CC v KK & Ors [2006] NTSC 68

PARTIES:	CC v KK and JC and Minister for Health and Community Services and Michael Carey SM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 24/2006 (9725549) JA 25/2006 (20504276)
DELIVERED:	18 September 2006
HEARING DATES:	21 July 2006
JUDGMENT OF:	OLSSON AJ
ON APPEAL:	Order of the Family Matters Court, 31 May 2006

CATCHWORDS:

APPEALS – JUSTICES
FAMILY LAW AND CHILD WELFARE – appeal against an order of the Family Matters Court – appeal to Supreme Court – appeal jurisdiction only enlivened upon demonstration of an error or mistake of fact or law or fact and law by the learned magistrate – appellant bears onus of proving such an error or mistake – no such error or mistake established
Appeal dismissed

CC v NT Minister for Health and Community Services and Others [2005] NTSC 69, referred to
JK (a juvenile) v Waldron [1988] NTSC 465, explained
Re Barbara and Others [2006] NSWSC 536, followed
AH v Minister for Families and Communities [2005] SASC 339, considered

Community Welfare Act (NT) s 42, 43, 50
Justices Act (NT) s 163

REPRESENTATION:

Counsel

Appellant:	In person
First Respondents:	A Whitelum
Second Respondents:	A Young

Solicitors:

First Respondents:	Morgan Buckley
Second Respondents:	Mark Heitmann

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

CC v KK & Ors [2006] NTSC 68
No. JA24-25/2006 (9725549, 20504276)

BETWEEN:

CC
Plaintiff

AND:

KK
and
JC
and
MINISTER FOR HEALTH AND COMMUNITY SERVICES
and
MICHAEL CAREY SM
and

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 18 September 2006)

[1] These reasons span two separate, but related, appeals concerning the proceedings referred to in files numbered 9725549 and 20504276 respectively.

[2] The notice of appeal on the first file is in relation to the outcome of a review by a stipendiary magistrate of an existing order of joint guardianship of KK (the eldest child of the appellant) between the Minister for Health and

Community Services ("the Minister") and the appellant. It seeks to impugn an order made by the learned magistrate on 25 May 2006, whereby he directed that the Minister be granted sole guardianship of KK until she attains the age of 18 years, reserving limited rights of access by the appellant to the child.

[3] The notice of appeal on the second file is in relation to the outcome of an initiating application pursuant to s 42 and 43(5)(b) of the Community Welfare Act for a declaration that JC, the youngest child of the appellant, be found in need of care. It seeks to impugn an order also made by the learned magistrate on 25 May 2006, whereby he directed that the Minister be granted sole guardianship of JC until he attains the age of 18 years, once more reserving limited rights of access by the appellant to that child.

[4] In each instance the learned magistrate adjourned the proceeding until 28 May 2008, for review.

[5] The detailed grounds of appeal set out in each notice of appeal are identical. They are expressed in the following terms:

> "1. That the findings on which the Orders are based are against the weight of, and not adequately supported by, the whole of the evidence.
>
> 2. That the finding that the Appellant would never have the ability or develop the skills to appropriately parent the child is against the weight of the evidence and not supported by the whole of the evidence.
>
> 3. That the finding that the mother suffers from a severe histrionic borderline personality disorder is not supported by

> the evidence and is against the weight of the whole of the evidence."

[6] The orders now subject to appeal were made as the outcome of a lengthy hearing on oral evidence that extended over some six sitting days. At the time of the making of the impugned orders the learned magistrate published very extensive and definitive reasons for judgment, in which he made a careful analysis of the large volume of evidence given before him. Much of the evidence was given by a series of professional specialist witnesses. I will return to that analysis in due course.

The relevant history

[7] It should be said, at the outset, that, in so far as these proceedings relate to the child KK in particular, they have a long history of previous litigation. It is convenient to extract a good deal of that history from reasons for judgment published by Mr Ward SM on 13 December 2002 and further reasons for judgment published by Mr Birch SM on 3 February 2004.

[8] As I understand the situation, the two children, KK and JC, have different fathers.

[9] The appellant is a Caucasian woman about 36 or 37 years of age. KK was fathered by AK, who is a full-blood aboriginal male of the Arrernte clan. She was born in Alice Springs on 11 November 1997. AK has not displayed significant interest in any of the proceedings relating to KK.

[10] There is no information before me concerning the identity of the father of JC, but the learned magistrate found that JC was born on 16 June 2004.

[11] Mr Ward SM recorded that, on the very day on which KK was born, an application was made to the Family Matters Court for a holding order and the child was, at least notionally, taken into custody by the Minister.

[12] At a subsequent hearing on 24 December 1997 a magistrate declared KK to be a child in need of care and made an interim order placing her under the guardianship of the Minister. At a further hearing on 27 February 1998 the learned magistrate ordered that KK be placed under the sole guardianship of the Minister for a period of six months.

[13] That order was overturned on appeal on 19 September 1998 on technical legal grounds. The child was then returned to the care of the appellant.

[14] On 18 October 2001 a second application was filed seeking a declaration that KK be declared a child in need of care. This gave rise to a series of further hearings before Mr Ward SM. On 29 May 2002, by consent, a declaration was made that KK was a child in need of care. Sole guardianship was vested in the Minister for a period of 12 months, with provision for the appellant to have access under supervision. The child had been in foster care pending the resolution of the application of 18 October 2001, access to her being afforded to the appellant.

[15] On 22 August 2002 the appellant applied for a variation of the orders that had been made. This led to a protracted hearing in November and December of that year.

[16] In the course of his quite lengthy reasons for judgment published on 13 December 2002, Mr Ward SM recited the following extracts from a report by a psychologist dated 17 February 1998 as accurately portraying the prior conduct of the appellant that had given rise to the in need of care proceedings:

> "C has lived in Alice Springs for 18 years. She is of European descent, although she identifies with the Aboriginal Community. C has reportedly led a transient lifestyle around Central Australia, residing mostly in Aboriginal town camps. C gave birth to her daughter, K., on 11/11/97 at the Alice Springs Hospital. K's father, AK, is a local aboriginal man who reportedly has problems with alcohol dependency and related violent behaviour.
>
> C is reported to have had contact with community Mental Health and other services for several years.
>
> … she suffers a severe personality disorder, namely Borderline Personality Disorder…
>
> She has a history of very disturbed behaviour….
>
> She has been known to many Human Services organisations in town since approximately 1987 including the women's shelter, police, Tangentyere Council, hospital, Allure, St. John's, Mental Health team and Department of Lands and Housing.
>
> Since 1992, C has been reported to attend the emergency department at the hospital on a periodic basis in extremely emotional and distressed states.
>
> Hospital and social work staff have reported on C's often extreme, bizarre, anti-social and sometimes violent behaviour. Behaviours include taking off all her clothes in public places whilst wailing, screaming, and smearing menstrual blood over her body and

> surrounding environment; masturbating in public, urinating and defecating on the floor and proceeding to eat the faeces…
>
> These behaviours include crying and wailing in the street, collapsing on the ground, rolling around and moaning, and being verbally and physically aggressive.
>
> Assistance… attempts have been refused and sabotaged by C…"

[17] It was said at that time that the background and behaviours described were consistent with a condition of Borderline Personality Behaviour with Some Anti-Social, Paranoid and Histrionic Features. It was recorded that there were also suggestions of alcoholism, anorexia nervosa and recurrent suicidal ideation.

[18] I pause to note that, in the proceedings that are the subject of the present appeal, one of the expert witnesses made the point that a person suffering from the appellant's disorder tends to act in a way that is about attention seeking for themselves and therefore reflects an inability to put their child's needs over and above their own. The opinion was expressed that, on occasions, it seemed that there was a blending of the mother's personality with that of her children and she was not able to differentiate between herself and her children. It was also said by one of the expert witnesses that the diagnosed condition is intractable and virtually untreatable and that the appellant has demonstrated a lack of insight of her situation and an inability to change her behaviour, as evidenced by a significant number of episodes that have occurred over a long period of time.

[19] In the course of his reasons, Mr Ward SM catalogued a long history of bizarre conduct on the part of the appellant extending from the close of 1998 up to the close of 2001. He recounted strenuous efforts on the part of relevant authorities and community agencies to assist the appellant to rehabilitate herself and improve her behaviour to the point at which she might be capable of caring for her daughter. He noted that, by early 2002, it was said that she had formed a new relationship with a man other than AK, although she was not forthcoming as to the identity of that person.

[20] It seems that the appellant's behaviour did not improve during 2002. Mr Ward SM pointed out that, during the period from May to November of that year, police had been called to attend to disturbances created by the appellant on a number of occasions. Whilst he noted that there had been some improvement by the appellant, it was not sufficient to justify him ordering that K be returned to the appellant's custody. He observed that the child had been with her then current foster carers for more than 12 months and was doing very well in that environment. In the circumstances, he refused to vary the existing arrangements.

[21] The matter came before Mr Birch SM in mid-2003, both as to a mandatory review of the earlier proceedings and also by reason of an application by the Minister for a variation of the then existing order related to KK. At that time KK was about 6 years of age and remained in foster care. As earlier, her father continued to show no interest in the proceedings.

[22] Mr Birch SM noted that, as a result of an application made by the Minister on 5 February 2003, Mr Ward SM had made an interim order to the effect that:

1. Sole guardianship was to be with the Minister for 12 months;
2. The present appellant was to have access to KK for one 2-hour access visit each fortnight; and
3. Such access was to take place only under the supervision of a person approved of by the Minister.

[23] On 7 March 2003, on the application of the Minister, Mr Ward SM made a further interim order eliminating an earlier provision for limited overnight access. The present appellant appealed against the interim orders, but that appeal was dismissed by Thomas J on 17 April 2003.

[24] The proceedings went forward before Mr Birch SM, for the statutory review and as to the propriety of continuing the interim orders. Those proceedings were by way of rehearing and also occupied six hearing days. On 28 August 2003 Mr Birch SM found that KK continued to be child in need of care and vested sole guardianship in the Minister for a further period of two years. He granted the present appellant limited weekly access and foreshadowed some future overnight access in mid-2004. The order envisaged that the present appellant was to complete a parenting course and continue certain counselling.

[25] In the course of reasons published by him, Mr Birch SM reviewed the evidence that had been led before him in some detail. That evidence

included the testimony of a psychiatrist, the senior out of home case supervisor, a clinical psychologist, KK's caseworker, a person associated with the Church of the Rock who had known the present appellant for about five years, a school psychologist/counsellor, the appellant herself and a social worker who had been involved in counselling her.

[26] The learned magistrate noted a divergence of views expressed by the two psychologists. For reasons based on relative qualifications and experience, he preferred the opinions of the psychologist called by the Minister. He concluded that the evidence established that, in the past, KK had suffered serious emotional impairment as a consequence of the conduct of the present appellant and that, to leave her in her surroundings as they had been, would be to expose her to continued substantial risk of further emotional impairment. KK continued to be a child in need of care.

[27] The learned magistrate was further of the opinion that the present appellant was not able to make proper decisions for the care and welfare of KK and that, on the evidence, the only appropriate order, at that time, was to vest full sole guardianship in the Minister, to be reviewed after a further two years.

[28] Mr Birch SM concluded his reasons with these remarks:

> "97. Much has been made of what has become known as the Minister' s erraticism. This is particularly so from the mother's point of view. It is her contention that this erraticism has caused her to "jump through hoops", "the goal posts have been moved" and she is never able to comply with the Minister's

demands. I agree with Mr Young this is only one of many side issues in this case.

98. A consideration of the evidence does not in my view support the mother's contention. The history of the case since KK's birth is one of change. The changes in the child's age, carers, KK's emotional state and the mother's behaviour. The Minister's change of approach, case plan and so on merely reflect a reaction to the changing needs of KK. What is clear from the history of this matter and evidence before me is that the Minister needs greater flexibility in dealing with the changes or events of inappropriate behaviour by the mother. CC also needs some flexibility with access arrangements particularly when under stress and BPD [Borderline Personality Disorder] is causing mood and behavioural changes that impact upon KK.

99. I accept Mr Goldflam's submissions and CC's evidence that she has made considerable changes in her life both recently and generally since KK's birth. It is clear, on the evidence, there is still a long way to go. But if CC is able to put in place the skills learned at the parenting course, continue with counselling and interact effectively with FACS there is in my view still a possibility of reunification. This is of course dependent upon KK's ability to cope with full-time care as well as an evaluation as to the best interests for her welfare at such time.

100. It is Mr Young's submission that reunification or increased access is out of the question for the reasons highlighted above. Mr Young submits his view is supported by the evidence. Clearly Ms Delahunty considers the current access arrangements are sufficient to maintain the bond between mother and daughter. She does not rule out reunification. She is obviously concerned with the impact of CC's behaviour upon KK. Ms Fogarty has not ruled out reunification neither has Ms Owens. After considering the evidence the only inference to be drawn is that reunification is still a viable option. This is so having regard to the purpose and effect of the Act namely, "to provide for the protection and care of children and for the promotion of family welfare".

101. The evidence in my view justifies a graded increase in access with supervision by the Minister coupled with increased flexibility for the Minister to assist and deal with those periods in which CC is under stress and not behaving appropriately. The Minister also needs a clear statement from the Court as to

> what is required of CC in caring for and re-establishing an appropriate relationship with her daughter. In such a case "reasonable attempts" to comply with the Court orders will not be enough."

[29] In reasons for decision published by him in relation to the orders now appealed against, the learned magistrate recited that, following the decision of Mr Birch SM, it was decided by the Minister that an independent review should be made of the case. The Minister retained Dr P Meemeduma, an independent social worker, who is based in Western Australia and is also an Associate Professor of Social Work at Edith Cowan University, to conduct such a review. In the result, Dr Meemeduma recommended the adoption of a case plan that involved intensive support of the mother over a trial period, with a view to adopting a shared care plan ultimately directed towards reunification of KK with the appellant.

[30] That recommendation led, in turn, to the making of a consent joint guardianship order on 10 November 2004. This was followed by the implementation of what has been described as an elaborate and highly resourced program to support the appellant. Such was the level of support that it seems generally to have been accepted that it could, as a matter of practicality, only be continued for a limited period of time.

[31] The learned magistrate accepted, on the evidence before him, that the plan evolved by Dr Meemeduma had clearly failed. It was the subject of some criticism by other experts called as witnesses before him, one of whom expressed the opinion that Dr Meemeduma's premise for adopting the shared

parenting strategy could be viewed as a naive and ill-conceived plan that was very theoretically oriented and took little account of the actual clinical history, the severity of the appellant's pathology or the psychopathology in KK.

[32] Be that as it may, the learned magistrate ultimately concluded that:

> "Dr Meemeduma appears to have proceeded on the basis that if the mother were able to be re-educated and trained to be a competent parent then the needs of the children would automatically follow. The effect of this approach is to put the needs of the mother ahead of those of the children. Both the Department and Dr Meemeduma fell into this error for a substantial period of time, at least partly because the mother became adept, because of her familiarity with workers and her ability to manipulate them to some extent, at having them address her own needs ahead of those of the children. This is not a case where addressing the needs of the mother will automatically address the needs of the children. Probably for the same reason certain behaviours of the mother were tolerated beyond the point that they should have been, and should never again be tolerated in the future. The effect of that tolerance was to cause harm to the children in circumstances where their protection was paramount."

[33] At one stage during the attempted implementation of the reunification strategy, on 23 March 2005, an interim order was made removing JC from his mother's care. This apparently resulted from reports to FACS expressing concerns as to his welfare.

[34] After some discussion involving the appellant, departmental officers and relevant experts, JC was returned to the custody of his mother subject to the implementation of a so-called "*safety plan*", the main elements of which were regular, timely attendance of JC at day care, regular attendance by the appellant for counselling sessions and attendance by the appellant at a

specific residential program in Western Australia, to help her to better care for the children.

[35] It is said that all three elements of the plan failed, with the result that JC was finally removed from his mother's care on 27 May of 2005. The relevant history is set out in reasons for judgment published by Riley J on 2 November 2005 in *CC v NT Minister for Health and Community Services and Others [2005] NTSC 69 ("the Riley judgment").*

[36] The hearing before the learned magistrate extended over some six hearing days and he received a great deal of expert evidence. In the course of his reasons he summarised a long series of incidents depicting what he described as unusual, bizarre or dysfunctional behaviour by the appellant that extended from late August 2003 through to late August 2005. He observed that there had been some dispute before him as to the relative severity of the appellant's borderline personality disorder. However he expressed himself as satisfied, on the whole of the evidence before him, that her condition is a severe one. That assessment was consistent with the conclusion arrived at by Mr Birch SM in 2004.

[37] In the course of his reasons he summarised the evidence of Dr Meemeduma at some length. He noted that, in essence, whilst having regard to what had occurred, there remained issues as to the appellant's parenting capacity and that there was a need for KK to have a stable secure care situation from which she could then negotiate and manage her relationship with her mother,

she adhered to the view that it was important that there be significant ongoing access by the appellant to KK so that the latter would not start to fantasise concerning who her parent was. She had expressed the view that JC should remain in his mother's care with various safeguards built in to support that care. She considered that the appellant had sufficient parenting competencies to ensure the safety and well-being of JC, although they needed to be reinforced, developed and monitored for some period of time. In her opinion there ought to be substantial immediate access by the appellant to JC with a view to him returning into her care as soon as possible.

[38] The learned magistrate observed that the views of Dr Meemeduma were by no means shared by the other experts who gave evidence before him. This was particularly so when it was noted that there had been a deterioration in the mother's conduct during access periods with JC. I understand him to have accepted professional opinions to the effect that it was unrealistic to aim for any form of reunification and that the stage had been reached at which there was a need to set up a stable foster parenting situation with the two children in a way that ensured their ability to commit to their long-term carer, with there being only sufficient access to ensure that a child does not fantasise concerning his or her biological parent.

[39] Having given careful consideration to the whole of the evidence before him, including a review of the evidence given by the appellant herself, the learned magistrate expressed his ultimate conclusions in these terms:

> "As tragic as it undoubtedly is for the family I am satisfied on the whole of the evidence that the mother will never have the ability or develop the skills to appropriately parent the children or either one of them. This I find to be the direct result of the severity of the histrionic borderline personality disorder from which she suffers. It is my considered view that restoration of the children to the mother will never be a viable option. Accordingly, contact between the children and the mother will necessarily be for purposes of identification so that the children will continue to have knowledge of their mother as they develop into adulthood. If that contact continues to be harmful for the children, or either of them, then that contact will be terminated. I propose to include in the orders parameters on the behaviour of the mother during contact visits to ensure that harm does not befall children as a result of those visits."

[40] He went on to comment:

> "What these children require now is certainty in relation to their situation so that they will no longer suffer concerns about the permanency of their placements and the transfer of their primary attachments from the mother to their carer/s. While it is not possible to provide absolute certainty, as much certainty as is possible should be put in place for them. I am satisfied that the lack of certainty in the case of KK has been a major cause of the behavioural problems encountered and described by Dr Blunt in relation to KK."

[41] It should be recorded that the reference to behavioural problems on the part of KK was to the fact that a number of her placements in the past had failed due, in the opinion of the experts, to the unpredictability and instability of the situation and divided loyalty issues that had really sabotaged lasting, long-term placements. It was said that she had tended to model inappropriate behaviour from her mother.

[42] As to the question of access, the learned magistrate said that he accepted the general consensus of the various expert witnesses recommending that the appellant have access to JC, subject to her appropriate behaviour, at least

four times a year, increasing to six times a year depending on the success of those access visits. He agreed that JC requires more contact with his mother than KK does, because KK will always have knowledge of her mother even if access were to occur infrequently or cease altogether. JC was not in that situation, given his young age. Nor had JC been subject to the lack of certainty experienced by KK over a number of years.

[43] The learned magistrate felt that the most important aspect for KK at present and for the foreseeable future is the certainty of her placement and the transfer of her primary attachment to her foster carer. He said that he accepted the evidence that the mother's behaviour had deteriorated over time and that there ought to be a reduction in the frequency of access by KK with the mother. The evidence indicated that access by the appellant to KK ought to be between two and four times a year.

The appellant's submissions on the appeals

[44] On the hearing of the appeals the appellant appeared and presented arguments in support of them in person. (She had been represented by very experienced counsel in the proceedings before the learned magistrate). She presented as an articulate and far from unintelligent personality, although it is apparent to me that she does lack insight into her diagnosed condition and the practical realities of her situation.

[45] Unfortunately, her written and oral submissions indicate that she does not have any real appreciation of the legal principles upon which I am bound to

address her appeals. It must be said that, in the main, she seeks to advance assertions of fact that, in large measure, are a restatement or elaboration of the evidence given by her and her witnesses before the learned magistrate and, in part, are a commentary upon what she sees as being the shortcomings in the manner in which certain expert witnesses went about formulating their opinions. For example, her criticisms of the expert witnesses really seek, at least to some extent, to put before me factual evidence of what has occurred, by way of extension of factual evidence that may have been given at first instance.

[46] In truth, her presentation on the appeal was, in substance, an attempt to re-argue the merits of the case with a view to persuading me to arrive at a different conclusion on the evidence. She sought to assert that FACS had, at least in some respects, misconstrued or attempted to misrepresent the true factual situation, particularly as between herself and KK.

[47] She also complained of the weight that was attributed by the learned magistrate to certain expert evidence given before him, amongst other things, on the basis of what she asserts was an inadequate grasp by the relevant expert of the true factual situation. She sought to challenge the qualification of one of the experts in question (Ms Single) to make the assessments that had been expressed by her - particularly as she contended that Ms Single had had no direct contact with either her or the children. She sought to argue that there was no proper basis for various opinions expressed and set out to propound her own views on the same subjects. She

argued that the reasons of the learned magistrate were fatally flawed by reason of his reliance on the evidence of Ms Single.

[48] The appellant also sought to derive some support from the opinions expressed by Dr Leon Petchkovsky, a senior consultant psychiatrist and the clinical director of Central Australian Community Mental Health. In that regard, she proffered a letter dated 18 July 2006, in which he suggests that the appellant is "*actually improving psychologically and behaviourally*" and expresses the view that it is tragic that, because of the lack of access to adequate supportive and practical mother and child nurturance programs, the appellant should be treated as incurably, permanently dysfunctional in her mothering capacities.

[49] As to this letter, it must be said that no evidence was given by Dr Petchkovsky before the learned magistrate and no ground has been made out for the admission of fresh evidence against the objections of the other parties to the proceedings.

[50] In relation to the second ground of appeal the appellant, in reality, complained of the rejection of the views expressed by Dr Meemeduma and argued that the learned magistrate ought to have preferred her opinions to those of the other expert witnesses. She sought to impugn the witness Quinney on the basis of her cross-examination to the effect that she had, on one occasion, written what was said to have been a misleading letter to the appellant, designed to make the latter "*feel better*".

[51] The third ground of appeal seeks to challenge the acceptance by the learned magistrate of the proposition that the appellant suffers from a severe histrionic borderline personality disorder. She sought to argue before me that such a finding was erroneous, because none of the witnesses had claimed that she suffered from such a disorder. Moreover, she contended that it had never been established that a condition of Histrionic Borderline Personality Disorder even exists.

[52] As an adjunct to that argument she contended that, in any event, Dr Petchkovsky had certified that her condition was improving. She sought to raise a substantial series of facts with me in her written submission that, in large measure, go to the general merits of her case, rather than any specific ground of appeal.

[53] She argued that, to her observation, the placements of her children in foster care were patently having an adverse impact on them. She contended that the learned magistrate had failed to recognise the positive evidence in relation to her caring for them and had not acknowledged the adverse impact on them of the fostering arrangements made by FACS.

[54] In the course of her oral submissions it proved difficult to keep the focus of the appellant on the specific grounds of appeal relied on. She constantly sought to drift off to discuss general issues of what she perceived as the merits of her case generally. She argued that her youngest child had thrived whilst she looked after him.

[55] She said that, whilst she conceded having, at an earlier age, been anorexic and had exhibited obsessive-compulsive type behaviours, she did not now suffer from any psychiatric condition. She was in a situation in which an earlier "*label*" had stuck with her.

[56] She explained something of her past history and why she had experienced difficulties with FACS and certain of the reasons why practical difficulties had arisen. She sought to explain the adverse effect that removal of her children had had on her, including the fact that her youngest child had recently failed to even recognise, much less respond to, her when she had seen him.

[57] The appellant submitted that many of her alleged bizarre conduct incidents had been either misreported or had not even occurred. She drew comfort from what she construed as the views of Dr Petchkovsky and what she interpreted as his opinion that she did not in fact suffer from a psychiatric disorder at all, by way of contrast with the effects of stress and distress at losing her children and the sense of isolation being experienced by her.

The submissions of the respondents

[58] Mr Young, of counsel for the Minister, pointed out that, by virtue of s 50(2) of the *Community Welfare Act*, the provisions of s163 of the *Justices Act* govern the present appeals. Accordingly, to enliven the appeal jurisdiction, the appellant bears the onus of establishing either error or mistake on the

part of the learned magistrate as to a matter or question of fact alone or matter or question of law alone or matter or question of both fact and law.

[59] He drew attention to the unreported decision of Kearney J in the case of *JK (a juvenile) v Waldron* [1988] NTSC 465. I took him to submit that, in the case of discretionary orders such as those now under review, an appellate court ought not to interfere in the absence of demonstrated error or mistake, unless it could be shown that a finding of fact made was one that a reasonable person could not have made on the evidence.

[60] I pause to note that that case stands as authority for the proposition that an appellate court would be justified in interfering if it could be demonstrated that the relevant decision was unsafe or unsatisfactory, because the evidence was insufficient or of such a nature that it would be dangerous to arrive at the impugned result.

[61] It was pointed out by Mr Young that the primary jurisdictional finding of the learned magistrate was that the relevant children were in need of care (s 42, *Community Welfare Act*) and that, in making any such finding, the learned magistrate had been required to take into account the several considerations set out in s43 of the statute. As to this, I note that the general scheme of the legislation and its concepts are described at some length in *the Riley judgment*. There is no need to re-traverse the same ground.

[62] In essence, it was Mr Young's submission that no error on the part of the learned magistrate had been demonstrated and that, on the evidence at first

instance, the conclusions arrived at by the learned magistrate were fairly open to him. The appellant had not identified any proper basis for interference with the decisions appealed against.

[63] Mr Whitelum, of counsel for the children's representative, provided historical material complementing that supplied by Mr Young and generally supported the latter's submissions.

Appeal principles

[64] It is well settled that, as a matter of general principle, an appellate court ought not readily to interfere with the exercise of discretion by court at first instance which has had the advantage of seeing and hearing the parties concerned and their witnesses. Specific error or mistake, as envisaged by s 163 of the *Justices Act*, must clearly be demonstrated, or error or mistake must be apparent by reason of the fact that the appellant is able to demonstrate that the decision at first instance was one that no reasonable court could have reached on the evidence (cf *AH v Minister for Families and Communities* [2005] SASC 339). Furthermore, an appellate court ought not to pay mere lip service to the obvious need for restraint in interfering with the decision of an experienced magistrate constituting a court of specialist jurisdiction, arrived at after hearing some days of evidence (*Re Barbara and others* [2006] NSWSC 536).

[65] In the instant case the learned magistrate was sitting as a court of specialist jurisdiction. He enjoyed the advantage of having and considering a

substantial body of expert and factual evidence and the submissions of experienced and competent counsel representing all parties. In particular, counsel for the appellant carefully cross-examined the various expert witnesses called by the other parties and the appellant herself gave oral evidence at considerable length. The learned magistrate was therefore in a position of considerable advantage in assessing the witnesses and the evidence given by them, by way of contrast with the situation of an appellate court.

[66] The present submissions of the appellant must, accordingly, be viewed in that context.

The evidence at first instance

[67] By way of introduction of this aspect, I must assure the appellant that, as I undertook to do, I have carefully studied both the full transcript of the proceedings before the learned magistrate and the relevant primary documentary exhibits tendered to him. I have considered her detailed submissions to me in light of that examination.

[68] It is fair to say that, in presenting her submissions on appeal, the appellant has sought to derive considerable comfort from her understanding of the opinion evidence that was given by Dr Meemeduma. It is therefore convenient to first distil out of the evidence of that witness, the key theses that she sought to propound. In doing so, it is necessary, separately, to consider her views as to each of the children.

[69] In discussing the situation of KK, the essence of Dr Meemeduma's evidence really comes down to these points:

- KK is a troubled child who has exhibited a variety of behavioural problems that are clearly the product of what has been, for her, an unstable environment in which the behaviour of her mother has been dysfunctional. There has been "*a lot of damage*" in the appellant's relationship with KK.

- Dr Meemeduma accepted that it was in the best interests of KK that, for the immediate future, she be in a stable foster care situation. Her position should be reviewed in about two years time.

- However, it was her view that KK needs an ongoing relationship with her biological family. "*She needs to know who her mother is, she needs to have a relationship with her sibling and she needs to learn coping skills and mechanisms to manage the nature of the people who are her family members……*".

- To achieve a desirable stable, non-anxious primary caring relationship "*does not require the exclusion of the mother*". Such an exclusion can lead a child to fantasise who the parent really is. "*Even though that parent will be difficult and problematic that child needs to know who they are and they need to find a way of managing that knowledge and managing the history of that relationship*".

- Early in 2005 the appellant herself had developed sufficient insight to appreciate that "*she had to give up the dream of having KK back in her full-time care in the near future, because her priority to JC was just too much*".

- It was desirable that there be weekly access as between KK and the appellant on the basis that it was clear to KK that she was in a stable, primary care situation with an agreed foster carer. KK's need for predictability and stability does not necessitate exclusion from regular contact with her mother. "*What needs to be excluded its uncertainty and anxiety around that contact*". It will be impossible to maintain an ongoing relationship if KK only sees her mother very infrequently.

[70] Dr Meemeduma's opinions in relation to JC were as follows:

- She accepted that the appellant "does not have the required level of cognitive skills to parent competently". However, "we have

seen changes in that capacity, and… those changes need to be built on".

- She agreed that there was a need for ongoing intervention to facilitate further capacity development. Her thesis was that JC ought to return to the appellant's custody, with appropriate support and supervision, for a modest period of time to enable parenting skills to be built up.

- In cross-examination, this witness said that she felt that the appellant "*has now beginning level minimal [cognitive behaviour reasoning] ability*". When asked whether such a level was good enough, she responded in what I take to have been the affirmative and said that "*… giving that we are not discussing a child that has been physically harmed, that has been neglected in some form that she has been able to do that at a level that has ensured the safety and well-being of her child. But it certainly needs to be built on*".

- Dr Meemeduma did not profess detailed knowledge of certain behavioural incidents on the part of the appellant that had been reported earlier in 2005. She accepted that JC was potentially at risk if in the care of the appellant, but was unaware of any actual risk that had materialised.

- When details of certain incidents involving risk to JC were put to her, Dr Meemeduma said that she could not guarantee that such incidents would not re-occur in the future. However, she felt that there had been signs of cognitive improvement in the appellant, over time. She went on to say –

- "*I cannot talk from a position that says that the problematic behaviour is now totally eliminated. So what we see in a sense is … that the situation has arisen again with stress [sic] has responded to in this problematic behaviour and creates a situation that is unacceptable in terms of the care and well-being of her child. What we need to assess is in that developmental progress is she making sufficient progress around her own cognitive awareness that situations like this in the future are eliminated and do not happen again*".

[71] When this witness referred, in cross-examination, to the minimal capacity of the appellant to cope with social interactions creating stress, she was again asked whether that was good enough. She responded to the effect that she

believed that it was sufficient to ensure that there was safety for JC and his well-being. She had, in the course of her evidence in chief, expressed the view that the appellant's parenting competencies had improved from the time when she had KK in her custody. Moreover, she perceived a much greater level of insight and understanding on the part of the appellant that her behaviour had been socially unacceptable and was inappropriate to the level of stress that she had in her life - that she needed to find alternate ways of coping with that stress.

[72] The opinions expressed by Dr Meemeduma were not shared by the expert witnesses Ms Walsh, Ms Quinney, Dr Blunt and Ms Single. The first two of these witnesses had had extensive involvement in the actual management of the situation concerning the appellant and her two children. Dr Blunt had been retained by FACS as an external consultant psychologist, as had Ms Single.

[73] Ms Walsh was the client services manager of FACS in Alice Springs. She held tertiary qualifications in both psychology and social work and had 20 years practical experience, mainly in statutory child protection areas.

[74] This witness indicated to the learned magistrate that, by the close of 2004, she and the relevant case manager were of the opinion that the conduct of the appellant indicated that, in terms of her own insight, she was regressing. She was retreating from taking responsibility for her own actions, to blaming others. Ms Walsh quite fairly accepted that a severe electrolytic

imbalance episode experienced by the appellant at about that time could well have been a contributing factor. However, in one of her reports, she made the comment that it was apparent that the appellant seemed genuinely unable to utilise her intelligence and high-level verbal skills into appropriate, effective and socially acceptable problem-solving behaviour.

[75] Ms Walsh told the learned magistrate that the person who was asked to provide long-term care for KK had made it quite clear that she was only prepared to do so provided that the appellant's access was quite restricted in terms of periodicity, because of how KK had reacted after access occasions. I took her to have conceded that, for a large amount of the time, the appellant did manage the care of JC adequately provided that she had a high level of external support, but that, from time to time, she was, nevertheless, unable to manage her behaviour in an acceptable manner.

[76] Ms Walsh did not seek to quarrel with the proposition that children need to know who their parents are, as part of understanding their own identity, but she made the point that permanency planning was an important consideration. The problem was to get the balance correct, so that the level of contact with the appellant did not undermine the child's ability to commit to a long term carer.

[77] When challenged by counsel for the present appellant concerning the proposed infrequency of contact between KK and her mother, Ms Walsh was constrained to respond - "*We're not talking about a relationship-building*

exercise with a view to re-unification, we're talking about them growing up with the knowledge of who their mother is. The two are very different."

[78] I next move to the evidence that was given by Ms Quinney, a registered psychologist, who was primarily responsible for the implementation of the intensive support program that was provided by FACS to the appellant from 19 October 2004 until 28 January 2005, pursuant to the recommendation of Dr Meemeduma. This witness prepared several written reports based on that involvement and what occurred subsequently.

[79] I do not propose to summarise the evidence of this witness in detail, as it is fully reported in the relevant transcript. Suffice to say that she reported a series of situations in which the conduct of the appellant had rendered scheduled access periods abortive at the last minute. By way of example, on one of them the appellant was found naked and crying outside the front door on a doona. On another, the appellant was agitated, screaming and using bad language.

[80] There was also a bizarre behaviour episode when, in the December 2004, the appellant was taken to hospital and insisted on drinking large quantities of water despite concerns about her sodium levels. She was very agitated, removed her drip and defecated on the floor in the Emergency Department. There were also concerns at the state of her house.

[81] Ms Quinney said that, by the end of the three-month intensive support plan, there were only small changes in the conduct of the appellant and that there

was concern whether those could be sustained and maintained. These were essentially related to the ability to care for JC. (Ms Quinney reported in 2005 that the appellant was able to articulate apparent insight into what was required to develop necessary parenting skills, but without the ability to put them into practice on any consistent level. It was also the view of Ms Walsh, as expressed in one of her reports, that the appellant "*is able to articulate change, but is unable or unwilling to effect it*").

[82] It is important to note that, in her report of 27 March 2005, Ms Quinney summarised the outcome of the intensive support plan in these terms:

> "Despite this extensive support program and acknowledging the changes [the appellant] has made, assessment has demonstrated that a continuous, stable and predictable environment between [the appellant] and [KK] has not been effectively implemented nor has [the appellant] been able to demonstrate an ability to put her daughter's needs above her own. This is coupled with [the appellant] also not being able to demonstrate significant insight, knowledge and guidance of her inappropriate behavioural responses to emotional distress and an ability to respond within accepted and appropriate norms".

[83] This witness attempted to maintain significant contact with the appellant until the end of May, by which time she felt that the situation was such that JC should be removed from the appellant's care.

[84] The witness Dr Lucy Blunt, a clinical psychologist practising in Sydney, was retained by FACS in mid-2005, as a consultant, to prepare a report in relation to KK, as to the most appropriate long-term care option and contact plan. For that purpose she considered two specific foster care options.

[85] As I understand the evidence, it was the view of this witness, when she reported on 24 July 2005, that KK was suffering from what were described as severe abnormalities in the areas of attachment behaviour and emotion. These were impacting on her peer relationships, her placement and her ability to form friendships. The witness noted that three long-term placements had broken down over a period of some four years.

[86] It was Dr Blunt's view that two contact occasions per year would be sufficient to consolidate the children's sense of identity, although four would probably be more balanced.

[87] Dr Blunt could not accept the proposition that the appellant ought not to have been judged in relation to certain of her behaviour, because that behaviour might, in itself, have been a response to the extreme stress that she had been under due to the litigation environment in which she found herself. This witness argued that the extreme nature of the appellant's behaviours indicated that, when she was under stress, the children were more at risk. Her conduct destabilised both the children and their placements. The very stress associated with forthcoming access periods could well, in itself, precipitate inappropriate conduct.

[88] This witness pointed out that, at the time when she gave evidence, the court processes had extended over some seven years and that the stage had been reached at which it was important that permanency planning be put in place. KK needed to know that she had a home, albeit not with her mother. She

needed to grieve that loss and get on with her life. It was important that she be able to form a primary attachment that provided security, stability predictability and the care giving role, by way of contrast with the significantly dysfunctional model to which she had been exposed.

[89] Dr Blunt disagreed with the proposal of Dr Meemeduma for more frequent access, because of the undermining effect that it would have. KK was, she said, unfortunately very aware of her mother and the difficulties that had led to her removal and could do without frequent exposure to her mother's behaviour. She went on to say "*I think that what [C] to date has been able to provide for KK has not been complete enough to be able to provide her with the resilience which she needs, and I think the fact that she has a disorganised and anxious attachment indicates that this child doesn't have resilience, that she is doing it on her own and that this is hard and that she needs a family to back her up. And I think that if she can be well integrated into a foster family…… the chances are that she'll have an opportunity to build resilience*".

[90] When Dr Blunt was asked if she would accept that, when you ask KK who does she love, that the first person she would nominate would be her mother, her response was to the effect "*Yes. But she also spoke of… being very fearful of her mother*".

[91] When it was put to Dr Blunt that there was a high risk that very infrequent contact might lead to the situation where the relationship just dies, she

responded to the effect that the difficulty in this case was that the connection was too intense and that such a risk was worth taking. As she put it "*... the intensity needs to go out of it, because the intensity of it is not benefiting KK*".

[92] In the course of cross-examination, counsel for the children put a number of detailed incidents that had occurred to Dr Blunt in relation to JC, some of them being over a relatively short timeframe. Her comment with regard to those situations was:

> "I mean to me it's self-explanatory. If this is the nature of the contact that we are talking about, what are we asking for with these children? Who's it for? To me, this is the sort of contact that would traumatise a child. So what we're looking at is not weekly contact, we're looking at weekly trauma".

[93] When the question was asked of this witness "*What are the consequences if we limp on as we have been?*", her response was:

> "I think that it would be reasonable to assume that she continues to model inappropriate behaviour from her mum. I think that she would maintain a level of anxiety and hyper-vigilance during contact visits and that the frequency of those contact visits would depend upon whether or not she ever put her guard down, so to speak. As long as she is on guard she is likely to be not trusting of others, she is likely to be very self-reliant, and she is likely to start to make her own way from a very early age. So you would predict that, you know, she might leave any care situation at a very young age because she's self-reliant anyway and that the placement would be more likely to break down. If she doesn't form - if she doesn't have an appropriate modelled relationship about give and take within a relationship, about learning about forgiveness, about learning about being honest, about learning how to nurture someone else and how to allow yourself to be nurtured, then you run the risk of perhaps kids putting themselves in risky situations whereby-I mean a lot of these kids end

up in the very unfortunate position of believing that physical love is able to be equated to heart love, if you like".

[94] Mr Whitelum put a series of documented incidents (by way of examples of what can only be described as bizarre and unpredictable behaviour on the part of the appellant) to the witness and questioned her as to the implications of those incidents for present purposes. I do not propose to go into those aspects in detail at the present time. It will be sufficient to say that the incidents referred to were regarded by Dr Blunt as, generally speaking, raising serious concerns for the well-being of the two children, and particularly JC, if they were in the care of the appellant. It must be recorded that, in her report of 24 July 2005, Dr Blunt set out a comprehensive description of many relevant incidents related to the behaviour of the appellant that dramatically illustrate what has been her unpredictable and somewhat disturbing conduct.

[95] The evidence of Dr Blunt was supported by that of Ms Single, who is a senior clinical psychologist practising in Newcastle. Essentially, she supported the views of Dr Blunt. However, her opinion was that there should be no access for a period of 12 months and that, thereafter, access should occur only four times per year on a strictly supervised basis. Like Dr Blunt, she felt that the risk of harm arising from a fairly minimal contact for identity purposes was far less than that which was likely to result from the type of contact that had been occurring.

[96] She also joined issue with some of the views expressed by Dr Meemeduma as, in effect, being those applicable in an ideal world, but out of touch with reality in the present case. She said that what has to be looked at is the children's behaviour now and the more important parts of their development such as their attachment and personality development. As she put it:

> "It's a little bit like, you know, if you don't have the foundations of a house it is no use having nice curtains because that's really what it is, identity is a much later developmental issue, biological identity and that is something that people can resolve in adulthood. However, unfortunately with children who miss out on the basic building blocks, and this is really what we're asking for in reparative long-term foster care, that these children need to recover from the attachment damage that they've suffered and unless you have that, you know, the identity issues are very minor compared to these".

[97] She agreed that the minimal identity access arrangements proposed were not ideal, but they were much less harmful than exposure to abuse during contact visits. She described KK as having been living in limbo for a long period of time.

[98] This witness accepted that she had not had an opportunity of assessing the appellant personally and that her evidence as to the appellant was based on the materials provided to her.

[99] In the course of her cross-examination, counsel for the appellant put a series of psychiatric reports to her in an endeavour to demonstrate that there had been some lack of unanimity as to the appellant's correct diagnosis.
Ms Single agreed that Dr Petchkovsky had, at one stage, diagnosed a non-specific personality disorder with borderline and histrionic traits. However,

she testified that, in an e-mail that she had received from him only three months previously, he had said that the definitive diagnosis was one of severe histrionic personality disorder.

[100] It was put to this witness that the appellant's condition was, in fact, by no means as intractable as had been suggested. Her response was to the effect that whilst sometimes, with treatment and as a person gets older and perhaps in a stable relationship and lifestyle, some behaviours may abate to a certain extent, there has been no research evidence to establish that the personality traits of someone with a borderline personality disorder can be changed.

[101] The appellant gave evidence before the learned magistrate at considerable length. It is neither necessary nor practical to attempt a full resume of this material. I have read the relevant transcript in detail. In the course of her evidence she expressed many of the views that have been put forward orally or in writing on the present appeal.

[102] She contended that, after his birth, JC thrived under her care and sought to explain how it was that various of the incidents referred to by other witnesses had come about. She explained some of her difficulties in relation to KK because of her need to give priority to caring for JC as a young baby. She further explained that some of the apparently bizarre treatment accorded by her to JC was routinely carried out in the Aboriginal culture with which she had long identified and was intended to benefit and not harm him. This

included an incident that occurred on 8 September 2005 when JC was "*smoked*" over a fire by the appellant and his hair singed.

[103] The appellant testified that she was unable to participate in the so-called *Ngala* program in Western Australia because of her objection to the type of food that was provided at that program. This did not, she said, accord with her diet, particularly having regard to bad reactions that she had to certain foods. She told the learned magistrate that she had not had any organised access to KK following the removal of JC. This was, she said, because she had been absolutely devastated by the removal and her emotional and mental state had been adversely affected. She gave her version of certain incidents that had occurred in relation to JC whilst he was in her custody and her observations of him during periods of access that she had to him after he had been taken into care.

[104] It should be recorded that, in the course of the hearing, the learned magistrate received a very substantial quantity of written material, particularly in the form of written reports that had been generated by the various expert witnesses at relevant times, contemporaneous hospital and FACS records and certain medical reports, including a report that had been written by Dr Petchkovsky.

[105] I have studied this material which, in reality, formed much of the basis of the cross-examination of witnesses before the learned magistrate. I do not propose to attempt a summary of it. Such an exercise is neither necessary

nor practical in the course of already very lengthy reasons for judgment, although I will point up some salient features emerging from it in due course. I merely comment that the documentary material, *inter alia*, spells out in graphic terms a plethora of incidents of bizarre behaviour on the part of the appellant upon which the respondents relied before the learned magistrate.

A consideration of the three grounds of appeal

[106] I now return to the specific grounds of appeal relied upon by the appellant.

[107] It is necessary, in addressing them, to make the initial point that I have attempted to traverse the evidentiary and factual issues at some length in order to portray at least a reasonable picture of the very large amount of material considered by the learned magistrate. It must be said that the various evidentiary aspects relied upon by the parties were explored in great detail in the course of the hearing before him and that a review of his reasons for judgment readily reveals that he had an excellent appreciation of the relevant issues.

[108] The first ground of appeal asserts that the findings made are against the weight of and not adequately supported by the whole of the evidence. No doubt, that plea generally represents the appellant's perception from her viewpoint. However, a balanced consideration of the history of relevant events and of the evidence before the learned magistrate, as I have attempted

to summarise it, readily reveals that there was ample material upon which he could fairly have come to the findings that he actually made.

[109] At the end of the day, it was very much a question of the assessment of the witness evidence and the inferences that the trier of fact was compelled to draw, having regard to the whole evidentiary context. Moreover, much depended on a careful assessment of the accuracy, credibility and personality of the appellant herself as a witness, as to which this Court is in a position of permanent disadvantage, by way of contrast with the situation of the learned magistrate.

[110] I am satisfied that it simply cannot be demonstrated that, in general terms, the findings made were not adequately supported by or are against the weight of the evidence. As to this, the appellant has fallen far short of establishing any error or mistake on the part of the learned magistrate. In reality she has done no more than urge that her perception ought to be accepted in preference to the assessments made by him and that were fairly open on the evidence.

[111] Having so concluded, I am further compelled to reject the validity of the second and third grounds of appeal.

[112] I consider that the overall weight of the evidence abundantly justified a conclusion that, sadly, the appellant will never have the ability or develop the skills to appropriately parent her children. True it is that there was some difference between the opinions of Dr Meemeduma and the various experts

relied upon by the Minister as to the extent to which the appellant may have made some progress and, more particularly, the extent to which it is desirable for her to have access to the children. However, it seems to me that the expert evidence to the effect that the appellant's problems are permanent and intractable and that she was incapable of properly parenting the children absent a quite unrealistic ongoing level of professional and other support was quite overwhelming.

[113] Indeed, even if it was possible that vast support could have been maintained, there were still unacceptable residual risks. It seems to me that even Dr Meemeduma, eventually, appears to have retreated, at least to an appreciable extent, from the proposition that the appellant had or would be able to develop the requisite skills and then maintain them. As to this it is to be noted that, in her report dated 7 March 2005, Dr Meemeduma said that the appellant's "*stressor driven and socially unacceptable behaviour has consistently acted to undermine the credible changes achieved since the birth of the baby… The ongoing safety of baby [C] is dependent upon Ms [C's] capacity to manage daily parenting stressors without these stressors triggering high levels of anxiety and consequent socially unacceptable behaviour which places [J's] safety in question*". The ultimate main preoccupation of this witness seems to have been the extent to which access periods ought to be provided for, so that the children could grow up with an adequate knowledge of who they were and of their parentage.

[114] I entertain no doubt that the learned magistrate was correct when he made the point that Dr Meemeduma and (for a time) FACS actually fell into the error of putting what were seen to be the needs of the appellant ahead of those of the children, in the hopeful, but erroneous, expectation that addressing her needs would automatically address those of the children. As he pointed out, the net result of that strategy was that certain behaviours of the appellant were tolerated to an inappropriate extent and had the practical effect of causing harm to the children, when their protection should have been the paramount consideration.

[115] In so concluding, that I am by no means to be taken as suggesting that it was a mere matter of counting expert heads, pro and con. The expert evidence fell to be assessed by the learned magistrate, as to its weight, in light of the whole of the evidence and he was not bound to accept any particular aspect of it, if he was not persuaded by the views expressed. Nevertheless, commonsense applied to a factual scenario that was convincingly established by the Minister, strongly indicated the validity of the expert opinions that the learned magistrate was eventually constrained to accept.

[116] I finally come to the ground of appeal that the learned magistrate's finding as to the diagnosis of the appellant's condition was not supported by the evidence and was against the evidence.

[117] It is true that a reading of the various medical reports and records before the learned magistrate indicated that diagnoses of the appellant's condition seem

to have varied to some extent over time. The learned magistrate had the benefit of the findings of Mr Ward SM and Mr Birch SM in that regard. I have earlier referred to some additional material that was placed before the learned magistrate.

[118] The evidence before Mr Ward SM led him to the conclusion that the appellant suffered from a condition known as borderline personality disorder, whilst Mr Birch SM accepted that she suffered from what he described as a severe personality disorder, namely BPD. The learned magistrate found the lack of ability of the appellant to adequately parent the children to be "*a direct result of the severity of the histrionic borderline personality disorder from which she suffers*".

[119] It is clear that the learned magistrate arrived at that conclusion from a combination of the medical reports placed before him and the evidence of Ms Single concerning the recent diagnosis of severe histrionic personality disorder, as advised by Dr Petchkovsky. It will be recalled that this followed an earlier diagnosis by that psychiatrist of what was labelled a "*non-specific personality disorder with borderline and histrionic traits*". In her report dated 9 September 2005, Ms Single commented:

> "One could get into a battle over whether the mother has the diagnosis of Borderline or Histrionic Personality Disorder. In my opinion, she probably has both. However, such quibbles about diagnosis are really 'red herrings' in this case. The fact is that <u>all</u> clinicians agree she has a SEVERE Personality Disorder and this is the issue. Of greater import is:

- [the appellant's] longstanding patterns of aberrant behaviours and their interference with parenting capacity;
- the severity of her Personality Disorder; and
- her intractability to treatment which has been tried (and failed) over many years.

These are the salient issues in this case, rather than professional differences about DSM diagnostic criteria".

[120] It is obvious that the learned magistrate acted upon the most recent diagnosis. Like Ms Single, I consider it unprofitable to argue about what precise diagnostic label ought to be attached to the appellant's psychiatric condition. On any view, the substantial preponderance of opinion before the learned magistrate was to the effect that the appellant's condition, whatever it was, was such that it was, in large measure, intractable and that the very considerable efforts to assist the appellant and their failure had convincingly demonstrated such fact. As Ms Single has pointed out, a personality disorder, by definition, has to do with character rather than specific unresolved conflicts. It follows, she said, that such a disorder is characterised by an enduring pattern of experience and behaviour that deviates markedly from the expectations of the individual's culture and is both pervasive and inflexible.

[121] It must be said that Ms Single's assessment dated 9 September 2005 reads as a most perceptive and convincing document. It exudes a high level of reality and commonsense. I entertain little doubt that the content of it loomed large in the final reasoning of the learned magistrate.

[122] In her assessment Ms Single stresses that the fluctuation in the appellant's functioning and presentation at different times is part and parcel of the Borderline Personality structure. She makes the point that those fluctuations had led to some professionals believing that she had changed, if she was functional for a short period. It had also led to the belief that her behaviours must be solely related to stress, with the reasoning that if the stress in her environment could be removed, then all would be well. She expressed the opinion that that was a rather naive perception and indicated a lack of understanding of the unstable nature of Borderline Personality Disorder, in which extreme fluctuations in function and presentation are intrinsically part of the disorder.

[123] She went on to make the point that when the extreme fluctuations are not seen as part of the disorder itself, naive workers can believe that the person is "*cured*" because of a temporary abatement of symptoms, especially at a time when the person is fairly well supported and having her own personal needs met. She commented that it is the very fluctuating and unpredictable extremes of parental behaviours/attitudes/presentation that are so damaging for a young dependent child and can lead to disorganised attachment, as it had done with KK.

Conclusion

[124] I observe, as no doubt did the learned magistrate, that, in the course of her report, Ms Single expressed the view that there had not been enough

assessment of JC because the focus of observations during contact visits had been more on the appellant's behaviours. It was her opinion that this was a pattern repeated from KK, whereby workers had been swept up by the appellant's extreme behaviours, with a focus on them, often resulting in a loss of focus on the child.

[125] Ms Single's thesis was that, on the limited observations made in relation to JC, there may well be an emerging pattern of disorganised attachment, with the mother, simultaneously, being an object of attachment and fear to the child. She considered that, from now on, JC needs the opportunity to be raised by a well functioning, loving and stable family, if he is not to follow the same damaging path his sister has trodden. He needs to primarily and deeply attach to new carers and have only the most minimal contact with his mother for "*identity*" purposes. She considers that, given his young age, JC has a chance to make a much more complete recovery from his attachment damage than does KK, if he is placed in a long-term, reparative environment now; and hereafter has the most minimal contact with his biological mother.

[126] The foregoing opinions were plainly and reasonably accepted by the learned magistrate.

[127] Whilst one cannot but have great sympathy for the appellant and the distressing situation in which she finds herself, it is abundantly apparent that not only has no error or mistake on the part of the learned magistrate

been demonstrated, but, on the contrary, his ultimate conclusion was well-nigh inevitable on the evidence placed before him.

[128] That being so, I am bound to dismiss the appeal. There will be an order accordingly.

[129] Before departing from this matter I would make one final point. In her report Ms Single emphasises that the appellant also needs some closure to this litigation, although she would no doubt dispute that. It is said that, whilst the appellant continues to be inappropriately empowered in the way she has been by clinical and legal authorities, she will never be able to accept the reality of her parenting incapacity and thus appropriately grieve the loss of her children.

[130] It is to be hoped that the dismissal of this appeal may bring some degree of finality into the situation and enable that grieving process to commence.

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