervision and support of the Department."

Despite the impression given that these undertakings were given to the court, counsel for the Department conceded that they were oral undertakings given by the appellant to the Department. Under the present Act if such undertakings had been given to the court, the appellant would have been given the opportunity of answering any alleged breach, and in the end result much of the tragedy of this case would have been avoided.

The same chronology notes that the wardship order was based upon ongoing concerns regarding Miss mental health status and ability to provide a stable and secure environment for .

The application to the court by the Department was pursuant to section 90 of the **Children and Young Persons (Care and Protection) Act** (1998), which had come into effect shortly after the making of the order made pursuant to the **Children (Care and Protection) Act** (1987).

Section 90 provides for recision and variation of care orders. An application may be made with the leave of the Children's Court if it appears there has been a significant change in any relevant circumstances since the care order was made or last varied.

The application was for an order that the Minister have parental responsibility until the child was eighteen on the ground that the child's psychological needs were not being met or not likely to be met by the parent.

On 12 December 2001, the appellant filed an application pursuant to section 90 seeking that the child be returned to her on the ground that the child was being ill treated in foster care.

On 14 September 2001, the Children's Court differently constituted, had granted leave for the variation sought by the Department. The Magistrate at the hearing at first instance took the view that in any event as the order was about to expire and the Department had continuing concerns, leave ought to be granted. He appears to have thought that the appellant's basis of leave was insufficient, though he made no formal finding. In any event he proceeded on the basis that leave had been granted and he had jurisdiction and there has been no challenge to that before this court.

BACKGROUND

The appellant was born on , the sole daughter of parents who had two sons. She obtained her

school certificate. She described herself as an average student but as not working hard at school. After school she worked in welfare. In 1996 she obtained a Certificate 2, in career education for women at TAFE. In the same year she passed 19 subjects in an Advanced Certificate in community welfare. She impresses as an intelligent and articulate person. She married in and had two sons, born , now in the care of his father's extended family, to whom she has access. The other child died soon after birth from sudden infant death syndrome. The marriage ended in separation and in 1998 in divorce. In the meantime she had a number of relationships. She has had two other daughters, born and born , who have, like , been made wards and live with their respective fathers.

The evidence is that notifications were received in respect of the three children between 1995 and 2000. Many of those notifications were unsubstantiated, though some were.

The appellant had, at about the beginning of that time, a history of drug induced psychosis or personality disorder. It also appears that she had a number of unstable relationships with abusive men and accommodation problems. There is evidence that she had ambivalent relationships with her three elder children. There was a good deal of tension at the time about the birth of

as to access rights. No account appears to have been verbalised by the Department about the effect of her pregnancy on the appellant. She was clearly very suspicious of the Department for having removed the children and also because problems were arising about access.

This is against a background of alleged sexual assault on her when she was a child. This background is seen by Dr and Dr to be very likely at the base of her ongoing personality disorder which results in her being extremely defensive when under stress, and which is accompanied by paranoia, fear of her children being assaulted by paedophiliacs and being the object of bureaucratic conspiracy. Although therapy has been strongly recommended, nothing has been put in place until recently and then at my suggestion.

Soon after the birth of , access to her older daughters was suspended, and even now there is only informal and irregular contact with one daughter. She now sees regularly but there has been a similar history.

Most of her present disorder has to do with the poor relationship between herself and the Department, though she has had in the past trouble with her family, particularly her father who died in . She has also had problems with former male friends. The evidence is clear that whatever drug problem she had is in the past.

She has had, for about the last three years, stable accommodation, her home is clean and tidy, she is artistic and has made a number of improvements to it. She has not had any psychiatric intervention for some years.

After birth she was in a relationship, the exact nature of which was never made clear to the court. It is now ended. In July 2001 she took out an AVO against that person preventing unwelcome visits to her home. Very recently she has commenced a relationship with a long term friend who lives nearby who gave evidence. No submissions have been made about that relationship being inappropriate.

It was against this background that the Department from the time of birth, took an interest in her status, and it was certainly in the beginning a justifiable interest in the circumstances.

The appellant does not dispute that oral undertakings were made by her to the Department as is set forth in counsel's chronology. Unfortunately the court does not appear to have been informed of them. This of course would not occur now under the new Act with the need for a plan to be placed before the court.

THE PROCEEDINGS

Before the Children's Court the Department was represented by Miss V , Miss by Miss M and Miss P for the child. The hearing took place on 28 March, 3 April and 19 April, and judgment was

given on 17 May of this year.

The appeal was filed on 12 June 2002 and the matter first came before the District Court on 29 July and it was stood over till 5 August when it was fixed for hearing on 28 and 29 August, when evidence was given. Further hearing took place on 11, 26 and 27 September when decision was reserved. Mr O of Counsel appeared for the Department, the appellant was in person and Miss P continued to represent the child.

The complaint of neglect of the child whilst in the Minister's care was not pressed by the appellant.

The Department's case essentially was that there was a probability that because the appellant had failed in her relationships with her first three children, in the long term she would fail in her relationship with . The Department formed the view that she had not changed because she failed to recognise that she had a problem. The Department relied on her failure to pursue therapy and breach of her other undertakings, although only the first was directly referred to in the application filed on 13 September 2001, and by implication the fourth. Ultimately the paramount consideration is the safety, welfare and well being of the child, in the context that a child should receive such care and protection as is necessary taking into account the rights, powers and duties of their parents. I will revert to these matters.

I propose to examine the evidence concerning the

alleged breaches of the undertakings, the assertion that the appellant had not changed and whether on the probabilities it has been established by the Department that there should be a care order until eighteen. That is the principal issue.

UNDERTAKINGS

The undertakings were designed to ensure that the appellant would address her personality problems so as to reduce the risk of long term psychological harm to the child. There has never been an issue that the appellant was not a good mother in her physical care of the child and her emotional care of the child was never questioned while remained with her, except for observations on several odd occasions when in the presence of Departmental officials there was an outburst while was being nursed by her mother. However, it was clear that those outbursts were not directed at the child and Dr does not place any real significance on them.

The Department's concern had to do with the long term effects that the personality problems might have on development.

I will deal now with the various undertakings:

(a) Dr , psychiatrist. Dr had seen her for the first time on 16 June 2000 and again on 26 June 2000 for assessment at the Department's request. He had the benefit of a referring letter of psychological assessments of the family. He later saw a discharge

summary from the Hospital of 3 November 1995 and the notes from the Mobile Treatment Team (2 November 1995 and 11 July 2000). Those documents are not in evidence.

On interview she had presented carefully and had denied any gross psychiatric symptomatology. There was no observable evidence of underlying abnormal thought process, such as thought disorder or hallucinations. However, despite her denial of stress she obtained a score of 7 on the general health questionnaire which suggested significant underlying psychopathology. Other testing was typical of persons who are stubborn and over sensitive and who are afraid of emotional involvement. They feel put upon by others and although often over controlled may become irritable and have violent outbursts when outside demands are placed on them.

He took a history of her background as is set forth broadly above. In particular there was a history of regular sexual assault in her earlier life and abusive relationships later on. She had moved around to escape from violent situations. She had smoked marijuana and had been a heavy user until she had been seen by the Mobile Treatment Team four years before because of paranoid ideation. The discharge summary indicated that she had been admitted to hospital with a schizophrenic form of psychosis thought to have been drug induced.

Reports from the Mobile Treatment Team indicated that

she had been seen on 12 occasions thereafter with a diagnosis of drug induced psychosis or personality disorder.

I interrupt there to say that urine analysis evidence points to drugs as a past problem that has not been an issue before the Magistrate or on this appeal.

Dr ' conclusion was in these terms:

> "Reviewing the situation overall, although there is some conflict between her account and her immediate presentation, there is not strong evidence on interview of presently active major psychosis. On the basis of her history she meets DSM criteria for borderline personality disorder. This diagnosis is consistent with the results of personality testing. However, a diagnosis of personality disorder indicates only an enduring manner of functioning and is not of itself grounds for refusal of custody. It may be understood as a way of explaining past events and planning future directions of treatment. The court will have to base its decision on the proven history of actual events."

Thereafter in a second report of 24 October 2001, Dr recorded that he had seen the appellant on 18 January, 21 June and 15 October 2001. He had sighted reports from Mr , Departmental psychologist, of 19 April, 22 August and 12 September 2001 and an affidavit of of 13 September as well. The latter had made the subject application.

The appellant told Dr on 18 January 2001 that she had been well, and was spending more time with her mother than she had in the past. On 21 June 2001, she expressed concern that the Department had given custody of her two daughters to the same men who had assaulted her

allegedly at thirteen, their fathers as it happens. She had reported the assaults to the police who were investigating. He noted that during the interview she appeared more concerned with the actions of the Department than with the state of the children. (Although I make the comment that if true it would have been hard to differentiate the two).

He noted she had handled her infant appropriately and the child seemed comfortable with her. He noted that no further appointment was made:

> "As there was some confusion as to the source of her referral and whether the Department was prepared to pay for her treatment."

It emerged on the appeal that Dr was retained by the Department because he bulk billed. He saw her again on 15 October 2001, after the Department had removed the child. She had expressed concern and anger about this and the manner of the child's removal which had consisted of three police officers, two Departmental officers and later two members of the Mobile Health Team. His summary and opinion was in these words which I quote:

> "Miss is a thirty three year old woman who has a long term history of sexual assault and subsequent personality problems. As stated in my previous report Miss meets the DSM criteria for borderline personality disorder, but while this reflects an enduring manner of functioning it does not provide grounds for the refusal of custody. I note my conclusions are not correctly reflected in the quote in paragraph 7 of Ms affidavit... and I am concerned that having requested a report the Department did not place it in full before the court.
>
> As previously stated Miss diagnosis is

not an appropriate criteria for a decision about custody, and a proper decision on this should be based on specific incidences of risk to the child which are not merely confrontation with workers, as such direct confrontations reflect the management skills of the workers as much as Miss personality. The relationship to be sought in the longer term is one of mutual respect and support of the parenting relationship by the Department. This can be quite demanding of resources but is in the long term necessary and one of the fundamental roles of the Department. I am happy to provide ongoing support for Miss provided she is properly referred by her local doctor, and she has indicated that she would be happy with this.

In answer to your specific questions re your letter dated 24 October 2001,

(1) 'Does Miss psychiatric presentation have any impact on her ability to care for her daughter?'

On the whole Miss presentation on interview did not pose questions about her ability to care for her children. However, it is clear that she has suffered from significant trauma in the past and that this affects her emotional style and relationships. Because of this she is likely to have problems during periods of stress and this will inevitably affect her child caring. However appropriate access to services and support would minimise this.

(2) 'What might be necessary in relation to future directions of treatment to assist her in her parenting in the future?'.

Miss would benefit from ongoing caring support such as that which used to be provided by the Department at . The fundamentals of this require that the support worker has an understanding of Miss vulnerability and predominantly works by reinforcing appropriate responses rather than by using punishment to try to avoid less satisfactory behaviours, as the latter strategy compounds damage not only to Miss but to the whole family. As stated above I would be prepared to participate in this process."

Dr had in his second report taken Ms to task for misquoting his first report in her affidavit of

13 October 2001. However, she is clearly quoting from Mr report of 15 November 2000, in which he purports to reflect what Dr authorised him to say in an interview. It is unclear whether this was over the phone or in persona.

On that occasion in his report of 15 November 2000 at page 4, Mr refers to interview with Dr , and I quote:

> "Dr diagnosed Miss as having a borderline personality disorder. He said that with support and long term therapy she will improve and that therapy is essential otherwise will be at risk. He said that he was prepared to provide therapy and also work with a support worker if one is deemed necessary. He said that Miss drug use is an unknown risk factor. He added that some of the symptoms of most personality disorders diminished with time, and in Miss case her scores on personality testing were not extreme. Dr was willing to put the above in writing however due to time constraints he agreed for me to convey this information through my report."

So that it was not, in my view, a proper criticism of Ms , and Dr report was in evidence before the court.

A further report of Mr of 22 August 2001, reports that on 26 July he attended a conference with Dr along with the case worker and the supervisor. I quote from this report:

> "As mentioned a meeting was held with Dr on 26 July 2001. Miss has been to see him twice this year thus there has been no ongoing therapy. Dr was still of the opinion that with ongoing therapy, change is possible. He said is not in acute danger however her ongoing development maybe at risk if there is no improvement in Miss functioning. He recommended the Department

validates Miss history of abuse and help her get some closure or direction from the police regarding her allegations. He acknowledged that the first difficulty will be working with Miss to help her to start seeing him on a regular basis. This may be achieved by validating her history of abuse and helping her to see that while she is a victim we want to prevent her children becoming victims."

Dr as well gave oral evidence. He agreed in evidence given before the Children's Court on 19th April 2002 that she met the criteria for borderline personality disorder, (page 1). At page 2 he was asked:

"Q. And in terms of manifestation what sort of symptoms does that present?"
A. In her situation particular difficulty in coping under stress, she has had a difficult past and this is sort of reflected in her current relationships as well which she has difficulty in forming ordinary relationships.

Q. Apart from relationships any other symptoms that are manifested with this condition?
A. Well she did use drugs in the past and has become psychotic in the past with those as an effect of those. That seems to have been contained, certainly in recent times.

Q. Dr in your opinion this borderline personality disorder, that as people get a little older and reach middle age there is a tendency for the symptoms to decrease?
A. That is correct.

Q. So in Miss case you would envisage that as she does get older that the symptoms would be less severe?
A. Yes.

Q. And in your opinion, from your consultations with her that there is really no real reason why she wouldn't be able to care for the child, mother and child?
A. No, not on the basis of what I have seen."

In relation to the psychological condition he was asked about her scoring a level of 7 on the general health questionnaire, and his response to that was:

"Yes the general health questionnaire is essentially a screening questionnaire rather than a diagnostic one. Normally it is, the version that I use is the 30 question questionnaire on which there is normally a cut off of three or four for no mental illness. To give you some sort of perspective about these sorts of scores, we used a similar questionnaire in a community health survey in some years ago, and fully one third of the female population had scores in the abnormal range.

BENCH; Q. Just to put a score in perspective what is the normal range?
A. We tend to use a cut off of three or four, as sort of no problems at all, on the other hand, you know, many of my patients would score 20 or 25."

Her present score was not indicative of a serious disorder. A question was put by Miss V :

"Q. But you say that the results of that test or questionnaire showed significant underlyings, so that there is a fairly serious...
A. No, all that suggests is that the possibility is there and that she is some under distress and that is why we went on to do the MMPI."

Later she asked, at page 4:

"Q. And you assessed her as the fact that she may become irritable and have violent outbursts when outside demands were placed on her?
A. That was a possibility, yes.

Q. And those outside demands could include supervision by Department of Community Services?
A. Not in the ordinary sense, not if they are done properly.

Q. Could they include a requirement by the Department that she attend Child Health Clinic and attend counselling, would that be regarded as a demand?
A. I don't think so. It is the way these things are put and as I sort of pointed out in my second report it is the way you manage people. If you set it up in a confrontational way then you get confrontations. The idea of being an expert in that sort of field is to be supportive and to get through to people.

Q. Now following your initial assessment on 12th, or following your report of 2000, did you at any time say to Miss that you had no need to see her again?
A. Yes, she was never actually referred for treatment you see, she was, it was considerable confusion about her because she was never referred by a local doctor in the ordinary way for treatment. She was referred by the Department for assessment which was done and following that she existed in a kind of limbo. She'd indicated that she thought the Department wanted her to keep coming, but there was no, never any actual formal referral.
Q. Did you think that she needed to see you again?
A. Not particularly, I was available to her but it wasn't a matter of necessity, no.

Q. Then the proper course in that case would have been for her to obtain a referral from her GP?
A. If she felt she needed it yes, as I say there was an area of confusion about that and it is a bit hard to know just where it was meant to be.

Q. Are you aware that the Department in recommending at that time a twelve month order of wardship for , on the basis that would remain with her mother, part of the condition was that Miss continued to see you for therapy?
A. I am not sure about that."

He was asked what sort of therapy might be appropriate for a borderline personality disorder in the moderate to severe range. He said:

"Well you might do some psychotherapy which would be sort of long and regular, but it didn't seem to me that it was imperative. It seemed to me she needed support more than anything.

When the Magistrate raised the question of her poor relationship with her other children he asked at page 6:

"Q. can be, find herself in the same position?
A. Yes. And the difficulty of course with the other children is that they have been removed and there hasn't been continuing access, so there has not really been the formation of a

continuing relationship on either side. And also there is the factor that during the time that she was young that she was obviously sort of much more unstable than she is now.

Q. So to a certain extent your view that she could be a good mother with is based on the improvement in her condition?
A. Yes."

He then went on to say in answer to a question suggesting that children grow up mimicking their parents and that psychological disorders can be thus passed on:-

"There would have to be some level of risk, but depending on the manifest signs of the disorder. When you are looking at personality disorders, which many of us have anyway to a greater or lesser degree, the difficulty is that it is the nature of that particular relationship with that particular child and the environment it is living in. Now if she is in fact functioning relatively normally then there is no reason the child shouldn't develop normally, which is why in my report it is not really a medical diagnosis that has got to determine the situation. It is essentially the facts that are put before you as the actual things that have happened in that relationship with that particular child.

He was then asked whether the nature of the condition would mean that there was a level of unpredictability in determining what level of support would be required, and he was asked did he agree with that, and his answer was at page 7:

"Not necessarily, no, I mean if there is a structured program there is no reason why that wouldn't be an enduring secure base for treatment and management."

When asked what the level of support that was being looked at, he said:

"I would have imagined that the sorts of things I would look at is her forming a relationship with, and we are talking about Youth and Community with a District Officer who would see

her certainly perhaps monthly, perhaps more frequently if she is in crisis, who would be available if there were difficulties and who when she found the crisis would actually come and help, and perhaps allowing somebody to look after the baby overnight or give her a break so she can go shopping. Almost a grandparenting sort of role. I mean she is now seeing more of her mother which is a help, but those are the sorts of roles of the Department, you can involve her in a program to teach her parenting skills."

Later at page 8 he was asked was there any other form of treatment that she should be looking at:

"A. Well as I have said we could undertake a long term program of psychotherapy, look perhaps at some cognitive behavioural issues."

Then he went onto refer to a proposed group that was to meet at the Hospital, and he thought there were other additional services. He thought that that could last for several years. He did not think medication was at all appropriate. At page 9 he was asked:

"Q. If Miss doesn't accept therapy, doesn't attend to see you in therapy her condition is likely to remain unchanged for sometime isn't it?
A. Well as I said the natural history is for it to slowly improve.

Q. And therefore if a child is left, given that it may not change for sometime the level of care of a child of age could be quite compromised couldn't it?
A. Now that is a theoretical thing. It depends in generalities, you would have to say yes to that, but the question I would have assumed, it wouldn't be a long question simply sort of abandoning the whole thing and nobody is sort of actually meeting her and the child and seeing how she is coping."

He went onto say:

"I would have assumed that in the ordinary course of events in a matter where there was some ongoing concern, that somebody would be keeping an eye on that, and if there were particular problems to then, say, let us see

what we can do about them."

At page 12 he was asked:

> "Q. Are you able to say that taking from the mother in the circumstances that she was, would have a more deleterious effect on the child than leaving her where she was?
> A. Well in the absence of some particular trauma on the child, I mean unless you are actually rescuing the child from some particular traumatic situation, you would be inclined to leave it with the mother.

I accept that the appellant was led to believe by Dr that she need not see him any more unless there was a change in her condition. I am satisfied that the Department never made it clear to Dr what his role was to be. As it turned out he did not think that she was in need of therapy as is reflected in his early report, and what he said to Dr . Later he made statements to suggest that therapy may help to reduce any risk of problem to .

It seems further to me that one of the reasons the Department was unclear in its communications with Dr was to do with parsimony. This is reflected in both what the appellant had to say and Dr and the admission about bulk billing.

The matter was compounded by the Department's failure to find out from Dr why there was no ongoing therapy. Even after the July 2001 conference with Mr and others, it should have been clear that he had not recommended it to her. But it does not seem to have been realised that it was no fault of the appellant that she was not having therapy. Instead without checking on the

facts the visits to her home seemed to have become more frequent and the assertions that she failed in her undertakings more strident.

It is little wonder that her tendency to become paranoid under stress was flamed by this unjust approach. Dr evidence suggests that she was fit to look after her child, that in the longer term therapy may reduce the risk that the child would suffer psychological and/or developmental problems. Whilst he may have contributed to the breakdown in communication by saying different things to different people, the primary problem was, in my finding, with the Department.

Even when this should have become apparent to the Department it persisted with what is largely a myth, that she had flagrantly breached her undertaking. Of even more fundamental importance is that Dr had clearly urged the Department to adopt a non confrontational approach and to work on the starting point that her problems could well have their origin in sexual assaults on her when she was a minor. These he urged should be confronted and either taken further by the Department and the police, if there was substance in them, or put to rest so as to more readily work positively in the future.

He had already expressed criticism of the confrontational role the Department adopted which he considered to be unprofessional. That confrontation, I might add, has continued throughout the case despite the

non adversarial nature of these hearings. I will give examples of it later.

Mr appears to have taken a fairer approach than some of his colleagues. Thus in his report of 22 August 2001, he made some significant recommendations.

> "1) Further attempts be made with Miss to encourage her to engage in a therapeutic relationship with Dr . This may now need to be done with a strict time line, or otherwise further measures will need to be taken to ensure safety and security.
> 2) If indeed this therapy begins a treatment plan will need to be formulated in conjunction with Dr . The treatment plan will need to include measurable outcomes for change that are within a time frame."

On 12 September 2001, in a further report to the court which revealingly suggested that the supervising case work manager had asked for clarification regarding his first recommendation, he provided an additional assessment in which he accepted the Department's view that she had not co-operated with it.

It seems that Mr , having learnt from Dr that therapy had not gone ahead, through no real fault of the appellant, considered that she deserved a second chance. On the other hand the report presented by Mr on 12 September appears to have accepted all of the Department's view as to what had gone wrong. So it seems as though the Department's now solidified view appears to have resulted in some pressure on Mr to change his view, thus the report of 12 September. Nevertheless in fairness to Mr in his report of 2 November 2001, he did repeat the same recommendations that I have just

referred to. That was an interim report which appears to have been produced to the court. It was an important document because it urged that therapy be commenced. There is nothing in the evidence to explain why it was not acted upon. Again it seems to suggest an intransigence on the part of the Department, particularly when the views of Dr and Dr to which I will shortly refer, were clearly known to the Department.

(b) I refer now to the undertaking that she maintain a positive relationship with her mother. This undertaking, breach of which was not referred to in the application for permanent care, in my mind has little substance.

The appellant had had a very poor relationship with her father and from time to time this involved her mother. At the time of the report of Mr of 19 April 2000, the relationship was described by Mrs to the Department, "as superficial so as not to provoke her." When account is had of the fact that she was about to give birth to a child and had had extreme upheaval in her life beforehand, it was perhaps a sensitive understanding on the part of .

Mrs comes across as a highly respected and impressive person. She gave evidence on this appeal but not before the Children's Court. In Mr report of 15 November 2000, he referred to an interview with , and I quote:

> " said she has been seeing her daughter and every few days since was born. She said appears to be clean, happy and developing well. She said she has not observed Miss experiencing any parenting difficulties. She has seen no evidence of drug use. is taken to the local chemist for check ups and believes here daughter is 'going well'. Indeed said there is a 'massive difference' in Miss behaviour compared to twelve months ago. reported that the only time she has seen Miss 'go off' was when a worker from the Department was at the home, and she also added that Miss calmed down very quickly once the worker left. believes that her daughter is trying 'a lot harder than before' and she gave examples where she loaned Miss money and it was paid back in a timely manner, and that she minded once so Miss could go out, and she returned punctually."

Later the report says:

> " said she is willing to keep visiting her daughter, indeed their current relationship is the best it has been for many years. said she would not hesitate to report to the Department if there was any deterioration in Miss behaviour. She offered for the case worker to contact her any time if they want to know how Miss was going."

Evidence that the relationship was still on an even keel is reflected in the fact that when the officials came to remove on 12 October, she called her mother who attended.

At page 117 of the transcript the appellant gave evidence about that relationship. She said:

> "We don't see a lot of each other any more because her father has gone into an Home and occasionally she calls past, picks me up and we both go in there together, and then we go shopping or whatever, afterwards."

She was later asked:

> "Q. Do you see her once a week or once a month?

A. When was with me, when I've got the children with me, probably every second day. I either walk up there every second day or she would come down to my place and then on the off day I would walk down to great grand dad and we'd go visit him. Now I probably see maybe once a week, once a fortnight may be. It has been a bit, like I said, in the last couple of weeks it has been, my mum doesn't know what to tell me. My family was never around."

affidavit of 28 July 2002, paints a somewhat different picture. She said, and I quote:

"I have had numerous discussions with mother since I've had the carriage of this case. Miss relationship with her mother is very tenuous. has described that the level of support she provides to her daughter fluctuates as it is very much dependant on Miss behaviour and state of mind."

Her mother is said to have reported that her emotional state was often very unstable.

Mr agreed, at page 57 of the transcript, that Mrs had indicated to the Department that the appellant had settled down quite considerably. I note that she did not give evidence before the Children's Court, her reasons seem to be that that had been her mistake. There is before the court her recent affidavit which she confirmed in oral evidence before this court:

"I support the return of my grand daughter to my daughter. My daughter can contact me whenever she wants and I would be more than willing to assist her in any way possible. I have been having regular contact with my daughter and I have observed the level of frustration, anger and hopelessness suffered by my daughter in dealing with the Department. I have also observed the positive aspects of my daughter's mothering and nurturing of and believe that would be best loved and cared for by her mother.
circumstances over the past two years have

> significantly improved, including stable and secure housing and her ability to cope on a daily basis with the demands on her of a young child. is a loved and wanted child. My daughter interacts with her in a most appropriate manner, not only as to her basic needs but also in the areas of physical and mental stimulation, play and entertainment."

Mrs admitted that she has not had the benefit of more recent observation, obviously because of the circumstances, limited as they have been, of access.

The Department obviously considered the appellant's mother to be well balanced and a reliable anchor person who could be counted on to report if she considered that things were not going well. It is noteworthy that the concerns of the Department did not lead to a checking with Mrs before October 17 (see paragraph 16 of affidavit to which I have referred.).

I do not conclude that the Department was in any event influenced by this alleged breach of the undertaking, and I do not think that it had a great deal of substance in any event. It is not exceptional in the parent/child relationship for it to vary from time to time whether the child is a child or an adult.

The important thing to note that there is now a close relationship between them. Mrs now confirms, as someone close to the scene, that over the past two years including the year up until was removed, that her circumstances had changed for the better, along with her ability to cope.

(c) The next undertaking was that progress was to be monitored regularly by Early Childhood nurses. Again this was not mentioned in the application made in September 2001. The allegations appear in affidavit of 28 February, paragraph 6 to 9. It should be repeated that the Department had no complaint about the child's physical development or material welfare.

Mrs in evidence I have already referred to, informed the Department that there had been regular visits to the Early Childhood nurse, as at the date of that report.

The appellant did agree that there had been a delay in immunisation program because of a fungal infection. However, the program was to recommence with the Medicare Centre, (page 120 of the transcript).

I note the blue book entry that she had had two month immunisation at sixteen months, that is just before her removal, indicating that things were back in place.

Dr , her GP, had confirmed to Dr that the appellant had visited her regularly with the child.

(d) I turn now to a consideration of Dr evidence as it relates to the final undertaking to accept the supervision and support of the Department.

Dr is a psychologist who is employed by an independent organisation The and produced a report at the direction of the court, or two

reports, one an interim report. It is clear from the documentation referred to in Dr report that she was provided with an enormous amount of material reflecting the early history, the history with the other children and much of the evidence that was before the Magistrate and myself.

The Department was very motivated, as it appears to me, to undermine Dr report because again like Mr report it did not reflect the Departmental feeling on what should happen.

The effort in my mind produced some contradictions as to what Miss had told Dr but I am satisfied that the overall thrust of Dr report is valid. For example in her first report in describing mother and child being reunited she said

> "During their hour together I observed a strong reciprocal bond between mother and child which was entirely natural and appropriate. spent the hour comforting and despite her own feelings of devastation was able to provide comfort and support for her daughter to whom she sang and nursed during the period."

In examining the appellant she found nothing to suggest any current problem at the time. She refers to Mr report of 15 November 2000 in which he quoted that:

> " appeared to be healthy, happy, contented and developing well."

He described the behaviour as typical of an emerging, secure attachment relationship between mother and baby. She noted in the course of the current assessment:

> " was reunited with her mother for one hour. She presented clinically as a child who

has been profoundly traumatised by the removal from her mother which was reportedly conducted by a team of uniformed police in collaboration with two Department of Community Service Officers."

She said:

" was emotionally traumatised a second time when removed by a case worker and her colleague from the Department of Community Services at the conclusion of the assessment."

She said:

"There was substantial documentary evidence describing the antipathy between and the Department of Community Services. Given her problematic personality traits it is likely that she has demonstrated defensive, combative and litigious behaviours throughout her association with the Department which has been involved in the external placement of her older children. An objective assessment of the capacity of to adequately parent her child must be viewed as an entirely separate issue, and should not be clouded by the poor relationship she appears to have with the Department of Community Services. The fact that no access arrangements were made following removal and according to case worker access was entirely dependant upon 'behaviour and attitude', suggests the involvement of possible subjective factors on the part of Departmental officers. Whilst it is understood that there needs to be continuing Departmental intervention in relation to psychological development, given the psycho social antecedents and the external placement of her siblings, it was clearly documented in Departmental records that there was no current indication of concern in relation to . It would appear that the action was prescribed upon hypothetical rather than factual grounds."

She regarded the action of removal of the child as unjustified, inappropriate and significantly damaging to the child's psychological well being, and there are suggestions indeed in some of the reports that she has continued to have problems and, in particular, have

sleeping problems.

She made a number of recommendations including that she be immediately restored to her mother's care. Dr was so concerned about the circumstances that she thought that it should be referred to the office of the Community Services Commissioner for review.

In her final report when she had been supplied with more information she explained why there had not been a follow up interview involving mother and child, and I quote:

> "In view of the traumatic separation response displayed by towards her mother during the assessment in which she screamed with terror upon removal from her mother by the Department, a final review appointment was deemed inappropriate by the given the potential for re traumatising by repeating a reunion and an emotionally disturbed removal from her mother."

She noted that:

> " reported that she had seen briefly on three occasions over the past three months and that at the conclusion of each visit has become progressively more distressed at separation."

In her opinion she agreed with Dr . She was also in agreement with the recommendation made by in his report to the court. She went onto say:

> "It is pertinent to note that Miss appears to become angry and agitated primarily in the presence of Department of Community Services officers who have entered her private home and removed her children. Her conditioned response to subsequent visits for many officers from Department of Community Services is therefore understandable, predictable and probably normal under such circumstances. I concur with the statement made by Dr that direct confrontations (by) reflect the management skills of the workers as

> much as Miss personality. It is significant that Miss has exhibited no combative behaviour with any her health care providers."

She thought that access had not been regular enough or there had not been reasonable periods of access. She went onto say somewhat devastatingly, and I accept this:

> "Given the seemingly irreconcilable differences between the views of each party, an analogy may be made in relation to the escalating conflict between the adult participants in case and the adversarial roles adopted by divorced parents engaged in child custody disputes."

She recommended that the child be restored immediately.

Addendum Ms V was advised of this omission within a day or two of judgment.

At this point I had intended to refer to aspects of Dr oral evidence before the Children's Court. I overlooked doing so but now make reference to the transcript at:

Dr

Transcript

p12 line 20 - line 33

p14 line 9 - line 29

p14 line 40 - 58 cont p15 to line 7

p15 line 52 - 58 cont p16 to line 27

p16 line 29 - 47

p17 line 11 - 27

p20 line 39 - 43

p23 line 14 - 55

p25 line 41 - 58 cont 1026 to line 7

p26 line 22 - 41

p27 line 49 - 58 cont p 28 line 1

p28 line 17 - 21

p29 line 4 - 11

Looking at the failure of the appellant to accept the supervision and support of the Department, I note also Mr report of 15 November 2000 when he referred to what Mrs had said, that she only "went off" when the Departmental officers were about. This is reflected in

Miss affidavit of 11 October 2001 at page 5, paragraphs 38 to 40.

When Miss endeavoured to deliver a letter to the appellant on 2 October 2001, when she was met by

who informed her

> "She is only like this every time you come around, it is going to take me four to six hours to calm her down now so I can even show her this letter. Do you realise what an impact this has on me every time you come here."

Those I think are eloquent statements of the effect that the Department had achieved on the appellant.

Dr in his evidence suggested departmental visits take place monthly or more often if the appellant was suffering distress, as appropriate supervision. The appellant claimed that visits were much more frequent. The Department did not produce any records to show how often visits took place. The relationship between the Department and the appellant had obviously broken down to such a degree that Dr took the unusual step of

comparing it to a couple in divorce relationship.

It seems to me the more the Department asserted she was breaking her undertaking about therapy, the more the appellant felt she was being victimised.

I have already recorded my finding that the Department was quite unjustified in this view.

There is no doubt that this perceived failure on her part motivated the Department to take action on 2 September. I do accept that the appellant was abusive to members of the DOCS staff in a way which no doubt reinforced their attitude. However, its attitude was not based on any actual threat to the child's care but an expectation of future risk. It seems an irony that the Department was the cause of the appellant's reaction.

Things did not get better. Dr is critical of the Department for not arranging access after the sudden removal of , although again it was difficult at that stage to get through to the appellant.

Miss affidavit of 25 October, to which I have just referred, states and I quote:

> "The Department wishes to facilitate contact and maintain the relationship between and her daughter. However, we want to make sure such contact will be positive and will not be exposed to often irrational, erratic and highly agitated state."

This could only have been based on the occasional time that the appellant had had "run ins" with the Departmental officers at the Department or on home visits.

To add fuel to fire at paragraph 31 Miss

reports:

> "The Department is requesting a commitment from to the following undertakings prior to any further contact being arranged with .
> (a) Access will be supervised by the Department at Community Service Department.
> (b) is not to threaten Departmental workers who are engaged in any case work discussion with such workers during access visits.
> (c) is not to speak in a negative manner about any family members during access visits.
> (d) is not to discuss her dissatisfaction with the Department's intervention during access visits.
> (e) is to maintain an appropriate calm presentation during access visits and not lose her temper.
> (f) Should not adhere to any of the above undertakings access will be terminated."

The basis for such access was really without foundation. Nothing the Department points to meant that anyone thought in the Department that there was a present risk. It was a future risk. There was thus no reason whatsoever apart from the misplaced assumptions about failure to have therapy to remove the child.

There was even less reason to insist on access at the Department, conducted, as it came to be, with two officials behind a screen taking copious notes of what was said and done and dashing into the room in the presence of the child if the applicant said one word out of place, to remonstrate with her.

Nothing in my view could have been less professional or demonstrate the degree of emotionalism that has clouded this case, even in the light of Dr and Dr clear views. Despite those views the Department had made up its mind and of course things got worse. Their advice

was ignored. Mr who was trying to be fair was clearly inveigled into changing his report. Affidavits were filed to suggest that Dr had been materially misinformed by the Appellant. Whilst there was some exaggeration on the part of the Appellant I do not conclude that the overall thrust of Dr opinion would have been different.

Other affidavits based on much hearsay evidence went so far as to suggest that the appellant was associated with witchcraft.

An effort was said to have been made by the Department to engage an independent agency. Mr the senior officer said he had tried but it had not rung back. He did not bother to ring back until after the Children's Court decision. I frankly find this assertion unbelievable for the reason that there was no point in his doing so, particularly when a decision was being made to reduce access from weekly to monthly, despite an appeal having been lodged.

Other examples of intransigence on the Department's part are as follows:

CASE CONFERENCE AND FINAL CARE PLAN

Miss in her evidence before the Children's Court said that despite assertions that the Department had tried to arrange a case conference and that she had not co-operated, in fact it was the Department that failed to

respond to her calls.

The Magistrate suggested a conference be held that day. Later when he took it up again the solicitor representing the Department, informed him that she had just been told by Mr that "the Department cannot, in all conscience, organise a conference of that type at this point." That did not stop Mr from presenting a final care plan dated 1 May 2002, noting the appellant's failure to be involved in it. Nothing I think could have been more hypocritical than that.

The final care plan at page 15, proposes to maintain a relationship with her natural mother and father. The Department following the making of the order said it

> "will convene a case conference to develop the strategies for the implement of this plan. Miss will be provided with the opportunity for an advocate to be present to assist her input in these decisions."

On 21 June 2002, sent a letter to the appellant "to confirm the conversation that we had on Wednesday, 19 June 2002". However, neither in her affidavit or the letter does she directly say what the conversation was. The letter advises that contact with has been suspended, and a meeting is referred to, to take place on Monday 24 June at 10am. It is peremptory in tone, and there is no hint of any other arrangement if not convenient to the appellant. The purpose of the meeting was said to develop contact schedule for the next 12

months between and the appellant. She was told she could bring a support person, but no mention was made of the permanency plan to have the advocate there, nor apparently was a copy sent to the appellant's lawyer.

No mention is made in the affidavit of the meeting but a letter annexed dated 12 July suggested its purpose was:

> "To address issues surrounding the appellant's contact with that we were not able to discuss at our meeting on Monday, 24 June 2002."

Despite the fact of the present appeal the Department had decided unilaterally to reduce contact visits from weekly to monthly. Again the tone of the letter is peremptory in that the date for access is fixed for fourth Wednesday of every month.

When I initially raised the possibility that some other organisation should be involved that was neutral and could re-establish a working contact, counsel was instructed to inform me that it was not possible for the Department to delegate its statutory responsibilities. However, it is clear that the Department often has contractors in its work. I note Dr made a number of suggestions, none of which seem to have been followed up. The Act itself refers to the use of agencies outside the Department.

THE LAW

The starting point is the objects set forth in section 8 of the **Children and Young Persons (Care and**

Protection) Act (1998). The objects of this Act are to provide:

> "(a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well being, taking into account the rights, powers and duties of their parents or other persons responsible for them.
>
> ...
>
> (c) That appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child raring responsibilities in order to promote a safe and nurturing environment."

What principles are to be applied in the administration of this Act? According to section 9 they are these:

> "In all actions and decisions made under this Act whether by legal or administrative process concerning a particular child or young person, the safety, welfare and wellbeing of the child or young person must be the paramount consideration. In particular the safety, welfare and wellbeing of the child or your person who has been removed from his or her parents are paramount over the rights of the parents.

In paragraph 2:

> "In deciding what action is necessary, it is necessary to take in order to protect a child or young person from harm the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family, that is consistent with the paramount concern to protect the child or young person from harm and promote the child or young person's development."

Finally in (g)

> "If a child or young person is placed in out of home care, the child or young person is entitled to a safe, nurturing, stable and secure environment, unless it is contrary to his or her best interests, and taking into account the wishes of the child or young person, this will include the retention by the child or young person of relationships with people significant to the child or young person including birth or adoptive parents, siblings,

extended family, peers, family friends and community.

By virtue of section 71 the court may make a care order for the reasons there set out. The relevant one here is (d) where the child's basic physical, psychological or educational needs are not being met or are not likely to be met by his or her parents.

Section 71(2) provides that:

> "The court cannot conclude that the basic needs of a child are not likely to be met, only because of a parent's disability."

The Act does not define disability. In my view it should be given a broad-interpretation to include physical and mental disability. Thus the Macquarie Dictionary defines it "As lack of competent power, strength or physical or mental ability, incapacity."

The reference to poverty excludes the narrow interpretation of pecuniary inability or want of means (and see the Oxford English Dictionary where reference is made to mental disorders).

Section 72 provides that a care order may be made only if the court is satisfied on the balance of probabilities that the child is in need of care or protection. The court may however, make a order where (a) the child was in need of care and protection when application was made and (b) would be in need of care but for arrangements made pursuant to sections 49, 69 and 70. They refer to care pending the proceedings, interim care orders or other interim orders.

In this case I am not satisfied on the balance of probabilities that the child is in need of care and protection. I am not satisfied that the child ever was in need of care and protection despite the earlier court orders.

I am not satisfied that any of the provisos to section 73 exist. Similarly I am not satisfied that an order for supervision should be made pursuant to section 76.

The most that can be said on the evidence is that the child may be at risk in the future. The risk is that the mother's inability to deal with her borderline personality problem may lead to dynamics between herself and the child which could be harmful to her psychological development. Both Dr and Dr see it as a possibility rather than a probability. Neither see it as affecting present custody.

It is a condition which tends to reduce with age, it is a condition which is aggravated by life stresses. I accept that Miss has problems with symptoms of paranoia and conspiracy. Both Dr and Dr were aware of them. They are particularly brought out in her relationship with the Department.

It would be beneficial for her and her relationship with the child and her other children, to recognise that she has problems and to seek professional assistance. Much of her problems seem to result from sexual abuse when

young, which typically is a background to such problems as she has. Her chief problem is that she does not recognise that she has any problem.

I had considered the possibility of ordering undertakings. However section 73 leads me to the view that the court has power to do so only where there is a finding that the child is in need of care and protection. More over it seems to me that they must relate to the care and protection of the child, and it is unclear whether this maybe achieved indirectly by reference to a parent for example undertaking psychotherapy.

It is not necessary for me to decide this here but the note to section 74 dealing with support services says

> "The parents of a child or young person cannot be compelled to accept the provision of support services, particularly if the services relate to the parents rather than the child or young person."

The Act specifically says that notes are explanatory and do not form part of the Act. I note further the power in section 75 to order attendance of a child at a therapeutic or treatment program. There is no similar provision for parents.

Division 6, dealing with examination and assessment orders gives the court power to order an assessment of a parent with or seeking parenting responsibility. However, such assessment can only be carried out with that person's consent.

Finally the Act appears to be silent on the court's

power where an appeal is upheld leading to a return of the child to the parent to stage that return with minimum upheaval to the child. I agree with Mr that it is highly desirable and in the absence of specific power I would strongly urge some agreement to be reached between the parties.

Any of the powers that the court has seems to be limited to allocation of a child in need of care and protection.

I am prepared to hear argument about what should happen and certainly to encourage agreement between the parties, and perhaps Miss P might be prepared to negotiate some sort of arrangement with the Department to reduce any further likely trauma in the restoration of the child to her mother.

The order I make is that the child should be returned to the appellant.

Mr O it was not until I looked closely at the Act that I arrived at the conclusion that desirable and all as it might be, once I decide that she is not in care it seems as though I do not have any further power.

O : No, that is right your Honour.

HIS HONOUR: It seems to me to be a lacuna in the Act and it might be desirable for those reconsidering the Act to think about that.

O : Your Honour that may be something that needs to be looked at obviously that has been--

HIS HONOUR: I think the Act is about to be reviewed is it not or is in the process?

O : It is yes, that is right your Honour. It is a

provision that has never really, I don't think, been looked at in the legislation because it is a similar provision applied in the 1987 Act as well. There had to be the establishment then the placement going on from that.

HIS HONOUR: It certainly tends to cause problems in borderline cases.

O : Yes, the difficulty I suppose is this your Honour. With your Honour's decision now there is no basis for the Department continuing to have this child in its care at all as of now. Now your Honour has suggested that we get together basically and try to come to some sort of agreement as to how this can be done in the best interests of the child, but strictly speaking if the mother were to insist that the child be returned.

HIS HONOUR: Well that is perfectly true, I think it must follow. But it seems to me that the child has undergone enough trauma as it is, as I have found through no fault of the appellant.

O : Could I ask this then your Honour. Would your Honour be prepared to stay your Honour's decision for a week so that we can at least get together and try to work out an agreement?

HIS HONOUR: Well how about if I adjourn to allow Miss P and the appellant to discuss these matters with you, because they have to be done by consent. Do you understand the problem Miss ?

APPELLANT: I understand what--

HIS HONOUR: Well it is not interests for her to be suddenly plucked up and returned to you, just as you would agree that the Department should not have done it to you. It should not happen to for her sake rather than anyone else.

APPELLANT: I would just prefer the child home. I have heard that.

HIS HONOUR: Anyway can I just adjourn shortly and maybe your mother could assist in the discussion as well.

SHORT ADJOURNMENT

HIS HONOUR: Mr O I understand that you have reached some sort of, I am not sure if it is an understanding but position at least.

O : Yes, it is a position and an understanding yes your Honour.

HIS HONOUR: So you do not seek anything further, the child is going to be returned today I understand.

O : Indeed this afternoon your Honour.

HIS HONOUR: All right, I will simply note that.

O : Obviously I will have to report fully the Department on your Honour's decision.

DISCUSSION AS TO AVAILABILITY OF TRANSCRIPT OF JUDGMENT

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