IN THE CHILDREN'S COURT OF NEW SOUTH WALES
AT PARRAMATTA

JUDGE MARK MARIEN SC
PRESIDENT

FRIDAY 16 JULY 2010

No. 1044, 1045 and 1046 of 2009

IN THE MATTER OF: THE DIRECTOR GENERAL OF THE DEPARTMENT OF HUMAN SERVICES

and

Kyle HAMILTON
Kevin HAMILTON
Keith HAMILTON

JUDGMENT

1. HIS HONOUR: These are care proceedings in relation to three children: Kevin born on 3 February 2005; Kyle born on 20 April 2006; and Keith born on 14 September 2008.

2. The mother of the children is Ms Natalie Stone, born in March 1987 and the father is Mr Charles Hamilton, born in January 1954. The father is the maternal step-grandfather of the mother. The father had previously been married for 12 years to Ms Stone's grandmother. The children were removed from the mother's care by the Department on 10 July 2009 and placed in Departmental foster care.

3. By applications filed on 19 June 2009, the Director General of the Department of Human Services seeks orders that parental responsibility for each of the three children be allocated to the Minister until the child attains the age of 18 years. At the commencement of the hearing before me on 7 June 2010 I was informed by Ms Hall, the mother's legal representative, that the mother conceded that there is no realistic possibility of restoration of any of the children to her care. Earlier in the proceedings the mother and father conceded, without admission, that the children are in need of care and protection pursuant to section 71 of the *Children and Young Persons (Care and Protection) Act* 1998 (the Care Act).

4. The father, Mr Hamilton, on 12 March 2010 conceded that there is no realistic possibility of restoration of any of the children to his care and in an

affidavit filed on the same day he deposed that he was seeking contact with his three children and that he supported parental responsibility for each of the children being allocated to the Minister. He further deposed that he did not support the children being restored to their mother. However, when the matter came before me for hearing Ms Griffin, who appears for the father, informed me that the father had changed his position and was seeking restoration of his son Kyle to his care but was not seeking restoration of the other two children to his care. In the course of the hearing, however, the father's position again changed when he said that he sought to have both Kyle and Keith (but not Kevin) restored to his care.

5. At the conclusion of the evidence, Ms Griffin obtained further instructions from the father and informed me that the father no longer sought restoration of any of the three children to his care and that he again conceded that there is no realistic possibility of restoration of any of the three children to his care. However, Ms Griffin informed me that the father seeks an order that he have supervised contact with each of the children six times per year with supervision by the Department. Mr McLachlan, who appears for the Director General, submitted that the court should not make any contact order in favour of the father. Mr McLachlan informed me that in the event that the court was to make an order for supervised contact by the father with any of his children the Department did not consent to supervising contact.

6. Ms Hall, who appears for the mother, informed me that the mother does not oppose contact between herself and the three children as proposed in the notations to the Director General's proposed Minute of Care Order filed on 21 June 2010. According to those notations it is the intention of the Minister to facilitate supervised contact between the children and their mother on not less than six occasions per year, such contact to be subject to a number of conditions set out in the notations. The notations also record that the Minister intends to facilitate contact between the children and their maternal grandmother and that the Minister also intends to facilitate sibling contact in the event that the boys are not all placed together.

7. The child Kevin has been placed with the current Departmental foster carers since 8 September 2009. The Department proposes that Kevin will remain in his current placement until such time as he can be transitioned to a long-term placement. The children Keith and Kyle have been placed together (in a separate placement to Kevin) since 10 July 2009. Similarly, the Department proposes that they will remain in their current placement until such time as they can be transitioned to a long-term placement.

8. Although none of the parties ultimately opposed the making of a long-term order allocating parental responsibility for each of the children with the Director General, another important issue which arises for my determination in the proceedings is whether the Director General has within the case plan filed for each of the children appropriately and adequately addressed permanency planning for the child. I shall return to that issue later in my reasons.

9. Turning to the issue whether the court should make a contact order in favour of the father, the Director General submits that no contact orders should be made because, on the available evidence, any contact between the children and their father, even supervised contact, will expose the children to an unacceptable risk of harm. The mother and Ms Canning, the independent legal representative for the children, support this submission by the Department.

10. In determining whether the court should make a contact order as sought by the father it is necessary to consider the evidence before me concerning the nature of the relationship between the mother and the father, any detrimental impact on the children arising from the dynamics of that relationship as well as evidence concerning the father's physical abuse of his son Kevin and the evidence of his prior serious criminal record for sexual offending against children and indecent exposure. It is also necessary to consider any evidence that lack of contact by the children with their father will have any detrimental psychological impact upon the children.

11. In her affidavit material, the mother deposes that during her relationship with Mr Hamilton, who, as I have said is her maternal step grandfather, she found him to be controlling and she said she was afraid of him. She finally separated from him on 2 June 2009 when she left him and took the children with her. In her affidavit filed on 24 June 2009 she deposes that while she was fearful of the father she did not report her fears to the police. She states that the father threatened her that if she tried to leave him he would stab himself and tell the police that she had stabbed him. The mother obtained an Interim Apprehended Violence Order against the father in June 2009, which named the mother and the three children as the protected persons. A final Apprehended Violence Order against the father was made on 22 December 2009. In her affidavit filed on 12 August 2009 the mother deposes that throughout her relationship with the father, *"he had been verbally threatening and physically violent towards me."* She deposes that from about the age of about 18 months her son Kevin was subjected to his father hitting him around the head. She deposes that while the father never hit Kyle he had hit Kevin and shaken him while he was in a high chair causing Kevin to suffer a, "busted lip". In her affidavit filed on 24 June 2009 the mother describes an incident when she saw the

father hold Kevin upside down and threaten to kill him. The mother deposes that she would argue with the father about his actions and then he would hit her. She states that the father always apologised afterwards for his actions and told her that he would never do it again. She said that she was responsible for most of the physical day-to-day care of the children and that the father had a gambling problem.

12. The mother said that she was afraid to tell anyone that she commenced a sexual relationship with Mr Hamilton when she 13 years of age because he had told her to keep it a secret. I note that in a later affidavit filed on 5 March 2010 the mother states that the father commenced a sexual relationship with her when she was 14 years of age. The mother states that in late 2008 the father informed her that he had been charged in relation to a sexual assault of a little girl who he had pulled off the street and put his penis between her legs. She states that he also told her that he had had sex with her uncle when her uncle was 12 years of age. She further deposes that after their son Kevin was born the father told her that if he ever had a daughter who wanted to have sex with him he would let her.

13. In her evidence before me the mother said that as a young child her mother physically and verbally abused her and that she left home when she was 12 or 13 years of age. She said that she regarded the father, Mr Hamilton, as her grandfather and she said that, as a child, she called him *"pop"*. She said that when she was a child he was kind to her and he told her that his door was always open to her. She said she went to live with him and remained there for some 30 days until DoCS removed her from his care. She said that in that 30-day period he began to touch her sexually and they had penile/vaginal intercourse 15 or 16 times. When asked in her evidence who instigated the sexual intercourse she said she did not know whether it was her idea or whose idea it was. The mother said that during that 30-day period he gave her everything she wanted. She said that after she was removed from Mr Hamilton by DoCS she went to live with her mother again and then went to live with her own father. She said that whilst with her father Mr Hamilton visited her on a number of occasions. She said that when she was 14 years of age her father kicked her out of home and that she then went to live in a refuge and then later went to live with her mother again. She said that her mother continued to verbally abuse her so she again left and went back to live with Mr Hamilton. She said that she was 15 when she went back to him.

14. In her evidence before me the mother said there was no doubt in her mind that she had had sexual intercourse with Mr Hamilton on numerous occasions prior to her turning 16 years of age. When asked why she had sexual intercourse with him she said she really didn't know. She said, *"I was young and didn't know any different".* The mother described an

occasion when she was living with the father when she was asleep. She said that Mr Hamilton came and pulled her underpants off, that she screamed and that she started getting *"belted"* by him around the head. She said she felt like she had been hit by a truck. This was the first occasion she said that Mr Hamilton had been physically violent towards her. She said that she left and stayed with a friend for a week and then came back and that he hit her again to the head. She said in evidence that after the children were born the verbal abuse was worse than the physical violence but the physical abuse continued until the about 12 months before she finally left him.

15. The mother said in evidence that the children were always around when the father was verbally abusive of her. She also said that both Kevin and Kyle had, on occasions, witnessed the father being physically abusive of her.

16. When asked why she did not report the abuse to her mother, she said she was too scared to do so and she said she didn't know whom to trust. She said she tried to tell her family doctor but was unable to do so as she just *"froze"* out of fear and she said, *"nothing would come out".* In the course of her evidence the mother was asked about an occasion on 16 June 2007 when she took Kevin to the Emergency Department of Bankstown Hospital when he was suffering from severe diarrhoea. The hospital notes record that she stated that while she was verbally abused by the father she *"denies any outright physical violence".* In cross-examination by Ms Griffin, for the father, the mother said the reason she did not disclose the physical violence at the hospital was because she was not ready to tell anyone about it because she was fearful that if she disclosed the physical violence perpetrated by the father she would suffer more punishment from him. She repeated that the father threatened her that if she called the police he would stab himself and accuse her of stabbing him. She also said that he threatened to kill her a number of times. The mother emphatically denied Ms Griffin's suggestion to her that the father had never been physically violent towards her.

17. In relation to the mother's allegation that she commenced a sexual relationship with the father when she was underage there is some discrepancy in her evidence as to when that sexual relationship commenced. In her evidence she said that there was sexual intercourse between herself and the father when she was 12 or 13 but in her affidavit filed on 5 March 2010 she deposes that she commenced a sexual relationship with the father when she was 14 years of age. In her evidence before me she explained that having sexual intercourse with a person is different to having a sexual relationship with that person.

18. Ms Griffin took the mother to a document she agreed she typed on a computer in October 2008 (Annexure "B" to the affidavit of Charles Hamilton, sworn and filed on 7 August 2009). The document describes her relationship with the father and the birth of Kevin. The document clearly implies that there was no sexual connection between her and the father until she turned 16 years of age. In the document she refers to the father in a loving and affectionate manner and makes no reference to any verbal or physical abuse by the father against her. She stated in evidence that most of the first paragraph of the document is untrue. She explained that she wrote the document out of "boredom" when the father was present in the room.

19. The father, in his affidavits, filed and read in the proceedings denies that he has ever engaged in domestic violence with the mother and the children. However, in the course of cross-examination he conceded that before the children were born, *"pushing and shoving"* between himself and the mother had occurred. When asked why he had previously asserted in his affidavits that he had never engaged in domestic violence he said that he probably didn't understand what domestic violence is. The father also said that to this day he does not know why the mother left him and took the children with her. I note that in his affidavit of 7 August 2009 the father admits that he said to the mother on one occasion, *"if anyone tries to take Kyle off me I will kill them".* He states in his affidavit, *"the comment that I made was a figure of speech and it was not meant literally, what I meant was that I would enforce my rights".*

20. In the course of cross-examination by Ms Hall, for the mother, the father recounted an incident involving his brother's daughter when she was aged nine years of age. He stated in his affidavit filed on 21 August 2009 that his brother told him that his daughter had made an allegation against the father. The father deposes that he told his brother that he had done nothing wrong and that, in fact, his niece was swimming under the water and grabbed his penis. He admitted in evidence that following this incident the girl became wild, *"like a dog"*, when her father was out of the room and that it was necessary for him to sit on the child to control her. The father agreed in evidence that, upon reflection, he should have acted better.

21. The father has a lengthy and very serious criminal record for sexual offences against children and for indecent exposure. At the age of 14 years he was convicted of an indecent assault upon an 8-year-old girl. At the age of 19 years he was convicted of indecent assault of a girl under the age of 16 years and received a sentence of two years imprisonment. On that occasion he saw the girl on the street, called her over to him and took her to a secluded location where he indecently assaulted her by placing his penis between her legs. The father also has convictions for carnal knowledge at the ages of 16 years and 27 years and he has

numerous convictions for indecent exposure, the last such conviction being entered when he was 28 years of age.

22. Before the court is a report of Mr Gerard Webster, forensic and counselling psychologist dated 26 February 2010. Mr Webster gave evidence before me. In his report Mr Webster recounts the history of the father as including the sustaining of head injuries at the age of 19 years as a result of a motorcycle accident. As a result he suffered brain damage to the right temporal lobe. Mr Webster expresses the view that it is very likely that the brain damage has had a *"profound impact"* on the father's psychological functioning.

23. In relation to his history of exhibitionism the father told Mr Webster that he believed it commenced at approximately the age of 6 years, being around the time that he said his own father sexually assaulted him. Mr Hamilton told Mr Webster that he experienced an *"uncontrollable urge to expose"* himself. He said he would expose himself *"every day to females aged between six years and 20 years".* He told Mr Webster that he recognised the need to get professional help so he sought the assistance of Professor McConaghy at the Prince of Wales Hospital. He said that Professor McConaghy treated him pharmacologically with 8 injections administered on a monthly basis. The father told Mr Webster that he has not exposed himself subsequent to the treatment. He asserted, *"all sexual deviance is behind me…I never wanted children but I've never loved children more in my life".*

24. Mr Webster states in his report that with regard to the father's responses in relation to exhibitionism and despite claiming to have benefited from past sexual offender pharmacological treatment it was found that he continues to severely minimise that exhibitionist behaviour.

25. In his report Mr Webster states as follows;

"Mr Hamilton is a very solid example of the inadequacy of an exclusively pharmacological treatment of sexual offenders. While it is likely that injections of Depo-Provera would have lowered Mr Hamilton's overall level of arousal by reducing his levels of free testosterone (as hypothesised my Prof. McConaghy) it did not address his level of awareness about the planning strategies he used to 'set up' his offence behaviours either in relation to child molestation or exhibitionism. Likewise the exclusive pharmacological treatment did not bring Mr Hamilton to a point where he was able to recognise the anticipation and excitement he experienced as part of his offence behaviours. Hence Mr Hamilton still minimises his planning strategies and his feelings of anticipation and excitement that lead up to his molestation and exhibitionistic behaviours. Mr Hamilton's absence of awareness with regard to these matters offers no basis for

believing that he would be able to manage his impulses and behaviour in the future if he were again to be sexually aroused by a chid."

26. Mr Webster expresses the opinion in his report that the father suffers from a severe anti-social personality disorder and that he poses, *"an extremely high risk to all children, both male and female"*. Mr Webster further expresses the opinion, *"given the assessed level of risk posed by Mr Hamilton, I consider any contact between him and his children creates a high risk to his children's physical and psychological well-being".*

27. Mr Webster recommends that there be no contact (direct or indirect) between the father and the three children. However, he states that if the court is of the opinion that it is in the children's best interests to have occasional contact with their father then he recommends that there be contact on only one occasion each year, such contact to be supervised by the Department.

28. The father called no expert evidence to refute the opinions expressed by Mr Webster nor did Ms Griffin, in the course of cross-examination of Mr Webster, challenge his opinions that the father poses an extremely high risk to all children and that any contact between him and his children creates a high risk to his children's physical and psychological well-being. Mr Webster confirmed in cross-examination by Ms Griffin that in reaching the opinions he expresses in his report he placed *"no weight"* on any unproven allegations of sexual misconduct made against the father.

29. In the course of submission, Ms Griffin made some criticism of Mr Webster's report in that while he explicitly states in the report that he has read and agrees to be bound by the Expert Witness Code of Conduct, as contained in the *Supreme Court Rules,* he did not read or agree to be bound by the current Expert Witness Code of Conduct as contained in Schedule seven of the *Uniform Civil Procedure Rules* 2005. I do not regard this criticism as valid. The fact that an expert witness has read and agreed to be bound by an expert witness Code of Conduct that may not be the current code of conduct does not necessarily undermine the value of the witness' evidence. The Expert Witness Code of Conduct provisions are not intended to operate directly as rules of admissibility. Their primary intention is to operate as a Code of Conduct designed to improve the quality of expert evidence: **Australian Securities and Investments Commission vs Rich** (2005) 190 FLR 242; [2005] NSWSC 149 per Austin J at paragraph 253.In any event, the former Expert Code of Conduct under the *Supreme Court Rules* 1970 and the Expert Code of Conduct under the *Uniform Civil Procedure Rules* 2005 are substantially the same.

30. I had the benefit of observing Mr Webster give his evidence before me. I found Mr Webster to be a very impressive witness and, as I have said, with respect to the principal findings he made and opinions he expresses, he was never challenged in cross-examination by Ms Griffin.

31. In the course of his cross-examination Ms Griffin took Mr Webster to the Children's Court Clinic assessment report of Ms Greta Goldberg dated 8 October 2009, which is before me. Ms Goldberg was asked to assess the relationship, including bonding and attachment, between the mother and the three children and her parenting capacity. In preparing her report Ms Goldberg had the opportunity to observe the interaction of each of the three children with their mother. In her report Ms Goldberg refers to a childhood history of multi-generational incestual abuse both on the side of the father and the mother. She states that there appears to be reality-testing problems on both sides, in the case of the father, apparently associated with acquired brain injury and, on the side of the mother, associated with borderline features in her personality. She further states that the family exhibits generational patterns of domestic violence associated with symptoms of post-traumatic stress disorder (PTSD) and behavioural disturbances in the exposed children. There is evidence before me that paediatrician Dr Michael Freelander diagnosed both Kevin and Kyle in 2009 as suffering from autism with severely delayed language skills and behavioural difficulties. Mr Goldberg expresses the view that the children, particularly Kevin and Kyle, may be suffering PTSD as a result of exposure to domestic violence. She expresses the view that the boys may have a dual diagnosis of autism and chronic PTSD. She is of the view that that possibility should be further explored. Ms Goldberg in her report opposes any contact by the father with the children.

32. Ms Goldberg states in her report that all three children show problems in social and emotional development, which for the older two boys reflects a complex interaction between the trauma of their exposure to domestic violence and (possible sexual) abuse, further complicated by a diagnosis of mild autism. I should interpolate here that there is absolutely no evidence before me to suggest that the father has subjected any of the children to any sexual abuse. However, as I shall come to consider shortly, there is considerable evidence before me substantiating the existence of a relationship of domestic violence between the mother and the father to which the two older children, in particular, were exposed. Ms Goldberg recommends full psychological assessment of each of the children to clarify the possibility of autistic spectrum development in each child. Ms Goldberg states that the reason for this would be differentiating their possible autism from the PTSD effects of violence and (sexual) abuse by the father and the anxious over-protection by mother, in order to better inform the children's treatment and rehabilitation.

33. In his evidence Mr Webster said that if the children were exposed to domestic violence perpetrated by the father they are likely to be re-traumatised by any exposure to the father. Mr Webster also said that any contact that the children may have with the father would raise the risk of possible sexual grooming of the children by the father. Mr Webster also raised the concern in his evidence that the other risk factor of any exposure by the children to the father relates to the father's inability to set appropriate sexual boundaries, evidenced by his inappropriate sexual relationship with the mother.

34. The Departmental caseworker, Ms Martine Liberman, gave evidence before me. She took over the casework in this case in December 2009. She said that the care agency, St Xavier's, has been identified as a possible source to provide long-term foster carers for the three children. Ms Liberman said that the Department proposes to place all three children together in the same long-term foster placement and that failing that the two older boys, Kyle and Keith, be placed in the same placement together. In that regard I note the recommendation of Ms Goldberg that Keith and Kyle should be placed together because they've been in the same foster placement since July 2009.

35. Ms Liberman said that two possible placements have been identified, one of which may be able to place the three children together. She said that a further meeting with St Xavier's clinical staff and psychologists and the Departmental psychologist is being arranged. Mr Liberman said that some conjecture has recently arisen as to whether Kevin suffers from autism and that he has been referred to the Parramatta Early Childhood Assessment Team for further assessment. I understand the reference to "conjecture" arises from a report of Ms Goldberg that the children may be suffering from PTSD as well as autism. Ms Liberman said that in relation to Ms Goldberg's recommendation that there be full psychological assessment of Kevin that this has not yet been carried out and that Kevin is presently on a waiting list for assessment.

36. Of particular concern is Ms Liberman's evidence that both Kevin and Keith have recently been exhibiting sexualised behaviour including attempts by Kevin, when bathing with Kyle, to bite Kyle on the penis. She also said that Kevin has also been exhibiting other violent behaviour following contact visits with his mother and has been regressing into infantile behaviours.

37. It is imperative that full psychological assessment of both Kevin and Keith be arranged by the Department as soon as possible. Although Dr Freelander had previously made a diagnosis of autistic spectrum disorder in both Kevin and Kyle, the recent extreme and inappropriate behaviours exhibited by Kevin in particular, clearly raise, as Ms Goldberg states, the

possibility that the boys are suffering from PTSD as a result of prior exposure to physical abuse.

38. As I have previously stated, there is abundant evidence before me to support a finding that the relationship between the mother and Mr Hamilton was marked by severe and ongoing domestic violence to which the children must have been exposed. Whilst the evidence of the mother that Mr Hamilton commenced a sexual relationship with her whilst she was underage is uncorroborated by independent evidence there is cogent independent corroborative evidence before me that the mother was subjected to ongoing physical and verbal abuse by Mr Hamilton. I found the mother to be a forthright and impressive witness. There were aspects of her evidence that had a clear "ring of truth" to it. In the course of her evidence, she made no attempt to exaggerate or "gild the lily". For example, when asked who it was who initiated the sexual relationship between herself and Mr Hamilton she said she didn't know whether it was her idea or whose idea it was. Whilst she was adamant that Mr Hamilton had physically assaulted Kevin on a number of occasions she said he had never assaulted Kyle. These answers do not support a finding that the mother had deliberately set out on a course of maliciously making false allegations against Mr Hamilton.

39. I have referred to that independent evidence that the mother disclosed verbal abuse by Mr Hamilton to Blacktown Hospital in June 2007. I accept the explanation of the mother that she was afraid at that time to disclose the physical abuse perpetrated by Mr Hamilton upon her and I accept her explanation that she was also afraid to disclose the abuse to her family doctor. Of particular significance as corroborative evidence is Exhibit 8 being the case notes of Brighter Futures South West Sydney. The notes record that on 25 June 2009 the mother acknowledged *"the controlling and undermining behaviours"* of Mr Hamilton and that there was discussion about the connection between this and the boys' behaviour. The notes further record that there was discussion about options for her leaving the relationship and the availability of the DV support line. Notes for 19 May 2009 record that, *"Natalie described events and experiences constitute verbal, financial, psychological abuse from the children's father"*. Notes for 5 May 2009 record there was discussion with the mother of the dynamics of victim and perpetrator in a domestic violence relationship and the impact of children. The notes record as follows, *"Natalie identified with all questions highlighting there is DV in the relationship"*. The notes record that on 28 April 2009 the mother disclosed that *"she feels intimidated and controlled"* by Mr Hamilton *"in most areas of her life"*. The notes record that she is fearful to leave Mr Hamilton. The notes further record that on 20 April 2009 Mr Hamilton was observed to undermine the mother's parenting capacity. The notes record that the Brighter Futures (BF) workers observed Mr Hamilton *"to become verbally abusive, threatening*

and confronting to both Natalie and to BF worker in regards to parents roles in the home".

40. Whilst the mother mad no direct disclosure of physical abuse by Mr Hamilton to the BF workers, I accept her evidence that she was fearful for her safety if she disclosed that physical abuse.

41. The mother's allegation of physical abuse by Mr Hamilton is further corroborated by Mr Hamilton in his own evidence when, while denying that there had ever been any domestic violence in his relationship with the mother, he agreed that there had been *"pushing and shoving"* between them before the children were born. The fact that the mother sought and obtained interim and final apprehended violence orders against Mr Hamilton in 2009 lends further support to her allegations of domestic violence against him.

42. Whilst I was impressed with the mother as an honest and forthright witness, I found Mr Hamilton to be evasive, confused and at times contradictory in his evidence. When pressed in cross-examination by Mr McLachlan as to what significant change had occurred to cause him to change his position in relation to seeking restoration of Kevin and Kyle he offered a number of conflicting explanations (including short term memory problems) and ultimately said he wasn't able to answer the question. As I stated previously whiles emphatically denying any domestic violence in his relationship with the mother, he later admitted to them "pushing and shoving".

43. On all the evidence before me I find that the relationship between the mother and Mr Hamilton was marked by serious ongoing domestic violence by Mr Hamilton against the mother, including verbal abuse. I find that the children were exposed to that serious ongoing domestic violence. I accept that upon the evidence of Ms Goldberg and Mr Webster that there is a real risk that Kevin and Kyle are currently suffering behavioural problems related to their exposure to the domestic violence perpetrated by the father. I accept the opinion of Mr Webster that any exposure of the children to the father, even by way of supervised contact, creates the risk that the children may be re-traumatised by that exposure. I read Ms Goldberg's report as expressing the same opinion.

44. In determining whether a contact order should be made in favour of the father I must bear in mind, pursuant to section 9(1) of the *Care Act*, that in making that determination with respect to a particular child, the safety, welfare and well-being of the child are paramount. As the High Court said in **M v M** [1988] HCA 68 in the context of parenting orders made under the *Family Law Act* 1975,

"The court is concerned to make such an order for custody or access which will be in the opinion of the court best to promote and protect the interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in the child's best interest to maintain a filial relationship with both parents…" (at page 76)

See also **B v B** [1988] HCA 66

45. In **M v M** the High Court went on to say (in the context of an allegation against a father of sexual abuse of his daughter) that in achieving a proper balance between the risk of harm to the child from sexual abuse and the possibility of benefit to the child from parental access, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to *an unacceptable risk of harm.* The High Court held that in applying the unacceptable risk of harm test it is necessary to determine firstly whether a risk of harm exists and, secondly, the magnitude of that risk. Once it is found that a risk does exist and the magnitude of the risk is assessed, in determining whether the risk of harm is unacceptable the court must balance against that risk the risk that the child may be harmed by lack of contact with the parent.

46. The balancing process involved when the court comes to determine whether a risk of harm is *"unacceptable"* may be illustrated by the following examples. If, in a particular case, the court determined that the risk of harm to the child at contact from sexual abuse by the parent is very low but the risk of psychological harm to the child from having no contact with the parent is very high then the court may well determine that contact should be granted on the basis that the risk of harm to the child from sexual abuse is, in all the circumstances, not an unacceptable risk. In such a case it would be likely that the court would only allow supervised contact because some risk of harm from sexual abuse does still exist, albeit a very low risk.

47. However, if in a particular case the court determined that the risk of harm to the child at contact from sexual abuse by a parent is very high and the risk of psychological harm to the child from having no contact with the parent is low then the court no doubt would determine that any contact should be refused on the basis that the risk of harm to the child from sexual abuse in the circumstances is an unacceptable risk.

48. The unacceptable risk of harm test propounded by the High Court in **M v M** has been extended to risks of harm other than sexual abuse: see **Orwell v Watson** [2008] FamCAFC 62 where Dessau J said:

"It is entirety of the evidence that satisfies me that [Mr Orwell]'s manipulative and over-bearing behaviour, his disrespect for boundaries, his preparedness to do whatever it takes to get his way goes beyond just being problematic for the mother in dealing with him. I am satisfied that his behaviour has impinged on his close relationships and it poses ***an unacceptable risk of psychological abuse to [the child]****".* at [257]]. (emphasis added).

49. The unacceptable risk of harm test is regularly applied by the Children's Court in making determinations in care proceedings: see for example, **Re Maree** [2007] CLN 6 (an allegation of sexual abuse) and **Re Anthony** [2008] CLN 8 (non-accidental brain injury) both decisions of former Senior Children's Magistrate Mr Mitchell.

50. Upon all the evidence before me I assess the magnitude of the risk of psychological harm to the children or any of them resulting from any contact with the father to be significant. In assessing the magnitude of risk of psychological harm to the children or any of them resulting from having no contact with the father I note that there is no evidence before me of positive attachment of any of the children to the father. I have explicitly found that the children were exposed to domestic violence perpetrated by the father upon the mother. I am clearly of the view that the risk of psychological harm to the children arising from them having no contact with the father is low.

51. I have therefore come to the view that any contact between the father and the children would expose the children to an unacceptable risk of harm. Accordingly, I refuse to make a contact order in favour of the father.

52. I now turn to final orders in relation to the issue of placement. As I stated earlier in these reasons both the mother and the father concede that there is no realistic possibility of restoration of the children to their care. The mother and the father do not oppose the long-term order sought by the Director General that parental responsibility for each of the children be allocated to the Minister until the child attains the age of 18 years. Ms Canning, as independent legal representative of the children also seeks that long-term order with respect to each of the children.

53. On all the evidence before me I agree with the assessment of the Director General that there is presently no realistic possibility of restoration of any of the children to their parents' care. However, pursuant to subsection 83(7)(a) of the *Care Act*, the court must not make a final care order in relation to a child or young person unless it expressly finds *"that permanency planning for the child or young person has been appropriately and adequately addressed".*

54. In considering the meaning of "permanency planning" under the Care Act it is necessary to also consider sections 78 (care Plans), 78A (Permanency Planning) and section 83(7A) of the Care Act.

Section 78(1) provides,

If the Director-General applies to the Children's Court for an order, not being an emergency protection order, for the removal of a child or young person from the care of his or her parents, the Director-General must present a care plan to the Children's Court before final orders are made.

Section 78 (2) provides,

The care plan must make provision for the following:

(a) the allocation of parental responsibility between the Minister and the parents of the child or young person for the duration of any period for which the child or young person is removed from the care of his or her parents,

(b) the kind of placement proposed to be sought for the child or young person, including:

(i) how it relates in general terms to ***permanency planning*** *for the child or young person, and*

(ii) any interim arrangements that are proposed for the child or young person pending permanent placement and the timetable proposed for achieving a permanent placement,

(c) the arrangements for contact between the child or young person and his or her parents, relatives, friends and other persons connected with the child or young person,

(d) the agency designated to supervise the placement in out-of-home care,

(e) *the services that need to be provided to the child or young person.*

(emphasis added).

Section 78A relevantly provides,

(1) For the purposes of this Act, ***permanency planning*** *means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security and that:*

(a) *has regard, in particular, to the principle set out in section 9 (2) (e), and*

(b) *meets the needs of the child or young person, and*

(c) *avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements.*

(2) ***Permanency planning** recognises that long-term security will be assisted by a permanent placement.*

*(2A) A permanency plan need not provide details as to the exact placement in the long-term of the child or young person concerned **but must be sufficiently clear and particularised so as to provide the Children's Court with a reasonably clear picture as to the way in which the child's or young person's needs, welfare and well-being will be met in the foreseeable future.***

(emphasis added)

Section 83 (7A) of the Care Act provides as follows:

*For the purposes of subsection (7) (a), the permanency plan need not provide details as to the exact placement in the long term of the child or young person to whom the plan relates **but must provide the further and better particulars which are sufficiently identified and addressed so the Court, prior to final orders being made, can have a reasonably clear plan as to the child's or young person's needs and how those needs are going to be met.***

55. Sections 78A (2A) and section 83 (7A) are recent amendments to the Care Act being enacted pursuant to the Children L*egislation Amendment (Wood Inquiry Recommendations) Act* 2009. Those amendments which commenced operation on 24 January 2010 were made following upon a recommendation of the *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (November 2008) that the Care Act be amended to ensure that the decision of former Senior Children's Magistrate Mr Mitchell in **Re Rhett** [2008] CLN 1 is followed. The Report stated (at paragraph 11.198) that while the decision in **Re Rhett** is not binding on magistrates, the decision "*accurately reflects the law and represents good policy. It should be applied by all magistrates exercising jurisdiction in care proceedings*".

56. In **Re Rhett** Senior Children's Magistrate Mitchell referred to the "close parallels" between the child care and protection systems in England and Wales and in NSW and stated that it is therefore permissible to take into account English decisions for some guidance as to the interpretation and

the implementation of the NSW Care Act. His Honour referred to the "*cardinal principle*" referred to in decisions **Re S v S and Ors** [2002] UKHL 10 that, in general terms, it is for the welfare authorities to formulate a care plan and for the courts, in deciding whether or not to make a final care order, to approve the care plan or disapprove it. Mitchell SCM stated that in making final orders based upon a care plan the court is required to act in the best interests of the child or young person. His Honour stated at [25],

"In order to do that, there must be sufficient detail in the care plan to allow the court to satisfy itself that the order will pass the "best interests" test".

57. His Honour noted that an element of future uncertainty is necessarily inherent in the very nature of a care plan. His Honour went on to say:

27. "…. There are cases where the Director-General just doesn't know and cannot reasonably be expected to know what lies in store for a child or young person in care. For example, there have been cases where a young person is suffering from anorexia nervosa and is in danger of death or there is a possibility that a degree of irreversible brain damage has already occurred where the extent to which the Director-General is able to address permanency planning principles is necessarily limited. There are other cases where a child or young person with huge special needs and suffering massive disadvantage requires a long term out of home placement where the Director-General can surely not be criticised for failure to have found such a placement in the limited time allowed by the Court's rules and directions regulating litigation. In those cases, then, perhaps the best the Director-General will be able to do is to describe and express an intention to find and to persist in his attempts to find an acceptable arrangement for such a child or young person and to provide specifics of the details which he regards as essential to a satisfactory arrangement. Usually, though, even in those dire cases, the Director-General would be able to and should go further and advise the court of the steps he has already undertaken to secure the arrangement he seeks.

28. "But in most cases which might be thought of as ordinary, "run of the mill" cases (in the sense that they contain no very significant peculiarities and pose no extraordinary difficulties), the Director-General should go considerably further. There will almost always be uncertainties and unknowns in a care plan for a child or young person. First of all, "the best laid plans 'gang aft a-gley.' These are matters for the local authority if and when they arise. A local authority must always respond appropriately to changes, of varying degrees of predictability, which from time to time are bound to occur after a care order has been made and while the care plan is being implemented. No care plan can be regarded as set in stone" - Munby J. in ***C.W. & S.W. and Enfield****.*

29. "Secondly, in any case there will be details of the proposed upbringing of a child or young person which will not have been clarified in anybody's mind, including the Director-General's mind, at the time the care plan is submitted to the court and which have not been and need not be specified in the care plan. These are matters which one can confidently expect will be properly dealt once the child or young person is in an appropriate placement. The court doesn't need to know the colour of the child's bedspread, whether he will be playing Rugby or Football (or even League), whether she will go to PLC or Plunkett St. Public or the outcome of any of the hundreds of decisions which have to be made in the course of a child's upbringing. They will be matters for whoever holds parental responsibility or perhaps for the Director-General but not for the court and not for the care plan. No court needs to or should intrude into those areas and the Director-General has no obligation to inform the court about them. As Wall J. found in ***Re J.*** *[1994] 1 FLR 253, 262 "There are cases in which the action which requires to be taken in the interests of children necessarily involves steps into the unknown…provided the court is satisfied that the local authority is alert to the difficulties which may arise in the execution of the care plan, the function of the court is not to seek to oversee the plan but to entrust its execution to the local authority……The court must always maintain a proper balance between the need to satisfy itself about the appropriateness of the care plan and the avoidance of over zealous investigation into matters which are properly within the administrative discretion of the local authority.'"*

30. "But as Lord Nicholls of Birkenhead said in ***S. v. S. & Ors*** *"despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is* ***sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future.*** *The degree of firmness to be expected, as well as the amount of detail in the plan, will vary from case to case depending on how far the local authority can foresee what will be best for the child at that time." "*

58. The need, referred to by Lord Nicholls of Birkenhead in **S v S and Ors,** for a care plan to be sufficiently firm and particularised to provide a reasonably clear picture of the likely way ahead for the child for the foreseeable future has now received statutory recognition in NSW by the enactment of sections 78A(2A) and 83(7A) of the Care Act. Although the amendments do not strictly adopt the language of Lord Nicholls, the substantive effect of the amendments mirrors the language of his Lordship.

59. Under the current legislation the following questions therefore arise for my determination. First, whether, pursuant to section 78A(2A) of the Care Act, the permanency planning as provided for each child in the care plans filed by the Director General (supplemented by the evidence before me) is sufficiently clear and particularised so as to provide the court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future? And secondly, (in determining under section 83 (7)(a) of the Care Act whether permanency planning has been appropriately and adequately addressed) whether, pursuant to section 83 (7A), the permanency plan provides the further and better particulars which are sufficiently identified and addressed so the Court, prior to making final orders, can have a reasonably clear plan as to the child's needs and how those needs are going to be met. In determining whether, pursuant to section 83 (7)(a), permanency planning has been appropriately and adequately addressed, the court must also take into account the requirements set out in sections 78A(1) and 78A(2) of the Care Act.

60. In the present case the Director General proposes, as its preferred option, to place all three boys together in the same long-term placement if a suitable placement can be found. In the event that a suitable long-term placement cannot be found for all three boys, then the Director General proses to place Kyle and Keith together in the same long-term placement and to place Kevin (who clearly has the highest special needs of three boys) in a separate long-term placement. As I have previously stated the Clinician Ms Goldberg recommends that if all three boys cannot be placed together then the two older boys, Kevin and Kyle, should be placed together.

61. The Director General filed Care Plans for each of the boys on 18 November 2009. The Care Plans state that it is proposed that all three boys be placed in a long- term placement with long-term carers and possible adoptive applicants. The Care Plans state that due to the high needs of both Kevin and Kyle "*it is proposed that the carers will have experience in caring for children with high needs or to have been assessed as willing and capable of learning the required skills to parent Kevin in a manner that supports him to reach his full potential*". It is proposed that should Kevin be placed separately form Kyle and Keith that all three boys should be in placements which are in physical proximity to each other so that they may maintain and develop a positive sibling relationship.

62. As I have previously stated Ms Goldberg recommended in her report that there should be full psychological assessment of each child to clarify the possibility of Autistic Spectrum Development. She recommends this to be done "*to differentiate their possible autism from the PTSD effects of*

violence and (sexual) abuse by father and the anxious overprotection by mother, *in order to better inform the children's treatment and rehabilitation*". Again, I make it clear that I have made no finding that any of the children were sexually abused by the father but I have found that they were exposed to ongoing domestic violence perpetrated by the father against the mother. I entirely agree with the opinion of Ms Goldberg that given the serious dysfunctional and inappropriate behaviours exhibited by Kevin and Kyle that there should be a full psychological assessment of each of them. A full psychological assessment of the youngest boy Keith (now almost 2 years of age) may be required when he is older.

63. Despite the fact that Ms Goldberg made her recommendation for full psychological assessment of each of the children in October 2009 that assessment has still not taken place. I was informed by the Department that Kevin is presently on a waiting list and that it is expected he will be assessed in August this year.

64. I have given careful consideration to the question of whether permanency planning for each of the boys has been appropriately and adequately addressed by the Director General in the Care Plans. Mr McLachlan submitted that whilst suitable placements have not yet been found for any of the boys and while a full psychological assessment of Kevin and Kyle has not yet taken place, the Department is fully aware of the special needs of the boys and is working towards finding suitable placements for them and to put in place any special counselling or other support services for the boys which undoubtedly will be required.

65. While under section 78A (2A) of the Care Act the Director General does not have to provide details as to the exact long-term placement of a child, its permanency plan must be sufficiently clear and particularised so as to provide the Court with "a *reasonably clear picture as to the way in which the childrens' needs, welfare and well-being will be met in the future"*. Under section 83 (7A) a Care Plan must have sufficiently identified further and better particulars "*so the Court, prior to final orders being made, can have a reasonably clear plan as to the child's needs and how those needs are going to be met*". I must also be satisfied pursuant to section 78A (1) that the Care Plan, inter alia, meets the needs of the child and avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements.

66. Whilst I do not regard the present case as an "ordinary" or "run of the mill" case, in the sense used by Mitchell SCM in **Re Rhett**, the difficulty I have in reaching a satisfaction that permanency planning has been adequately and appropriately addressed by the Director General, is that the special needs of the children Kevin and Kyle, in particular, have not as yet been identified. However, when the full psychological assessment of Kevin and

Kyle is undertaken, hopefully shortly, then those special needs may be identified. The special needs of the boys having been identified, the Court will then be able to discern whether the Care Plan provides a reasonably clear plan as to how those needs are going to be met. Further, when those special needs are identified the Director General will have the opportunity to present a Care Plan which provides a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met.

67. Another matter of concern which needs to be clarified in the Care Plans is whether the Director General does or does not propose to place the three boys in the same long-term placement. The Care Plan for Kevin states that, because of his special high needs, it is proposed that he will be placed in a separate long-term placement to Kyle and Keith. However, when Ms Liberman gave evidence she said that St Xavier's is considering a possible long-term placement for all three boys.

68. On the evidence presently before me I am not satisfied that with respect to each of the three boys, permanency planning has been appropriately and adequately addressed and I prose to adjourn the matter to allow the Director General to file amended care Plans.

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