Warbrooke v McGregor & Others [2001] NTSC 18

PARTIES:	MELANIE JANE WARBROOKE (A delegate of the Minister for Territory Health Services) v ALASDAIR McGREGOR (Stipendiary Magistrate) AND: TF AND: ML
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from FAMILY MATTERS COURT
FILE NO:	39 of 2001 (20102185)
DELIVERED:	9 March 2001
HEARING DATES:	6 March 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REVIEW OF DECISION BY A STIPENDIARY MAGISTRATE

Decision by a stipendiary magistrate – application for review of decision – parens patriae power of the court – application before Family Matters Court– interim order – sole guardianship for the child to be transferred to the Minister

Community Welfare Act 1983 (NT), s 9, s 10, s 11, s 17, s 23, s 36, s 47 and s 50

Minister for Territory Health Services of the Northern Territory v LG (1998) 146 FLR 396; *Secretary Department of Health & Community Services v JWB* (1992) 175 CLR 218; *Re Spence* (1847) 2 Ph 247; *R v R:*(2000) 25 Fam LR 712; *Northern Territory v GPAO* (1998) 196 CLR 553; *Re K* (1994) 17 Fam LR 537; *In Marriage of B and R* (1995) 19 Fam LR 594; *P and Legal Aid Commission (NSW)* (1995) 19 Fam LR 1, cited

Re Z (1996) 134 FLR 40, agreed with

REPRESENTATION:

Counsel:

Appellant:	D. Lisson
1st Respondent:	E. Hutton
2nd Respondent	J. Franz
Child Representative	M. Orwin

Solicitors:

Appellant:	Solicitor for the Northern Territory and Morgan Buckley
1st Respondent:	Hunt & Hunt
2nd Respondent:	Melanie Little
Child Representative:	MC Orwin & Associates

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

Warbrooke v McGregor & Others [2001] NTSC 18
No. 39 of 2001 (20102185)

BETWEEN:

MELANIE JANE WARBROOKE (A delegate of the Minister for Territory Health Services)
Appellant

AND:

ALASDAIR MCGREGOR (Stipendiary Magistrate)
First Respondent

AND:

TF
Second Respondent

AND:

ML
Third Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 9 March 2001)

[1] On 9 March 2001, I made the following interim order that:

1) The sole guardianship for the child, CF, be transferred to the Minister for Health, Family and Children's Services until further order or such time as

the application brought by the Minister and presently before the Family Matters Court is dealt with.

2) That service upon the third respondent of this application to the Supreme Court be dispensed with.

[2] At the time of announcing this decision, I stated I would publish reasons at a later date. These are the published reasons.

[3] This is an application brought on Originating Motion by Melanie Jane Warbrooke (a delegate of the Minister for Territory Health Services) for review of a decision by a stipendiary magistrate made on 4 January 2001, declining to make an order that the child, CF, be placed in the sole custody of the Minister pending the further hearing of the matter.

[4] On 4 January 2001, the application was supported by a court report for the Family Matters Court copy of which is Annexure A to the affidavit of Heather Matthews sworn 12 February 2001. The learned stipendiary magistrate indicated he had read the report.

[5] A summary of the report is contained in the Originating Motion. The report details the contact between the child's family and Family and Children's Services commencing 14 March 1994 to the date of the court hearing on 4 January 2001.

[6] At the hearing before the learned stipendiary magistrate the father of the child, TF, appeared on his own behalf. Ms Margaret Orwin appeared as the

representative for the child, CF. Mr Story appeared on behalf of the Minister for Territory Health Services. Personal service on ML, the mother of CF, was dispensed with because her whereabouts were unknown. The learned stipendiary magistrate did make orders for substituted service to notify ML of the dates allocated for the hearing of this matter in the Family Matters Court on 23 and 24 April 2001.

[7] Mr Story, on behalf of the Minister, indicated that he sought a continuation of the interim order in the terms sought in the court report. Specifically Mr Story sought an interim order placing the child, CF, in the sole guardianship of the Minister until further order. Mr Story advised the learned stipendiary magistrate that he could make this order without making a declaration that the child is in need of care – see *Minister for Territory Health Services of the Northern Territory v LG* (1998) 146 FLR 396. TF submitted that he opposed the order on the grounds that the scheduled hearing of the matter was more than three months into the future. TF also indicated that he would be opposing the court report which had been prepared for the Family Matters Court in its entirety and that in his opinion the report had very little credibility.

[8] Mr Story, on behalf of the Minister, indicated that he relied on the court report prepared for the Family Services Court in making the application for an interim order. He further stated that the court report lists a history of violence toward the child and a history of remorse after the event. He submitted the court should always err on the side of caution. I infer from

this he meant that the court should err on the side of caution by making the orders that he sought.

[9] Ms Orwin, on behalf of the child CF, advised the learned stipendiary magistrate that the child opposed the order sought by the Minister for Territory Health Services. She advised the court she had explained to CF that the order by the court would mean she remain in the care of the Minister until the date of the hearing on 23 April 2001. CF had advised her that she opposed such an order. Ms Orwin also submitted to the court that as the child's legal representative she was not in a position at that time to oppose the order and this had been explained to CF. Ms Orwin stated to the court "I tried to explain what – what she wants and what is in her best interests may not meet".

[10] The learned stipendiary magistrate then made the following order (t/p 5):

> ". . . TF may not turn out to be the best parent in the world. He may even turn out to be only a barely competent parent. But reading the report, listening to the parties here today I am going to err on the side of caution and I'm going to leave as it stands in the Family Court where TF has rather more rights than the department would like him to have at the moment. I'm not going to extend the interim order. I discharge the interim order."

It is this order which is the subject of review by this Court.

[11] At the hearing of this matter before this Court, Mr Eric Hutton appeared on behalf of the first respondent, the learned stipendiary magistrate. Mr Hutton advised that he did not wish to make any submissions in the matter. His

instructions were to submit to the jurisdiction of this Court. Mr Hutton sought leave to withdraw from any further participation in the proceedings. Leave to withdraw was granted.

[12] Mr Lisson appeared for the Minister for Territory Health Services. Ms Orwin appeared as the representative for the child CF. Ms Franz appeared for the father, TF. There was no appearance of the third defendant, ML. I understand the parties are still unaware of her whereabouts. I accepted the submission of Mr Lisson that as she did not appear in the Family Matters Court on 4 January 2001 with respect to an application for an interim order, I should proceed with the review of the order made on that date in her absence. I noted that orders have been made for substituted service upon ML in respect of the hearing scheduled to come before the Family Matters Court on 23 April 2001.

[13] The parties are in agreement that there is no statutory right of appeal to the Supreme Court from the learned stipendiary magistrate's refusal to make the interim order as sought. Section 50 of the Community Welfare Act 1983 (NT) provides a right of appeal in circumstances where a court declares the child in relation to whom the application is made to be in need of care or dismisses such an application.

[14] In this matter neither of those events occurred.

[15] The parties are also in agreement that this Court has jurisidiction to hear this matter under the inherent jurisdiction of the court, specifically the parens

patriae power. Parens patriae power may be exercised by the superior courts of the states and territories and by the Family Court (*Secretary Department of Health & Community Services v JWB* (1992) 175 CLR 218).

[16] In *Re Spence* (1847) 2 Ph 247 Lord Cottenham LC said at 251:

> "I have no doubt about the jurisdiction [*parens patriae*]. The cases in which the court [ie the Court of Chancery] interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of *any body* who is suggested to be improperly detained. This Court interferes for the protection of infants *qua* infants by virtue of the prerogative which belongs to the Crown as *parens patriae* and the exercise of which is delegated to the great Seal."

[17] I adopt the submissions made by Mr Lisson on behalf of the Minister for Territory Health Services at page 3 of his written submissions:

> "Matters concerning the protection of infants where infants become wards of the court to ensure their welfare were known as 'wardship' cases. Lord Justice Kay stated in the leading case of *R v Gyngall* that wardship:
>
> > '… is essentially a parental jurisdiction and that description of it involves the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again, the term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction.'
>
> His honour Lord Esher MR in the same case also characterised wardship as –
>
> > 'a parental jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place

of the parent, and as if it were the parent of the child thus superseding the nature guardianship of the child'

Wardship proceedings, like *parens patriae* matters, are not like ordinary proceedings. There is no 'lis' between the parties. The plaintiffs are not asserting any rights; the child is being committed to the protection of the court to make such order as it thinks is for the child's benefit."

[18] The Community Welfare Act of the Northern Territory sets out the powers and duties of the Minister with respect to children in need of care. The Minister is required to have as his main consideration the welfare of the child, the secure care and guidance to promote such welfare and maintain and develop family relationships in the best interests of the child. These powers and responsibilities include protection and welfare of the child and any review of the exercise of powers and responsibilities invokes the parens patriae jurisdiction of this court.

[19] Ms Orwin as the child's representative, and Ms Franz on behalf of TF, are in agreement with the submission made by Mr Lisson that this Court has jurisdiction to hear this application under the parens patriae powers of the court.

[20] Mr Lisson, on behalf of the Minister for Territory Health Services, seeks the following orders:

"1. The Sole Guardianship for the Child CF be transferred to the Minister for Health Family and Children's Services until further Order or such time as the Application brought by the Minister and presently before the Family Matters Court is dealt with;

2. That service upon the third Respondent be dispensed with; and

3. Such other or further Orders as the Honourable Court deems meet."

[21] Ms Orwin submitted that as the child's representative she supported the application made on behalf of the Minister. Ms Orwin also advised this Court that the wishes of the child expressed at the time of the application before the learned stipendiary magistrate were to reside with her father.

[22] Ms Franz, on behalf of TF, submitted on behalf of her client that the application was opposed.

[23] By agreement between the parties this application was restricted to a review of the matters before the learned stipendiary magistrate on 4 January 2001.

[24] Mr Lisson made a number of submissions relating to the problems that have arisen in this matter because there is a gap of almost four months from the date the interim order was applied for in the Family Matters Court being 4 January 2001 and the date scheduled for the hearing of the application in the Family Matters Court on 23 April 2001. I will address this issue and the submissions made by the parties for suggested guidelines in this mater at the conclusion of my reasons for judgment in this matter.

[25] Mr Lisson referred to the affidavit of Heather Matthews sworn 12 February 2001 and the attached court report.

[26] I have had an opportunity to read this report which details a series of incidents of ill treatment and abuse over a period in excess of six years.

[27] The report discloses that prima facie there has been a history of physical maltreatment of the child CF by her father TF.

[28] I will refer to only four incidents over that period being typical of the numerous incidents described in the report that have are reported to have occurred over the six year period.

[29] On 19 July 1997 (page 7.4) Family and Child Services notification was received by Family and Children's Services that CF had disclosed that:

> ". . . her father threw a calculator at her (that missed), then a metal ash tray which hit her on the right forearm. CF had also allegedly stated that she had been hit in the right side of her head by her father, with a clenched fist more than once. CF indicated that her father had thrown things at her and that she had tried to protect the top of her head with her arms.
>
> Workers Spoke with school staff regarding CF. Workers were informed that CF's school attendance was regular, however she was late often. CF was reported as very quiet, not mixing well with the other children, and continually seeking reassurance from teachers. She had been observed as affectionate towards her teachers, and always wanting to hug them and hold their hands. CF has been observed as far more withdrawn in 1997 than in 1996. The school described the interaction between CF and her father as aggressive. CF was wearing inappropriate clothing for the weather and wore the same tracksuit to school each day, refusing to remove it even when she very hot."

and relating to the same incident at page 7.8 – 8:

> "TF, when interviewed, admitted to incident and stated that he hit CF on the head with more of tapping motion rather than punching. He acknowledged that his own behaviour had gotten out of hand, and stated he regretted what he had done to CF. His explanation of this was that the family had been under stress as Nazmina's child Russell had Attention Deficit Hyperactivity Disorder (ADHA)."

and at page 9.1:

> "On 23rd April 1998 Family and Children's Services received a notification that CF had presented with a hand print on her face which she disclosed was caused by her father hitting her.
>
> Workers interview CF. She described the incident of the night before: she and Russell had to eat their tea outside because they were fighting. CF was then helping E wash the dishes. An argument with her father followed as she did not want to wash the dishes. CF stated she then sat in the corner. TF sent her to bed, where she started to read. TF had told her to go to sleep and turned off the light. After he left CF turned the light on again, wanting to read more. TF came back into the bedroom, and proceeded to 'give her a hiding'. CF disclosed that she was lying on her side, her father held her hands with one of his hands, and hit her with an open hand on the head. She described her father hitting her 'more than 50 times', and that she could not stop crying. CF stated her father had said 'You will do the dishes, won't you'. She said 'Yes' and also said 'Sorry'.
>
> CF was observed to have bruising to the left side of her face, ranging from her cheek to her forehead, into her hairline and also on her left ear. She described a sore head and that her jaw hurt when she ate. CF identified that she did not like what had occurred at home as it hurt, and that she did not like her father's comments the next day of 'it being a new day', as he always said that. CF described past incidents – being hit by a belt in Grade Two, last year being hit by a wooden slat from a door; this year being hit by her father's shoe. CF informed workers that her siblings are also hit. CF stated that since the time of the last investigation she had been smacked on the bottom, her back and her face by her father's hand which sometimes leaves red marks, staying a short time."

and at page 14.5 – 15:

> "On 22nd September 2000 a notification was received of an incident that was alleged to have occurred where TF dragged CF from the car and as a result, CF's shirt was torn and dirty. Family and Children's staff spoke with TF regarding the incident. TF stated that CF was refusing to go to school, and was clinging to the bumper of the car. He admitted to the incident and stated that he had tried to convince CF to get out of the car by other means. Respite was discussed with TF who made a decision for respite to occur with CF's mother, who is now living in Darwin.

> On 1st November 2000, the school raised concerns that the tension in the relationship between CF and her father was increasing and the family may benefit from weekend respite. This was offered, however TF declined.
>
> On 6th November 2000 Family and Children's Services received a notification that CF was upset as she had been hit by her father and had a cut inside her mouth.
>
> Departmental workers collected CF and E from Nightcliff Primary School. Workers interviewed CF at the FACS office. CF described to the worker the incident that occurred with her father the previous night. CF had cooked the meal for the family and was asked to do the washing up. CF did not believe this to be fair and was told to go to her room. CF stated to the worker that 'Dad did not grab me in an aggressive way, he held me and walked me to my room". An argument began as a result of this. CF stated that she continued to cry, her Dad had her pinned on the bed, by holding her arms down. CF acknowledged that she was yelling at 'top notch' and trying to wave her arms and kick her legs. She disclosed to the worker that her father was very angry and was shaking his fist at her, then he punched her. CF stated she did not believe that her father meant to punch her, just threaten her.
>
> CF indicated to the worker that she was unsure about returning home and was worried about what her father would say. She felt that her father would be furious about her speaking with the Department. Workers suggested to CF they attend her residence with her and speak with her father about the situation."

[30] I agree with the submission made by Mr Lisson that from a careful reading of the report the conclusions to be drawn are as follows:

1) There is likely to be further conflict between father and child. A pattern of behaviour has been established and there is no indication of this pattern changing.

2) It is likely the child will suffer further maltreatment at the hand of the father.

3) The child is likely to suffer permanent emotional and physical harm.

4) There may well be a reluctance by the child or any other person to report a further incident.

[31] I note that since 4 January 2001, there has been no significant contact between Family and Children's Services and TF who refuses to have any involvement with that Department. The family situation is no longer being monitored.

[32] Other matters in the report which are relevant to this review are the references made to the resistance by TF at any attempts to modify his behaviour and his lack of insight into the consequences of his actions upon the child. Another somewhat disturbing feature is that CF appears to be developing an attitude that she deserves such treatment from her father.

[33] I am aware that at the time of the hearing before the learned stipendiary magistrate CF, through her representative, expressed a wish to be with her father. I acknowledge the importance of the wishes of the child CF who is now almost 13 years of age – see *R v R* (2000) 25 Fam LR 712.

[34] It is relevant to note the provisions of s 9 of the Community Welfare Act which states as follows:

> "9. Duty of Minister
>
> In exercising his powers under this Part, the Minister shall, at all times, have as his main consideration the welfare of the child in relation to whom those powers are exercised and particularly for -
>
> (a) securing for the child such care and guidance as will promote that welfare; and

(b) the maintenance and development of those family relationships that are, in his opinion, in the best interests of the child."

[35] The rights of parents are to be protected but it is the interests of the child that are paramount. In cases concerning suspected maltreatment of the child, it may be in the best interests of the child for guardianship to be transferred to the Minister. I consider this is a matter in which the wishes of the child are not in accord with her best interests and it is her best interests that are paramount.

[36] Ms Orwin, as the child's representative, supports the application made on behalf of the Minister even though the child has expressed to her a wish to remain with her father.

[37] Ms Franz, on behalf of TF, made submissions with reference to the way in which the Family Matters Court should treat the court report on an application for an interim hearing matter *Re Z* (1996) 134 FLR 40. I agree with the remarks of Fogarty J at 86 where the court report refers to certain matters being "substantiated" they do not have any evidential significance or uniform objective value. In the court report the term substantiated is generally used to separate those reports which appear to have substance and require further investigation from those that do not. The matter of *Re Z* (supra) went on appeal to the High Court (*Northern Territory v GPAO* (1998) 196 CLR 553). However, the comments of Fogarty J are still applicable.

[38] At the hearing of this application in the Family Matters Court on 23 April 2001, TF will have the opportunity to challenge this report and to call evidence. The nature of an application for an interim order usually means there is neither the court time nor are the parties sufficiently prepared to argue the issues raised in the court report. There can only be a prima facie case established on behalf of the Minister at the interim stage.

[39] At the hearing of the application for an interim order the court report should be considered and taken into account in deciding whether to grant the interim order.

[40] The application on 4 January 2001 was not a hearing at which all the issues could be ventilated. It was an application for an interim order supported by a report which prima facie disclosed maltreatment and abuse of the child. The learned stipendiary magistrate was entitled, and in my opinion, should have accepted this report on a prima facie basis and in the best interests of the child erred on the side of caution and placed her in the sole care of the Minister. TF will have his opportunity at the hearing of the matter to respond to the matters in the report and challenge any aspects of the report.

[41] Ms Franz also submitted in argument that an order of the Family Court made on 27 March 2000 made orders that the Minister for Health, Family and Children's Services have joint responsibility with TF and ML for the day to day care of CF and that CF reside with her father. It is Ms Franz's submission that if the Minister for Territory Health Services consented at

that time to an order the child reside with the father, there can be no good reason for them to seek an alternative order now.

[42] I do not accept this submission. The court report I have already referred to, details the contact between Family and Children's Services and TF over a period in excess of six years and the efforts made to enable the child to remain in residence with her father. I note also that CF has, prior to the Family Court Order, been taken into care of the Minister. An example of this is 23 April 1998 when CF was taken into care under s 11 of the Community Welfare Act 1983. On 24 April 1998, a holding order was obtained under s 11(4) of the Community Welfare Act. Since then Family and Children's Services have worked with TF in efforts to provide sufficient support to enable CF to continue to reside with her father. These arrangements have broken down on numerous occasions as detailed in the report.

[43] I note further that since the Family Court Order of 27 March 2000, there have been two further reported incidents of maltreatment and abuse and that the relationship between Family and Children's Services and TF has been deteriorating.

[44] I consider that in the best interests of the child, there should be an interim order that:

3) The sole guardianship for the child, CF, be transferred to the Minister for Health, Family and Children's Services until further order or such time as

the application brought by the Minister and presently before the Family Matters Court is dealt with.

4) That service upon the third respondent of this application to the Supreme Court be dispensed with.

[45] In addition to the orders sought, counsel for each of the parties indicated it would be of assistance to provide some guidelines in respect of the applications for interim orders in the Family Matters Court. The application for interim order was made on 4 January 2001. The hearing of the full application was listed to be heard on 23 April 2001 and allocated two days. Clearly the hearing could not proceed on 4 January 2001 and it was for that reason an interim order was sought. I note there is provision in the Community Welfare Act for matters to be adjourned for a limited period when an interim order is made. Section 47 provides as follows:

> "**47. Interim orders**
> Where the Court thinks fit, it may make an interim order in accordance with this Part which shall include particulars of the date, time and place fixed by the Court for a further hearing of the application to which it relates and it shall remain in force -
>
> (a) subject to paragraph (b), for such period not exceeding 2 months, as the Court thinks fit; or
>
> (b) where the Court thinks fit, for a further period not exceeding 4 months from the making of the first interim order."

[46] I am well aware of the very heavy workload in the Magistrates Court and the difficulties in providing for an earlier hearing date. Ms Franz referred to the system that presently exists in the Magistrates Court with the respect to the

fast tracking of applications made under the domestic violence legislation. This court was told that system appears to work very satisfactorily. Mr Lisson was in agreement that it would seem to be appropriate to have a similar system of fast tracking matters such as this which concern the welfare and protection of a child.

[47] It is not for me to suggest or attempt to impose any such system on the Magistrates Court with respect to cases such as this in the Family Matters Court and I do not presume to do so.

[48] I can only suggest to the parties that they may consider making an approach to the Chief Magistrate for his consideration as to whether it is appropriate and/or feasible to have a fast tracking system for a matter such as this. Whether that can be achieved is entirely a matter for the Chief Magistrate and the Court of Summary Jurisdiction.

[49] Ms Orwin raised the issue of the role of the child's representative in the Family Matters Court and suggested that the appropriate guidelines for the role of the children's representative in that court would be the same as those which have been established in the Family Court – see *Re K* (1994) 17 Fam LR 537. *In Marriage of B and R* (1995) 19 Fam LR 594 at 627. In the matter of *P and Legal Aid Commission* (NSW) (1995) 19 Fam LR 1 the Full Court of the Family Court held that (Headnote at p 2):

> "(viii) The *parens patriae* jurisdiction is not an adversary jurisdiction and though the child has the right to be heard through effective legal representation there is no duty on the separate

representative to oppose the application or to assume the role of the contradictor."

[50] The role of the separate representative has been conveniently set out at p 33:

> "The separate representative ought:
>
> 1. Act in an independent and unfettered way in the best interests of the child.
>
> 2. Act impartially, but if thought appropriate, make submissions suggesting the adoption by the court of a particular course of action if he or she considers that the adoption of such a course is in the best interests of the child.
>
> 3. Inform the court by proper means of the children's wishes in relation to any matter in the proceedings. In this regard the separate representative is not bound to make submissions on the instructions of a child or otherwise but is bound to bring the child's expressed wishes to the attention of the court.
>
> 4. Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the welfare of the child is before the court.
>
> 5. Test by cross examination where appropriate the evidence of the parties and their witnesses.
>
> 6. Ensure that the views and attitudes brought to bear on the issues before the court are drawn from the evidence and not from a personal view or opinion of the case.
>
> 7. Minimise the trauma to the child associated with the proceedings.
>
> 8. Facilitate an agreed resolution to the proceedings."

[51] The guidelines set out in these decisions in the Family Law Court would seem to be most appropriate guidelines also for persons appearing as the children's representative in the Family Matters Court.

[52] Mr Lisson, on behalf of the Minister, made a number of submissions relating to suggested guidelines to the Family Matters Court when dealing with

applications of this nature. I have set out these suggested guidelines hereunder:

> "1. In circumstances where the hearing of an application by the Minister for a declaration that a child is in need of care, (and for consequential orders), cannot proceed until some future date – particularly when the adjournment will be lengthy – the Court should ordinarily order that the residency of the child be at the direction of the Minister until the hearing of the application, unless:
>
> - on the material before the Court, it cannot be said that there are reasonable grounds for believing that the child may be in need of care;
> - there is no evidence, or inadequate evidence, as to the identity or age of the child or of family members; or
> - with the consent of all parties, and the approval of the Court, another residency arrangement is proposed.
>
> 2. For the purpose of determining interim orders, the Court should ordinarily accept the correctness of the facts provided in the Court Report, unless there is manifest error or if it appears to be wholly unreliable in some material respect.
>
> 3. The Court should assume, in the absence of evidence to the contrary, that the Minister has complied with, and undertaken the responsibilities imposed by ss 9, 10, 17, 23 and 36 of the *Community Welfare Act*.
>
> 4. If the Court is not minded to make the interim order sought by the Minister, consideration should be given to providing a further opportunity to provide additional information, or to conduct further inquiries or examinations, or to rectify any procedural, technical or substantive shortcomings before refusing the order.
>
> 5. The Court should provide reasons for the refusal to make an order.
>
> 6. In matters where there will be a lengthy adjournment until a hearing, and there may be a material risk of maltreatment or harm to the child in the interim, the Court should consider whether there ought to be further interim reviews of the circumstances of the child prior to the date fixed for hearing."

[53] Whilst I understand the concerns by the Minister with respect to these applications and the perceived requirement for clear guidelines, I am concerned that these suggested guidelines may be unnecessarily restrictive and fetter too much the discretion that lies with the magistrate sitting in the Family Matters Court.

[54] For example, suggested Guideline No. 2 may well be appropriate in some cases but not in others. In this matter I have held that the learned stipendiary magistrate should have given greater weight to the matters set out in the report and for the purpose of the application accepted there was a prima facie case established that the child was subjected to maltreatment and abuse and in the child's best interest made the orders sought by the Minister. However, I can envisage cases where there are reasons for the magistrate to reject the court report or parts of the report and I would not want to fetter his/her discretion in that regard.

[55] With respect to suggested Guidelines No. 1, 3 and 4 these may well be matters the representative of the Minister could submit to the magistrate on a case by case basis. However, again I consider it is not appropriate for this Court to attempt to establish guidelines which may only serve to fetter the magistrate's discretion.

[56] With respect to suggested Guideline No. 5, I accept the general principle that it is appropriate and particularly of benefit to the losing party, to give reasons for any decision be it an order in compliance with an application or

a refusal to make an order that has been sought. The nature of an application for an interim order make it likely that such reasons will be brief but I nevertheless agree that reasons should be given.

[57] With respect to suggested Guidelines No. 6, I have to some extent dealt with the issue of the time gap between an application for an interim order and the hearing of the full application. Again this is a matter that could be the subject of submission to the learned stipendiary magistrate on a case by case basis and where considered appropriate. However, I have concluded this also has to be a matter very much within the discretion of the presiding magistrate in the Family Matters Court who may well be assisted by such submissions from the Ministers representative but should not, in my opinion, be fettered by any proclamation from this Court.

[58] I conclude by expressing appreciation to each counsel for their very thoughtful submissions on the issue of proposed guidelines.

[59] I note that the copies of this Reasons for Judgment have been placed in the parties' court boxes on 30 March 2001.

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