

THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

CONFIDENTIAL

5 JUDGE J B PHELAN

THIRD DAY: THURSDAY 5 SEPTEMBER 2002

10 263/02 - IN THE MATTER OF THE APPEAL OF
v DEPARTMENT OF COMMUNITY SERVICES

CLOSED COURT

15 HIS HONOUR: Mr O , what has happened if anything?

O : Miss P has made some enquiries of various
20 services as I understand it and has got a response from
. No doubt she'll be handing up a copy of that
response where they've indicated that they will place
Miss on their counselling waiting list.

HIS HONOUR: What does that mean though?

25 O : I'm not sure but it says that counselling will
cover child sexual assault issues, management of her child
and other issues that arise from the assessment interview.
30 Obviously they're expressing some sort of interest anyway
in being able to manage this matter. I don't know to what
degree that they would be able to manage it and obviously
it would be a matter for them to have to assess the whole
case. So we're really at the, as I understand it unless
Miss P has that further information but as I
35 understand it we're at the forefront of the process really
at this stage.

P : Your Honour, I have telephoned . I
40 spoke to a there and she advised that all their
resources are stretched to the limit and they have
absolutely no funding to supervise such visits because
just a one hour visit would entail about four hours by the
time the child is picked up and returned and I was told
there that so far as they are aware DOCS is the only
45 organisation in this area that has the resources and the
facilities to do supervised visits.

I also was in touch with . I did forward them a
50 letter, a copy of which I can hand up to your Honour plus
a copy of their response and they unfortunately have no
facilities for supervised contact. They said they did try
and set up a pilot scheme at one time but it was just too
expensive and they had no funding. The person I spoke to,
at gave me the names of two
55 psychologists, a Mrs and Mrs who
are persons that are willing to do report and court work.
They said that themselves do not do home visits
and they don't normally, unless specifically requested, do

reporting to the Court. They feel that in their
 experience that that is counter productive to what they're
 trying to do. They are trying to focus on fixing the
 problem with their clients and they feel that if the
 5 client feels that they're being assessed every time they
 go there, the client may become closed or trying to mask
 problems and things of that nature so their total focus is
 on trying to sort out the problem with their clients. The
 difficulty at the moment is that are very busy.
 10 They have about 23 on their waiting list but they are--

HIS HONOUR: How many?

P : Twenty-three, but they are prepared to see
 15 Miss . They are aware of the problems as outlined in
 my letter and they feel that it would not be too long
 before she could be seen. She said they have a lot of
 counsellors and they are getting through them fairly
 quickly.

20 I did not ring the place in
 the establishment
 that Miss mentioned. I spoke to Miss this
 morning and she said that she's developed quite a rapport
 25 with . She also mentioned another name--

HIS HONOUR: The departmental officer.

P : Yes, he's from the Department and also another
 30 person, . Miss considers that both of
 those persons are very fair and that she would even agree
 to them coming into her home for home visits. It seems at
 this stage, your Honour that she's more than willing and
 happy to strike up a client relationship with
 35 They do not as I said do home visits and it may satisfy
 the Department if somebody like and perhaps the
 two of them so that there can be no dispute as to what
 takes place, could visit Miss if they think that
 things are not going right. But DOCS can also telephone
 40 the centre manager, at and she
 would be prepared to give any information or allay any
 fears that DOCS may have as a result of the counselling
 between Miss and . So DOCS would have a
 line of--

45 HIS HONOUR: Involvement.

P : Yes, of communication.

50 HIS HONOUR: I don't suppose you've had the opportunity to
 find out whether Mrs and Mr or indeed the
 Department is happy to involve itself in that way?

O : I understand that those two officers are the
 55 managers who are responsible for this case and in fact
 was the person who swore the affidavit which
 was--

HIS HONOUR: Yes, I remember.

5 O : I am instructed that they would be prepared to continue to act in the capacity they've been acting in which has been in a capacity which is somewhat unusual for a manager to act and usually these are done by case workers.

10 HIS HONOUR: I suppose because of the difficulty and sensitivity of the matter.

O : Yes, they're prepared and I'm instructed they're prepared to continue to act in that capacity.

15 HIS HONOUR: What's the suggestion then, if any?

20 P : My suggestion, your Honour would be that the child be returned to Miss and that she commenced this counselling with as soon as they are able to take her because it seems to me that the problem has been one of confrontation between Miss and the Department more so than any immediate concern or harm for the child, but more a perceived injury that may, not will, but may happen to the child at some future date because of her borderline personality disorder, and all of that has been canvassed and cross-examined and looked at very carefully in the Local Court and the reports are before your Honour as to how the doctors felt about Miss and the difficulty. I think the bottom line for both
25
30 doctors, both the psychiatrists and the psychologist was that the issues could be addressed by Miss having some counselling and the way the evidence has transpired it seems that part of Miss ingrained or underlying or latent problem is her own sexual assaults on her as a
35 child, and it seems that they have--

HIS HONOUR: Which she really needs counselling in respect of.

40 P : And maybe that is what is making her overprotective or worried that something is going to happen to her child and that in itself has caused conflict with the Department because of her ingrained fears, and perhaps--

45 HIS HONOUR: Let me enquire as to whether anybody wishes to present any further evidence. Do you have any further evidence, Miss ?

50 APPELLANT: My mother has come in with me today because I have back problems and I couldn't get the bus in here but I've explained to her some of the things that were outlined in the last proceedings with what the Department was alleged to have said through certain phone
55 conversations or whatever.

HIS HONOUR: Is your mother here today, is she?

APPELLANT: My mother is in the courtroom here today.

5 , if needed, is prepared to give
evidence if that need be. She has given written
verification because she was, the Department seemed to
really be a little unclear on whether my mother and I see
each other, whether we even speak, but whilst was
with me we actually had contact nearly every second day.
10 My mother would come down or I would walk the baby in the
pram to visit her Nan. That was like usually nearly every
day I'd say that we almost saw each other.

HIS HONOUR: I'm only asking the question do you want to
present--

15 APPELLANT: If need be, if need be and your--

HIS HONOUR: All right, I'll note that. Mr O ?

20 O : Your Honour, at this stage Miss is still
in cross-examination. I hadn't concluded that but I don't
expect that there would be any further evidence that the
Department would be putting on in these proceedings.

25 HIS HONOUR: Looking at the Act it seems as though the
Court if it was at first instance could make an interim
order and the legislation seems to suggest that this Court
has the same powers but I may be mistaken in that. Do you
have any--

30 O : No, it has the same powers as a Children's Court
has.

HIS HONOUR: I could make an interim order to see how
35 things go.

O : You could certainly, yes you could make an order
varying the order of the Children's Court again by making
an order that, for instance, the child, well you can make
40 any of the orders which are available under the
legislation including an interim order, an order for
supervision.

HIS HONOUR: I thought that's how it read but having not
45 had much exposure to this arena.

O : No, your Honour has exactly the same powers as a
Children's Court Magistrate.

50 Can I just answer some of the things though that have been
put by Miss P and one of them of course is that
although of course there is no evidence of injury to this
child, the legislation is very clear that it is not only
injury that has in fact occurred, it's potential injury
55 and we're not talking about physical injury in this case,
we're talking about emotional and psychological damage.

HIS HONOUR: I understand the Department's viewpoint.

O : The other thing that I have been asked to put is that the Department would certainly be urging the Court to ask Miss to get counselling and to have engaged in counselling to some significant degree before the child was restored to her if the Court was thinking of restoration because at this stage if she just is not getting any counselling--

10 HIS HONOUR: It's not immediately suggested that she needs it so that it's considered as I read the reports that because of the, I suppose the historical long term background and the fact that some of the issues have not been properly dealt with that she does need that counselling which would tend to raise the levels of her intolerance I suppose if she's put under pressure.

20 O : She seems to be recognising the fact that she does need counselling anyway because there seems to be some insight coming through there anyway because--

HIS HONOUR: That's probably a very important development.

25 O : And that's one of the Department's real concerns in this case is that insight is one of the real issues that Miss could only see that there is some need for give and take and it's the Department's case that that just hasn't been occurring from her side and I know that it looks very much as though the Department has been heavy handed in this case and your Honour's made some--

HIS HONOUR: I'm not for one moment not acknowledging that it's a difficult case.

35 O : It's extraordinarily difficult and in fact the instructing officer today who is the tells me it's the most difficult case he's come across in his 22 years in the service but be that as it may be.

40 Your Honour, could I suggest this that perhaps we really need to hasten somewhat slowly at this stage. We're still in the middle of the case to all intents and purposes. I was going to suggest perhaps if we could set the matter down for further hearing at some stage in the not too distant future.

45 HIS HONOUR: That's one of the difficulties about the case. It's almost a year now since the child was removed and every bit of time that continues is not going to make it any easier.

55 C : One of the great fears of course that the Department has is that if there were to be a restoration that the restoration may break down in the future again and the child's going to be in a position where it is really going to be going from pillar to post.

HIS HONOUR: There's already been some of that. There's

been two changes of foster care.

O : There has been but at the moment it's in long
5 term foster care and it can remain in that foster care all
things being equal until it reaches its majority.

HIS HONOUR: It's a question I suppose of balancing the
various issues which is my unhappy task.

10 APPELLANT: Can I just point something out, your Honour?

HIS HONOUR: Yes.

15 APPELLANT: I have been getting counselling and that was
already brought about on the stand. The Department is
saying that that's not been happening. I would just--

HIS HONOUR: You've had some counselling through the
20 Victims Compensation.

25 APPELLANT: I have that counselling when I need it and on
an as needs basis. The Department was aware of that.
That has been said on the stand and it's done actually
through the Attorney General's Department and from the
Victims Compensation Board which gives me 24 hour a day
counselling when I need it as I need it.

HIS HONOUR: That was fairly recent I think, wasn't it?

30 APPELLANT: Yeah, I get it as I feel that I need it and
I'm certainly not, I mean if there's something wrong with
me and the Department is trying to continually say that
there's something wrong with me or whatever that doesn't,
and as Dr pointed out does not affect my parenting
35 ability at all and I think that that really needs to be
addressed and seen to. There's been no harm on my child
except when my child left my care, my child was harmed
profusely. At every access visit I saw that child was
bruised, battered, dog mauled and burnt. I shouldn't have
40 to see my child--

O : That's just not so and I ask that that not--

45 APPELLANT: I shouldn't have to see my child hurt--

HIS HONOUR: I understand that's in issue.

50 APPELLANT: There are affidavits and there are police
event numbers in relation to the assaults that have
occurred.

HIS HONOUR: All I can say that's a matter in issue that
the Department acknowledges that there was some evidence
along the lines you're talking about but they claim that
55 it was the sort of thing that small children often present
in any event.

APPELLANT: The whole child's face was covered, your

Honour. A small child with accidental injury, a parent of five children--

5 HIS HONOUR: I'm not here to decide that matter at the moment, I'm just trying to work out what the future course of this case should be.

10 APPELLANT: Yes, your Honour but I'd just like to say that where the child is placed at the moment is where those injuries have occurred at, they're foster carers where the Department place here. They've now put her back into that place where they're saying is a long term place. That I do have concerns and I'm sure my mother does also, to sit back and see her grandchild being hurt while it's with somebody else is just unacceptable, and I've studied child protection myself, I'm certainly aware of the laws, the 15 guidelines and the boundaries and I just think that we may be having someone trying to cover up something. The assaults were severe, there were affidavits submitted before the Children's Court at . People who 20 witnessed those marks and bruising and dog mauls as well as the police. There are two police event numbers, that's all I'm saying and just don't disregard that because I think that's really valuable.

25 O : Could I suggest this, your Honour and it's just come to me that your Honour might find some value in a report that could be prepared, and it could be prepared if necessary by a totally independent person as to the state 30 that the child is in at the moment and the circumstances of the child and any changes that have been perceived in respect of the child over the last year. It's my understanding that the child is doing quite well now and that notwithstanding what Miss says about--

35 HIS HONOUR: Well there is evidence to suggest that the child was really doing quite well when it was taken.

40 O : Yes your Honour but--

HIS HONOUR: There was no evidence to suggest that the child was being mentally affected, save for the isolated event which seemed to focus the Department excessively as to what happened at that case conference.

45 O : Well no, your Honour there's also ongoing evidence or evidence of ongoing problems so far as the child is concerned. There was continual headbutting, screaming, tantrums--

50 HIS HONOUR: Yes, but Dr thought that was more likely to be explained by the circumstances of the child's recent removal rather than a reflection on Miss . This is what makes this case so blurred.

55 O : Yes, your Honour. The other difficulty that as I say I come back to this issue though and the things that Miss has just said are indicative of this in my

submission that she just has no insight into the issues pertaining to herself and her ability to care for children. She's already had three of her other children and these are historical matters I know.

5

HIS HONOUR: I understand that and it may well be the explanation for the somewhat coloured view on the part of the Department. I'm not making a final decision about that but it seems strongly arguable that that has been the background. Right from the start they took the view she was going to be unfit and had to be looked at closely and they were justified to a point but it seems to me that there's strong evidence to suggest that they over reacted and it was not helped by Miss failure to co-operate with them.

15

O : Can I just say this in answer to that, your Honour? Their over reaction was this. That they approached the Family Court seeking a supervisory order, only a supervisory order in relation to this and that was what the order that was sought back in December 2000. That meant that the Department would be able to--

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HIS HONOUR: I'm well aware of that, I've read the voluminous materials, we're going round in circles.

25

O : I don't want to hold your Honour up any more. Can I suggest, your Honour if this would be suitable if we could get a further date for hearing, if your Honour has any time available in the not too distant future.

30

HIS HONOUR: We'll have to make some enquiry about that.

P : Your Honour, if I could just say I cannot possibly see what continuing or another hearing is going to do in this matter.

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HIS HONOUR: I feel very attracted to the idea of making an interim order but I don't want to make an order without giving at least the Department the opportunity to put submissions to me about that.

40

P : We can keep on getting report--

HIS HONOUR: Yes, I understand the difficulty. It's Catch 22.

45

P : And if I could just say one other thing, your Honour. Much has been said about the child and about where she is at the moment but the cold hard fact is that the younger the child the more that child should bond with somebody and in this case in my respectful submission it is with the mother and it was the circumstances that the child was taken away from the mother, the fact that she was earmarked by the Department even a week before when they found out she was about to give birth. They were already at the hospital to take the child without giving an opportunity--

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HIS HONOUR: I think what I'll do is I'll leave the matter in the list. I'll call through the criminal list and see whether I might have some spare time later in the day. Is that convenient to the parties? Mr O are you--

O : No, it's not convenient to me I'm sorry. My instructing solicitor is certainly not here today. We understood it was to be on a, the basis of the matter being in the list today is so that Miss P could report on enquiries that she made. I didn't think it was going to go any further than that.

HIS HONOUR: That's correct, I'm not saying that I insist that you respond today.

O : No, I'm not in a position where, I'd be very uncomfortable for the matter to proceed further today.

HIS HONOUR: But at any stage I can make an interim order anyway.

O : You can, your Honour you can make an interim order at any stage but your Honour--

P : Perhaps another suggestion, your Honour would be that you make an interim order today that the child be returned to the mother and in the meantime that if the Department want to have further hearing or have further reports well then it only seems fair to me that if there's going to be another report, that report should include observations of mother and child or whatever.

O : I'm instructed if your Honour were to make an interim order today that I'd ask that your Honour stay your hand in regard to the making of that order so that we can take further action. Miss P is here to represent the child. She's not here to represent Miss yet she's acting as though she's Miss representative. The best interests of this child are not going to be served by a restoration order--

HIS HONOUR: Mr O, I don't necessarily accept that to be the position at all. I think this is a position that Miss P has taken for some time and I think she's quite justified in taking that position.

O : She's representing the interests of the child though your Honour. We're all here to represent the--

HIS HONOUR: There's a good deal of evidence to suggest that she's right. That's the thing that concerns me. I mean Dr, Dr, the original psychologist with the Department. Anyway as I said I don't want to go into it again and I don't think it helps to be making these attacks on somebody who stands very high in the estimation of this Court.

O : Your Honour, I just realised the Court wasn't closed either. It should have been a closed court while this argument has been going on.

5 HIS HONOUR: Yes, I think that's correct. I didn't expect that we'd be here for so long. I'm told that there's some time available next Thursday, 12 September.

10 O : Unfortunately I'll be in Court on that day, your Honour doing another matter. I'm free all of next week other than the Thursday.

15 HIS HONOUR: I'll tell you what I'll do is I'll list it on Wednesday at 9 o'clock.

O : Thank you.

ADJOURNED TO WEDNESDAY 11 SEPTEMBER 2002 AT 9AM

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