RG v DG & Ors [2013] NTSC 66

PARTIES:	RG v DG and KAG and Chief Executive Officer, Department of Children and Families
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 6 of 2013 (21241441)
DELIVERED:	9 OCTOBER 2013
HEARING DATES:	18 JUNE 2013
JUDGMENT OF:	KELLY J
APPEAL FROM:	H HANNAM CSM

CATCHWORDS:

ADMINISTRATIVE LAW—Natural justice—Procedural fairness—Chief Magistrate refused to make order sought by consent and adjourned matter without affording parties an opportunity to make submissions—No final

determination made but failure to accord procedural fairness "was not without consequence"—Held that Chief Magistrate failed to accord procedural fairness to parties—Appeal allowed

ADMINISTRATIVE LAW—Natural justice—Procedural fairness—Adjournment—*Care and Protection of Children Act*—Chief Magistrate adjourned matter without regard to mandatory considerations in s 138—Error in considering that section did not apply—Appeal allowed

FAMILY LAW—CHILDREN—*Care and Protection of Children Act*—Whether two year short-term parental responsibility order in best interest of child—Principles considered in making order—Duty of CEO of Department to apply for further orders if reunification of child with family not likely—Appropriateness of parenting assessment at later stage prior to reunification

Care and Protection of Children Act (NT) s 10, s 123, s 138

Kioa v West (1985) 159 CLR 550; *Escobar v Spindaleri* (1986) 7 NSWLR 51; *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42, applied

WM & FM v CEO Department of Children and Families & Ors [2012] NTSC 67, followed

REPRESENTATION:

Counsel:

Appellant:	A Wyvill with J Stoller
First Respondent:	A Kurda
Second Respondent:	C Faulkner
Third Respondent:	G Brown

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
First Respondent:	Margaret Orwin, Barrister & Solicitor
Second Respondent:	NT Legal Aid Commission
Third Respondent:	Solicitor for the Northern Territory

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

RG v DG & Ors [2013] NTSC 66
No. LA 6 of 2013 (21241441)

BETWEEN:

RG
Appellant

AND:

DG
First Respondent

AND:

KAG
Second Respondent

AND:

CHIEF EXECUTIVE OFFICER, DEPARTMENT OF HEALTH AND FAMILIES
Third Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 9 October 2013)

Background

[1] In 2012, the child DG lived with her grandmother RG (the appellant in these proceedings) and five cousins (all aged between 7 - 12) in an Aboriginal

community. DG was six years old at that time. Following several notifications to the Department of Children and Families ("the Department") in relation to the living conditions at the residence and the grandmother's care of the children, the Department intervened and removed DG and the other children from the care of the grandmother. DG was placed in an informal care arrangement with her aunt. She was later taken into provisional and then into temporary protection by the Department on 19 October 2012.

[2] On 8 October 2012, the CEO of the Department filed an application seeking long-term parental responsibility orders for each of DG's cousins under the *Care and Protection of Children Act* ("the Act"). On 29 October 2012, the CEO filed an application under the Act for a 12 month short-term parental responsibility order for DG. These applications were joined on 1 November 2012 and the CEO later amended the application to seek identical two year orders for DG and the other children.

[3] On 10 January 2013, all of the applications came before Ms Fong Lim SM, who granted two year short-term parental responsibility orders to the CEO for all children except DG. The application in respect of DG was adjourned so that DG's mother (KAG, the second respondent in these proceedings) could seek legal advice. The application was further adjourned, for the same reason, on 24 January and 28 February 2013.

[4] On 4 April 2013, the application came before Ms Hannam CSM (as she was then). By that stage, all parties including the mother had reached agreement and the CEO applied for a two year protection order. Counsel for the grandmother, counsel for the mother, and counsel for DG all informed the court that they did not oppose a two year order being made. The court was informed that it was hoped that at the end of the two year period DG would be returned to the care of her grandmother or her mother, and that there was no dispute between the two in relation to that. The court was also informed by counsel for the CEO that if that hope were not to be realised and there were any further child protection issues after the two years had expired, the CEO would apply to the court for another protection order.

[5] Ms Hannam stood the matter down in order to read the file. When court resumed her Honour announced:

> "Thank you for coming back everyone. I will indicate at the outset that I do not propose making the order that has been agreed to by the parties, or to which the parties consent, as in my view it is not an appropriate order to make as it would not be the best means of safeguarding the wellbeing of DG, nor would it be in her best interest. And I will outline the reasons why I am of that view, and bearing in mind that at this stage, I've not had the benefit of any submissions from anybody. I've simply read all of the material filed. So after I've given my reasons for what it is that causes me concern and why I am not today making this order, then we can have a discussion. There can be submissions as to what should happen next."

[6] Her Honour then delivered lengthy reasons for her decision not to grant the two year protection order at that time and adjourned the matter to 11 April 2013.

[7] As her Honour herself pointed out in the passage quoted above, the decision not to grant the order sought by the CEO on 4 April 2013, and the decision to adjourn the application, were both made without inviting or hearing submissions from counsel for any of the parties.

[8] When the matter resumed on 11 April 2013, the CEO again applied for a two year protection order in relation to DG. Counsel for the grandmother supported the application, as did counsel for the mother.

[9] In discussions with counsel for the grandmother in particular, Ms Hannam indicated fairly clearly that she was opposed to making a two year protection order and was leaning towards making a long-term protection order for DG. She also said:

> "I maintain that I can't make a decision in this case without a psychological assessment of the child and a parenting capacity assessment of the grandmother."

[10] The final person called upon to make submissions was counsel for DG who had indicated on the first hearing date that DG wished to go back to living with her grandmother, and that she did not oppose the making of a two year protection order. She submitted:

> "Your honour, it could also, I suppose be the case that if we had a psychological report and they assessed DG, the outcome could be "extremely resilient"[1] and I would suggest that even then, you may

[1] This followed from a series of comments by her Honour about research emerging in recent times about the impact of trauma and intergenerational neglect; about the need for a psychological report to assess the resilience and individual make up of the individual; and to the effect that she had seen cases where children had been exposed to quite traumatic things and were quite resilient and others where children were less so.

> reconsider whether a two year order is appropriate, notwithstanding ….."[2]

[11] Her Honour ordered the CEO to file and serve a psychological assessment of DG, a medical report on DG, and an assessment of the parenting capacity of the grandmother and further adjourned the matter for mention on 23May 2013.

[12] Counsel for the grandmother opposed the further adjournment of the matter saying it had been on foot for 6 months. Her Honour said:

> "This is not an application to adjourn, this is me saying that I can't make up my mind without – and I did foreshadow that last time. I hear what you say, I know what the Act says, but it talks about adjournments, talks about what's possible. It's not possible for me to make a decision, there's a big difference between not two years or not two years on the information available to me, and any other order [sic]."

She added:

> "That's my feeling about the matter, so it's not really an adjournment."

The Appeal

[13] On 9 May 2013, the appellant appealed to this Court. The grounds of appeal were:

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[2] Counsel for DG at no stage withdrew her support for a two year order and indeed supported that position on this appeal. It appeared that during these submissions she was suggesting a report (which the Chief Magistrate clearly wanted) as a way of staving off the possibility of an immediate long-term order, although this is not entirely clear as the submission was interrupted.

- that the learned Chief Magistrate erred in failing to conclude that it was in the best interests of DG to make a two year short-term parental order (on 4 April or 11 April 2013); and

- that the learned Chief Magistrate erred in granting an adjournment without placing sufficient weight on s 138(2)(1) and s 138(3) of the Act or taking into account the best interests of DG under s 138(2)(b)(i) and s 138(2)(b)(ii) of the Act (on 11 April 2013).

[14] At the hearing, the appellant sought and was granted leave to add three further grounds of appeal:

- that the learned Chief Magistrate erred in refusing to grant the order of 4 April 2013 without first giving parties an opportunity to make submissions as to whether or not her Honour should do so ("the Natural Justice Ground");

- that the learned Chief Magistrate erred in failing to place any weight on the decision made by Ms Fong Lim SM in relation to the other children and DG's desire not to be treated differently to her siblings; and

- that the learned Chief Magistrate took into account irrelevant matters, namely, her 'experience' that the CEO may not seek further orders even if it 'ought to'.

[15] The appeal was supported by all three respondents. The mother and the child's representative adopted the submissions made by the appellant and the CEO made separate submissions in support of the appeal.

[16] On 18 June 2013 I allowed the appeal, set aside the orders of the learned Chief Magistrate made on 4 and 11 April, and proceeded to hear the matter in accordance with the powers available under s 142(2) of the Act. At the conclusion of the hearing I made an order under s 128 of the Act in the terms sought by the CEO, namely an order that parental responsibility for DG be given to the CEO for 2 years (a short-term parental responsibility direction).[3] I made no orders as to costs, and indicated that I would publish my reasons for decision at a later time. These are those reasons.

The Natural Justice Ground

[17] I propose dealing with the Natural Justice Ground first as it is the most clear-cut.

[18] It is a fundamental principle of natural justice that a party be given a reasonable opportunity to present his or her case[4] and a failure by a court to accord natural justice to a party is an error of law.

[19] In my view her Honour did not afford any of the parties a reasonable opportunity to be heard before making the decision she did on 4 April 2013.

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3 Section 123(1)(c)

4 *Kioa v West* (1985) 159 CLR 550 per Brennan J at [368]

[20] In *Consolidated Press Holdings Ltd v Wheeler*[5] (a Work Health matter) the nominal insurer had applied to the court for an order stating a special case for consideration by the Supreme Court and another respondent to the worker's application had applied for summary judgment. When the matter came before the Work Health Court no submissions were made on the merits of the summary judgment application, but submissions were made that the application for the special case stated was premature, as the facts on which it depended were in dispute. The magistrate dismissed the case stated application and then said:

> "What about the application that's been put for summary judgment? You see again that ties in with your application that's been refused *[ie the case stated application]* and my view is that again that can only be determined once the facts are known."

[21] Counsel for the worker submitted that the magistrate's view was correct and the magistrate dismissed the summary judgment application without calling on counsel for the applicant to make submissions. Mildren J upheld an appeal against the magistrate's decision based on a failure to accord natural justice. In doing so he said:

> "His worship failed to give the appellant an opportunity to be heard before dismissing the application. Although the appellant was represented at the adjourned hearing, … his Worship did not call upon the solicitor for the appellant before ordering that the summons be dismissed. There is nothing to suggest that the appellant's solicitor waived her right to be heard. This was a clear denial of natural justice to the appellant, and a … denial of natural justice is an error of law."

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5 (1992) 84 NTR 42

[22] Similarly, in *Escobar v Spindaleri*[6] the New South Wales Court of Appeal held that there had been a denial of natural justice, and hence an error of law, when a New South Wales Compensation Court proceeded to a decision without calling upon counsel for the claimant to address the court.[7]

[23] In my view, these principles are plainly applicable and there was a failure by the learned Chief Magistrate to accord procedural fairness to the parties. It might be objected that her Honour did not make a final decision to dismiss the CEO's application on that day, but the decision not to make the order sought on the day, and instead to adjourn the matter for the reasons that her Honour enunciated, was not without consequences for the parties. The decision affected each of them in terms of leaving all concerned (the child DG and the grandmother in particular) in a state of uncertainty for a further period of time and in the position where all parties were obliged to expend additional funds in returning to court. It was a decision on which the parties had a right to be heard.

[24] Accordingly the appeal is allowed on this ground.

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6 (1986) 7 NSWLR 51

7 Though the decision of the Court of Appeal was plainly correct, one can sympathise to a certain extent with the judge in the Compensation Court in that case. The judge asked counsel if he intended to call further evidence, counsel declined, and the judge warned him that the claim might be dismissed. Counsel responded, "You can do what you like." The judge then proceeded to dismiss the application without calling upon counsel to make submissions.

Failure to conclude that it was in the best interests of DG to make a two year short-term parental order

[25] The appellant complains that the learned Chief Magistrate erred in failing to conclude that it was in the best interests of DG to make a two year short-term parental order (on 4 April or 11 April 2013).

[26] I do not think the appeal ought to be allowed on this ground. Had the learned Chief Magistrate accorded procedural fairness to the parties by affording them the opportunity to make submissions, then it would have been a matter for her Honour to assess whether it was in the best interests of DG to make a two year short-term parental order, or some other order (including an order adjourning the case to enable further reports to be obtained.) In any case, this ground was not pressed on the hearing of the appeal.

Granting an adjournment without taking into account the relevant matters under s 138

[27] Section 138 of the *Care and Protection of Children Act (NT)* states:

> (1) The Court may only adjourn proceedings for an application of an assessment order or protection order (including an application under section 136 or 137).
>
> (2) The Court must:
>
> (a) to the greatest extent possible, avoid granting adjournments; and
>
> (b) may grant adjournments only if the Court considers:

(i) doing so is in the best interests of the child to whom the proceedings relate; or

(ii) there are other strong reasons for doing so.

[28] As can be seen from her Honour's comments quoted in paragraph [12] above, her Honour considered that she was "not really" adjourning the matter on 11 April and that, accordingly, the principles in s 138 did not apply. In this she was plainly wrong. I do not propose going through the various matters that could or should have been considered under s 138. The error lies in not considering that the section applied at all. The appeal on this ground should be allowed.

Failure to place any weight on the decision in relation to the other children and DG's desire not to be treated differently to her siblings

[29] The appellants complain that the learned Chief Magistrate erred in failing to place any weight on the decision made by Ms Fong Lim SM to grant two year short-term parental responsibility orders in relation to the other children who had been removed from the grandmother's care when all the matters were before her in January 2013 and in failing to place any weight on DG's desire not to be treated differently to her siblings/cousins.

[30] These were certainly matters which would have been relevant to a final determination of the CEO's application, and they were not adverted to in her Honour's reasons for refusing to make the order on 4 April. However, her Honour did not ever finally determine the CEO's application so it cannot be said that she failed to take these matters into account in determining what

final order should be made. Therefore, I do not think the appeal should be allowed on that ground.

Taking into account irrelevant matters, namely, her Honour's 'experience' that the CEO may not seek further orders even if she 'ought to'

[31] This is a more problematic ground of appeal, and one which it is not strictly necessary for me to determine given that the appeal has been allowed on the ground of failure to accord natural justice.

[32] In the course of her reasons for refusing to make a two year order on 4 April 2013, her Honour referred to affidavit material which indicated that the Department intended to assess the grandmother's parenting capacity prior to any decision being made about reunification of DG with the grandmother and made the following comments:

> "It [ie the parenting capacity assessment] is not before the court and so I cannot see how there can be this assessment that the children will be returned within a two year period if we simply do not know whether a two year period is anything like appropriate or whether the grandmother in fact has any capacity to overcome the significant issues."

[33] On the next occasion the matter was before the court, in the course of submissions by counsel for the grandmother her Honour expressed concerns about what would occur at the end of the two year period if reunification of DG with her grandmother was not successful. Counsel for the grandmother pointed out that in those circumstances the CEO would have a duty to apply

for a further protection order. In response, her Honour made the following comments:

> "Unfortunately my experience tells me I can't be satisfied of that ... I have seen, in the last three years, hundreds of cases where I think that there is no doubt that action should have been taken, but it hasn't been. That's my opinion on what I have seen in the past. And the idea that the CEO always acts in the way that the CEO ought to act is simply not my experience, unfortunately ... I have to take count of my experience. That is of course what the CEO ought to do, that is the CEO's obligations, but the CEO also lives in a world with extremely restricted resources and all those things."

[34] Not unnaturally, on the hearing of the appeal, counsel for the CEO took exception to these remarks. It should be noted that during submissions before the learned Chief Magistrate, counsel for the CEO specifically advised the court that if the reunion with the grandmother did not prove successful, the CEO would apply for a further protection order.

[35] In *WM & FM v CEO Department of Children and Families & Ors*[8] I allowed an appeal against a decision of the learned Chief Magistrate to make a long-term parenting order to age 18 in respect of a child, in circumstances where the CEO had applied for a short-term 12 month order and this was supported by the parents.

[36] In rejecting the order sought by the CEO in that case her Honour said:

> "On the evidence before me, I cannot be satisfied that a 12 month order which will involve the restoration of these children to their parents' care during that period, on the evidence before me, is the best means of safeguarding their wellbeing, as I am not satisfied that

[8] [2012] NTSC 67

there is sufficient evidence from which it can be concluded that the children could safely be returned during that period."

[37] I said the following in connection with her Honour's conclusion:[9]

> "Posing the test, and answering it that way ignores the fact that the CEO has a responsibility under the Act to treat the best interests of the child as the paramount concern in any decision the CEO makes. As counsel for the CEO pointed out at the hearing, the CEO is under a duty not to return the children to the care of the parents if that would not be in their best interests and would not do so.
>
> Contrary to the assertion by her Honour, a 12 month protection order does not involve "the restoration of [the] children to their parents' care during that period". It merely provides an opportunity to the parents to satisfy the CEO that the children should be returned to their care at the end of that period. If things do not go according to plan, and the CEO is not satisfied at the end of the 12 months that it is in the best interests of the children to be returned to the parents, she has a duty under the Act not to return the children automatically, but to apply to the court for an extended protection order. Consequently, the court should not approach an application by the CEO on the basis that it must be satisfied that there is sufficient evidence from which it can be concluded that the children could safely be returned during that period of the order sought. Rather, the court should ask whether making the order sought by the CEO is in the best interests of the children, having regard to the principles in sections 7 to 12 of the Act, including the principles that, as far as practicable, contact between the child and the family should be encouraged and supported and the child should eventually be returned to the family. In practice that will sometimes mean making a short term order to give the parents an opportunity to demonstrate to the CEO that they can properly care for their children and give them an incentive to address issues which have made it necessary for the CEO to seek a protection order for their children. Of course, there may come a time when the need for stability outweighs these other factors. What is in the best interests of the child is a question of fact in every case to be determined on the evidence, and it is not an easy task for magistrates to perform."

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9 *WM & FM v CEO Department of Children and Families & Ors* at [24] and [25]

[38] It seems to me that in the remarks quoted in paragraphs [32] and [33] above, her Honour fell into the same error in this case as she did in *WM & FM v CEO Department of Children and Families & Ors*. There is also the consideration of the extent to which it was proper for her Honour to take into account her own "experience" as distinct from matters that were put before her in evidence. However, as none of the parties to the appeal addressed this issue in any great detail, and as there was effectively no contradictor in this appeal, and as, moreover, the appeal has been allowed on other grounds, I do not propose to deal with this ground in any more detail.

[39] The appeal is allowed.

Reasons for decision to make a protection order with a two year short-term parenting direction

[40] The CEO's application is brought under s 121 of the Act. Under that section the CEO may apply to the court for a protection order for a child if the CEO reasonably believes the child is in need of protection (or would be in need of protection but for the fact that the child is currently in the CEO's care) and the proposed order is the best means to safeguard the wellbeing of the child.

[41] Upon an application being made, the court may make a protection order for the child as proposed by the CEO, or an order specifying other directions mentioned in s 123 as the court considers appropriate, or it may dismiss the application. Directions that may be made under s 123 include a direction giving parental responsibility for the child to a specified person for a

specified period not exceeding two years (referred to in the Act as a short-term parental responsibility direction) and a direction giving parental responsibility for the child to a specified person for a specified period that exceeds two years and ends before the child is 18 (referred to in the Act as a long-term parental responsibility direction).

[42] The court must make the protection order if the court is satisfied that the child is in need of protection (or would be in need of protection but for the fact that the child is currently in the CEO's care) and the proposed order is the best means to safeguard the wellbeing of the child.

[43] When a decision involving a child is made, the best interests of the child are the paramount concern.[10] The Act provides that a child may be removed from the child's family only if there is no other reasonable way to safeguard the wellbeing of the child and, as far as practicable, (and consistent with the interests of the child being the prime consideration), if a child is removed from the child's family contact between the child and the family should be encouraged and supported and the child should eventually be returned to the family.

[44] I am satisfied that the child DG is in need of protection (or would be in need of protection but for the fact that the child is currently in the CEO's care). I have had regard to the affidavit material filed by the Department which indicates that while in her grandmother's care, DG had been diagnosed as

10 *Care and Protection of Children Act* s 10

"failing to thrive". She was living in overcrowded, unsafe and unhygienic conditions, was often not adequately supervised, was not given appropriate medical or dental treatment (and had never owned a toothbrush), was not being sent to school regularly, and had been exposed to drunkenness, drug taking and domestic violence by adults who frequented the grandmother's house.[11]

[45] I am also satisfied that a protection order giving parental responsibility to the CEO for a period of two years (a two year short-term parental direction) as proposed by the CEO is the best means to safeguard DG's wellbeing.

[46] The affidavits filed by the Department indicate that, after some initial difficulties, DG has settled well into foster care where she is being cared for in the same home as two of her cousins/brothers. She is thriving, her health needs are being attended to, and she relates well to her foster carer. In sessions with a psychologist she reported some conflict with her two cousins who live in the same house but otherwise said she was happy, enjoyed school, and liked playing with friends and her other cousins at school. The proposed two year order will involve no immediate change to the child's living and care arrangements. She will continue to be looked after for the time being in an environment in which she is safe, happy and healthy.

[47] The affidavit material also indicates that DG enjoys weekly access visits with her grandmother which she attends with her cousins who are also in

[11] For these reasons her Honour the Chief Magistrate had found the child was in need of protection and it seems there had been an earlier finding of the same nature by another magistrate.

care. The grandmother consistently attends these access visits (with other family members attending on occasions). An affidavit sworn by an officer of the Department in December 2012 stated that the grandmother has stated her commitment to making changes in the children's home environment and has made an effort to engage with case workers from the Department since the children have been taken into care. A two year order will give time for the grandmother to work with the Department, to develop parenting skills, and to demonstrate that she can provide DG with the proper care. I take into account the evidence of Department officers that if a short-term parental responsibility direction is made, the Department's emphasis is on fostering links with the child's family whereas, if a long-term order is made the focus changes. DG has expressed a wish to live with her grandmother, and not to be treated differently from her cousins and those wishes must be taken into account.[12]

[48] Moreover, DG is very young. If a staged reunion with her grandmother occurs successfully over the next two years, she will be only nine years old when her grandmother resumes full time care for her, which means that there will be long-term stability in her living arrangements within the family for the rest of her childhood. If not, there is no suggestion that the present arrangement cannot be continued.

[49] A fresh affidavit sworn by an officer of the Department on 22 May 2013 was filed before I proceeded to hear the matter. It annexed reports that had been

[12] Section 10(2)(d) and 11(b)

obtained at the direction of the Chief Magistrate at the hearing on 11 April and I took those reports into account in making this decision.

[50] One of those reports was a parenting capacity assessment of the grandmother prepared by a psychologist. That report was very negative. The report focused heavily on the past neglect as a result of which DG was taken into care. The psychologist noted that "the family" had received "intensive and targeted involvement from numerous community agencies and OCF" and that the grandmother had not engaged well with them. She concluded:

> "As [the grandmother] has not been able to acknowledge any concerns of neglect despite the evidence to the contrary therefore she will not be able to work collaboratively with OCF."

She recommended that a long-term order be put in place and that access between DG and her grandmother be at least twice weekly.

[51] The grandmother's solicitor swore an answering affidavit taking issue with these conclusions. He said that there were language difficulties that impeded communication between his client and the psychologist doing the assessment, and deposed that the grandmother had demonstrated to him a commitment to her grandchildren and to changing her situation that was completely contrary to that detailed in the psychologist's report. He pointed out that the grandmother had attended 11 court appearances in relation to her grandchildren's matters, often waiting for hours in the Local Court for the matter to be called. (She has missed only one mention when there was confusion over the listing.) On 23 May 2013 she left a funeral at Ngukkur

at 3.00 am and drove through the night to ensure she would be at court for the 9.30 am listing. She has applied for (and been admitted to) the Territory Housing Priority Housing List and has applied for entry to the Tenancy Support and Sustainability Programme run by Anglicare.

[52] It seems to me that the grandmother has evidenced a strong continuing desire to have DG returned to her care. She has expressed, through her counsel, a willingness to undertake the measures necessary to enable them to be re-united, and there is evidence from an officer of the Department that she has engaged with the Department since the children were taken into care.

[53] In one respect the unfavourable report of the psychologist demonstrates why it may not always be appropriate for parenting capacity assessments to be performed for presentation to the court on the initial application for a protection order, as requested in this instance by the Chief Magistrate. If done at such an early stage, the report will necessarily rely mostly on past performance, which is almost certain to be sub-standard, that being the reason why a protection order is being sought. There is much to be said for the approach which I understand the Department proposed to adopt in this case, namely to work with the grandmother towards improving her parenting capacity and to perform an assessment of that capacity at some suitable time in the future before reunification occurs, a satisfactory report being a pre-condition to reunification taking place.

[54] In making this decision I also take into account that the best interests of the child must be the paramount concern of the CEO in making any decision under the Act. If the CEO is not satisfied that the child's best interests are served by a return to the care of the grandmother (or the mother) by the time the two year protection order expires, the CEO will have a duty to apply for a further protection order – and has indicated that she will do so.