In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2008: No. 16

BETWEEN:

A. W.

Appellant

-and-

DIRECTOR OF CHILD & FAMILY SERVICES

Respondent

JUDGMENT

Date of Hearing: 3, 4, 9, & 10 June 2008

Date of Judgment: 20 June 2008

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates, for the Appellant

Ms. Maryellen Goodwin, Attorney-General's Chambers, for the Respondent

Introduction

1. This is an appeal against a decision of the Magistrates' Court, sitting as a Special Court, namely the Family Court ("the Family Court"), made on 3 April 2008. On that date, the Family Court confirmed a care order which had been made on 19 February 2008 in respect of the three children of the Appellant. Those children are OW, a boy born on 29 November 2003, WW, a boy born on 7 June 2006, and

TW, a girl born on 27 May 2007. The care order placed the children under the care of the respondent ("the Director").

2. The order made on 3 April 2008 was the last in a succession of orders which had been made by the Family Court since its first order, which was made on 11 October 2007. That order was an interim order made under the provisions of section 32 of the Children Act 1998 ("the Act"), within a matter of hours of the children having been taken from the Appellant's home by a combination of a police officer who was a member of the Child Victims Unit, Sergeant Renay Rock, and Annisha Peets-Cottie, a social worker in the employment of the Department of Child & Family Services ("the Department").

The Care Orders

3. The order made by the Family Court on 11 October 2007 was an interim care order (although not so described) for the three children, made for an initial period of twenty-eight days. The order provided that the Department should use its best efforts to find alternative accommodation for the Appellant and the children, and set a review date for 9 November 2007. On 9 November 2007, the Family Court made a four month care order for the three children, and directed that they should be placed at the discretion of the Director. The plan of care prepared by the Department was to be implemented, with a further review on 19 February 2008. On that date, the Family Court ordered a further six month care order for the three children, again ordered that the plan of care prepared by the Department should be implemented, and set a review date for 13 March 2008. On 13 March 2008, the Family Court confirmed the care order which it had made on 19 February 2008 with respect to the three children, ordered that the Department should be satisfied with the Appellant's employment and new residence before placing the youngest of the three children, TW, back in her care, and set a review date for 3 April 2008. Finally, on 3 April 2008 the order which is the subject of the appeal was made, and this again confirmed the care order made on 19 February 2008 for the three children. The Family Court ordered that the youngest child, TW, should be put

back into the care of her mother, the Appellant, once the Department was satisfied in relation to her employment and accommodation, and set a review date of 15 July 2008.

4. That is intended as no more than a brief summary of the procedural history of matters, and it will in due course be necessary to consider in more detail the nature of the proceedings before the Family Court on the various occasions on which it made orders, and determine whether the Family Court acted properly on those various occasions, and particularly whether it acted in accordance with the provisions of the Act.

Procedural Matters

5. On 15 May 2008 the matter came before the Chief Justice on the Appellant's application, which sought leave for the Appellant to file and rely upon an affidavit sworn on 22 April 2008. The Chief Justice made an order to that effect, dealt with various procedural matters, and gave the Director leave to file affidavit evidence in reply. Affidavits were subsequently filed by Ms. Peets-Cottie, who had been the lead social worker in the matter from 9 October to 5 December 2007, and by Darren Francis, a social worker in the Department who became the lead social worker on 5 December 2007.

6. It is clear from reading these three affidavits that there are material conflicts between the Appellant's version of events, particularly those of 11 October 2007, and that of the social workers. Although Mr. Francis did not take over as lead social worker until 5 December 2007, he had attended with Ms. Peets-Cottie at the Appellant's home on Ord Road on 11 October 2007. The conflict covered what was said by a police officer and the social workers to the Appellant when they arrived at her home, as well as the condition of the home itself, and the condition of the children. I took the view that because of the conflicts it was necessary to make a determination in relation to the underlying facts, and the three deponents were sworn and were cross-examined on their affidavits and generally. The cross-

examination of the Appellant and Ms. Peets-Cottie was extensive and that of Mr. Francis was relatively brief. Having heard the deponents, I took the view that I preferred the evidence of Ms. Peets-Cottie and Mr. Francis to that of the Appellant. In making that ruling, I noted that my view in that regard should not be taken as a criticism of the Appellant, who would necessarily have been subject to very considerable stress by the events of the day. The social workers had been accompanied by a large number of police officers, of which again I make no criticism, but realistically that would have affected the Appellant, and of course the outcome was that the two younger children who were at home were removed by the police and the social workers, and arrangements were made to collect the oldest child from pre-school. That would be bound to upset the Appellant greatly, and indeed she acknowledged in her affidavit that at the time of the court hearing later that afternoon, she was not sure what had been said to the Family Court because she had been so upset. It is to be noted that the Appellant assisted the social workers by providing information in relation to the children, both in terms of their medical condition (the two younger children had both been born prematurely, and were then aged 16 and 4 months) and the pre-school arrangements for the oldest child.

The Events of 11 October 2007

7. The events of 11 October 2007 were put in train by two calls which were made to the Department, which detailed what Ms. Peets-Cottie had described in her affidavit as "the dangerous circumstances" that the three children were then in at their residence. The two callers were respectively a nurse and a worker in a child protection agency, although in accordance with Departmental policy their identities were not revealed. The Appellant believed that the Department was acting on the basis of anonymous calls, but I accepted Ms. Peets-Cottie's evidence that this was not the case. Ms. Peets-Cottie was assigned to the case and contacted the Child Victims Unit of the Bermuda Police Service. She was informed that police officers had been called to the Appellant's residence in the past to deal with complaints of domestic violence, that the children's father, AD,

was known to the police for drug involvement, and that the Appellant's home was located in a known "drug area", where men were known to congregate, the implication being that their gathering was connected to the drug trade. For this reason the social workers were accompanied by no less than ten police officers when attending the Appellant's home, two of whom were from the Child Victims Unit, with the others being mainly narcotics officers.

8. Sergeant Rock of the Child Victims Unit entered the residence first, followed by the social workers and the other police officers. They explained to the Appellant that they were investigating complaints of child neglect, and were shown around the house by the Appellant. In relation to the condition of the house and the children, this is best demonstrated by setting out the relevant part of Ms. Peets-Cottie's affidavit, which is in the following terms, amended only by the use of initials to protect the identities of the children:

> "9. The house was dark, dusty and dank. I saw dirty clothes strewn about the house, not organized piles as if they were being sorted out. The house was generally speaking filthy and full of junk with plastic containers stacked up in the middle of the kitchen floor. There were holes in the ceiling and the floors were splintered and unstable. The kitchen sink was full of dirty dishes including baby bottles which were covered with ants. I recall asking the Appellant to provide us with bottles for the children and she gave us a sippy cup for WW which was filthy and a bottle out of the kitchen sink.
>
> 10. There were crumbs and other remnants of food on the furniture and floors and trails and trails of ants at least an inch thick. WW was picking up crumbs off the bedroom floor and attempted to eat them before I removed them from his hand. When I went into the bedroom where the Appellant told me she slept with the children, I saw the baby, TW, asleep face down on a pillow on the only bed in the room which was a double or queen-sized bed. There were ants on the bed. There was a "Pack and

Play" type playpen in the room but the baby could not be put in it because it was full of clothes, old food and ants. It appeared that Mr. D lived in the other bedroom and the Appellant's father was sleeping on a couch in the living room.

11. The bathroom was disgusting. There was standing water in the bathtub with a film on it. The toilet obviously did not flush. It did not appear to me that the Appellant was in the process of cleaning the home at all. I did not see any cleaning products, buckets, mops, brooms, etc. anywhere.

12. I spoke further with the Appellant about her situation. She readily admitted the domestic violence. She told me that she was sexually, emotionally and physically abused by Mr. D. She complained that she did not have enough money to properly provide for the children. When I asked her whether she left the children unattended she told me that she had to be with them all day and when they went to sleep that was her chance to take a break and that she would go and talk with the men at the end of the road.

13. When TW woke up I could see thick white mucous running out of her nose. WW's face and shirt were also covered in mucous. Both children appeared to be having considerable difficulty breathing."

9. At this point, Ms. Peets-Cottie and Sergeant Rock had a discussion in which they concluded that the children needed to be removed from the home immediately. Again, quoting from Ms. Peets-Cottie's affidavit, she indicated that this was:

> "not only because of the condition of the house but also because we had serious concerns about the children's health, the Appellant's mental health, the lack of supervision for the children, the domestic violence, the "neighbourhood" the home was located in and the possibility that the children were exposed to individuals who were under the influence of drugs."

10. Arrangements for the removal of the two younger children were then put in hand, and the Appellant assisted in the arrangements, being "compliant", to use Ms. Peets-Cottie's word. The oldest child was collected from pre-school. In relation to the youngest child, TW, Ms. Peets-Cottie spoke with the child's pediatrician Dr. Perinchief, and when he was told of the child's symptoms, he directed that she should be taken to hospital. There she was admitted, and she remained in hospital for eight days.

The Hearing of 11 October 2007

11. A court hearing was arranged for 4 p.m. that same afternoon, and the notes of that hearing form part of the record. The Wor. Juan Wolffe presided, sitting with two members of the Special Court panel ("the Panel"). The learned magistrate's notes indicate that present were the Appellant, her mother, Ms. Peets-Cottie, and Ms. Terri-Lynn Richardson, another social worker. The notes do not indicate whether those addressing the Court were sworn, but the Court was addressed by Ms. Peets-Cottie, the Appellant, and her mother. The Court then made an order in the following terms:

> "We have taken into consideration all that everyone has said. This is a situation whereby it is obvious that (the Appellant) loves her children and that she, as Ms. Cottie states, "is making the best out of a bad situation". It is our view that the children must be taken out of the deplorable environment that they are presently in and in this regard we accept what the Social Worker has said about the state of the premises and the very real health concerns of the children, whom it appears to us require immediate medical attention. Therefore we are satisfied that a Care Order shall be made for a period of 28 days.
>
> However, we urge upon the Dept. of Social Services to use their best efforts to find alternative accommodations for (the Appellant), and soon thereafter re-unite mother with her children.

We therefore order the following: -"

The Court then proceeded to make the order referred to in paragraph 3 above.

12. There are two matters to which I would refer in relation to that order. The first is that the notes reflect that Ms. Peets-Cottie had requested a twenty-eight day interim care order, which would be an order made under section 32 of the Act. The order itself is not so described. The second point is that the ruling envisages that if alternative accommodation could be found for the Appellant, she would be re-united with her children relatively quickly.

The Hearing of 9 November 2007

13. This hearing was presided over by the Wor. Tyrone Chin, whose notes form part of the record. He sat with two different members of the Panel. The Department had by this time produced a plan of care which formed part of a document headed "Care Order", which made various recommendations both in relation to the children, the Appellant, and the children's father, AD. The heading "Care Order" is confusing when that form of words properly refers to the order made by the Family Court, particularly when the document itself was clearly prepared in preparation for the court hearing, before any care order was made by the Family Court. It is more in the nature of a Social Inquiry Report, and I would propose, therefore, to refer to this document and subsequent ones of the same nature as "the Report", and if necessary to refer to the different Reports by date. In relation to the children, the plan of care provided that they were to reside at the discretion of the Department. The Report was a very full (some nine detailed pages) document prepared by the Department which covered the history of matters since the events of 11 October 2007. Initially, TW was in hospital and WW and OW were with a foster parent. TW was discharged from hospital on 19 October 2007, and visits between the Appellant and her children had been conducted through the Department. The Department's recommendation was that the children remain in a neutral foster placement, as many of the identified concerns remained unaddressed. Despite the detail contained in the Report, the plan of care was

criticised on the basis that it failed to comply with the provisions of section 31(1) of the Act. While some of the matters required by the Act to be set out in the plan of care could be found in the body of the Report, this is not the case in respect of all of them. Particularly, section 31(1)(d) requires that where the Director proposed to remove children from the care of a parent, he should give an explanation as to why the children could not be adequately protected while in the care of that parent, and a description of any past efforts to do so, as well as a statement of what efforts were planned to maintain the children's contact with the parent. No doubt all of the matters covered in section 31(1) should have been covered in the plan of care, but it does seem to me that those in relation to section 31(1)(d) are the most important. What should have happened, and did not, was that the plan of care should have gone through the matters raised in section 31(1) in turn, and should have dealt with each and every one of them.

14. The learned magistrate's notes referred to the documents supplied. For this hearing there were three social workers present, the Appellant, and an attorney (whom the Appellant said in her affidavit was there at the request of her mother, and with whom she had not spoken before the proceedings). Her mother and AD, the children's father, were also present.

15. Again, the notes do not indicate whether those addressing the Family Court were sworn, and reflect an unstructured approach which is confusing in evidential terms. The plan of care was implemented by the Family Court, and the four month care order referred to in paragraph 3 was ordered, with the next review date being set for 19 February 2008. Unfortunately, the care order was made without any ruling being made on behalf of the Panel, so that there are no reasons given by the Family Court for its order. Hence there was a complete failure on the part of the Family Court to comply with the provisions of section 31(2)(b) of the Act. This subsection requires that where the Family Court makes a care or supervision order, it should give the reasons for its decision, including –

(i) a statement of the evidence on which the court bases its decision; and

(ii) where the order has the effect of removing children from the care or custody of their parent, a statement of the reasons why the children cannot be adequately protected while in the care or custody of the parent.

In other words, the Family Court is required to indicate why it chose to make a care order removing the children from the care of the parent, as opposed to a supervision order, which would have had the effect of leaving the children in the care of the parent, but subject to the supervision of the Director.

The Hearing of 19 February 2008

16. Again, the hearing was presided over by the Wor. Tyrone Chin, this time sitting with two different members of the Panel. There was a further Report prepared by the Department, which began with a section headed "Background Information" which was in identical terms to that set out in the Report of 8 November 2007. The document then gave the current situation, detailing the various meetings which had been held between the Appellant and Mr. Francis, the writer of the report, and indicating that the Appellant remained unemployed and continued to live at the Ord Road property. This was still referred to as "squatting", although the full position had been set out in the previous Report.

17. In relation to the children, the two boys were by this time back in the care of their father, Mr. D, and were said to be adjusting well to their new circumstances, although there was a behavioural problem with OW. In relation to the youngest child, TW, the report noted that she continued to reside with foster parents who were competent with her medical needs, and indicated that her parents did not object to this arrangement.

18. In relation to the plan of care, there were again a series of recommendations. These included a requirement that the Appellant undergo a full psychological assessment, which would focus on her parenting capability, that the father continue to attend anger management courses, and that the Appellant re-apply for financial assistance, and obtain gainful employment. The Department indicated it would continue to liaise with the Bermuda Housing Corporation regarding accommodation for both parents, and that the Appellant would have supervised weekly access to the children.

19. The Magistrate's notes are unfortunately very brief, and again fail to address the requirements of section 31(2) of the Act. The order itself provided for a further six month care order for the children, with the plan of care to be implemented and a review date set for 13 March 2008.

The Hearing of 13 March 2008

20. Again, the Wor. Tyrone Chin presided, and again there were two different Panel members, although one of these had been present at the 11 October hearing. By this time Mr. Harshaw had been instructed and appeared, and the notes reflect the submissions made by him. The Family Court's order confirmed the six month care order made on 19 February 2008, a step which does not appear to have been necessary, and indicated that the Department needed to be satisfied with the Appellant's employment and new residential premises before the youngest child, TW, could be placed back in her care. A review date was set for 3 April 2008.

The Hearing of 3 April 2008

21. This hearing also was presided over by the Wor. Tyrone Chin, and one of the Panel members was new, while the other had been present at the 19 February hearing. The notes again reflect the unstructured approach to which I have referred previously. Whilst there may not have been the requirement for the provisions of section 31(2) of the Act, because the Family Court was not making a care order, it would have been helpful to have had regard to those matters. In any

event, the order made was again to confirm the six month care order of 19 February, and again to order that TW be put back in her mother's care once the Department was satisfied in relation to her employment and accommodation, with a review date being set for 15 July 2008.

The Appellant's Objections

22. It is not an understatement to describe these as comprehensive, and indeed Mr. Harshaw describes the case as having seen "a catalogue of failures" both by the Department and by the Family Court. In relation to the original removal of the children from their home on 11 October 2007, Mr. Harshaw submits that the children were unlawfully taken, and that all that happened thereafter is tainted by this initial illegality. I will, therefore, attempt to deal with the orders in turn, and determine which of the complaints made on behalf of the Appellant have been made out.

The 11 October 2007 Order

23. As I have previously indicated, this was obviously an interim order, even though the order itself was not so described. That was what Ms. Peets-Cottie had asked for at the outset, and that must have been the basis upon which the Family Court proceeded, given that this hearing took place approximately three hours after the original visit. The matters which need to be addressed in relation to this order are

    (i) the legality of the removal of the children from the home
    (ii) the nature of the evidence put before the Family Court, and
    (iii) the extent to which the requirements of the Act were satisfied.

The Removal of The Children

24. It is accepted on both sides that there is no power for the Director or the social workers employed by the Department to remove a child from his or her home in the absence of an order of the Family Court. No doubt for this reason, Ms. Goodwin for the Director relied upon the terms of section 41 of the Act, and the

fact that Sergeant Rock of the Child Victims Unit had been present when the decision had been taken (between herself and Ms. Peets-Cottie) to remove the children from their home. The grounds upon which a police officer may detain a child and deliver such a child to the Director are similar but not identical to those required before the Family Court can make a care order or supervision order. Both make reference to the child suffering or being likely to suffer significant harm, as those words are defined in section 3 of the Act, but whereas the Family Court on making its order must be satisfied in this regard, the police officer detaining the child is required only to have reasonable and probable grounds to believe that the child is so suffering or likely to suffer.

25. A similar issue came before the English Court of Appeal in the case of *Langley -v- Liverpool City Council* [2005] EWCA Civ 1173. In that case, the three oldest Langley children had been taken on a lengthy car journey by their father. All members of the family except one child were said to be profoundly deaf, and in addition Mr. Langley suffered from Usher's Syndrome, which meant that he had tunnel vision and night blindness. He had been registered blind in 2000, and had been without a valid driver's licence since September 1999. The events in question occurred in September 2001, and when it became clear that the Langley family were missing from their Liverpool home, complete with car, the Council made application for an emergency protection order ("EPO"). That order was granted in the Liverpool Family Proceedings Court, but by the time attempts were made to serve the order, the family had left their home. Police assistance was requested, and police attended at the home in the evening, by which time the parents and one of the children had returned. The police officer decided to remove the child to foster parents who had been alerted, and the question arose whether the child's removal by the police was unlawful. The trial judge held that it was. Under the applicable English legislation, the mechanism for the grant of an EPO was contained in section 44 of the Children Act 1989, whereas the power given to the police to remove and accommodate children in cases of emergency is contained in section 46. In the Court of Appeal, Dyson L.J. held (paragraph 36):

> "(W)here a police officer knows that an emergency protection order is in force, he should not exercise the power of removing a child under section 46, unless there are compelling reasons to do so. The statutory scheme shows that Parliament intended that, if practicable, the removal of a child from where he or she is living should be authorised by a court order and effected under section 44. Parliament could have provided simply that specified persons could remove children if the statutory criteria are satisfied without any court involvement at all. But the removal of children, usually from their families, is a very serious matter. It is, therefore, not at all surprising that Parliament decided that the court should play an important part in the process."

26. In *Langley*, quite apart from there being a different statutory regime, there was a court order already in existence, and hence a potential conflict between the terms of such order and the exercise of the section 46 jurisdiction. Dyson L.J. had referred to the Home Office circulars governing the duties and the powers of the police under the UK act, and took the view that the circulars were consistent with his interpretation of the act, namely that

    (i) removal of children should usually be effected pursuant to an EPO, and
    (ii) section 46 should be invoked only where it was not practicable to execute an EPO.

    Hence he held that the child's removal was unlawful.

27. Part of the court's concern in *Langley* was the difference in skill level which might be expected to exist between a social worker and a police officer. At paragraph 39, Dyson L.J. said:

> "It is also relevant to point out that children who require emergency protection and have to be removed are often already well known to the Social Services Department within whose area the children are ordinarily resident. It is obviously preferable for the removal of a child to be effected if possible by, or at least with the assistance of, social workers who are known to the child, rather than by uniformed police officers who will almost certainly be strangers to the child. Whether known to the child or not, a social worker has skills in dealing with the removal of children from their homes which the most sensitive police officer cannot be expected to match."

28. As I have already indicated, Sergeant Rock was a member of the Child Victims Unit, and as such had received appropriate training in matters concerning children. She was also accompanied by social workers. Most importantly, there was no existing court order. My view is that *Langley* can be distinguished, and that the requirements of section 41 of the Act were satisfied, so that the removal of the children on 11 October 2007 was lawful, and I so find.

The Need for Sworn Evidence

29. I therefore turn next to the nature of the evidence before the Family Court. Again, there is a distinction between the test in respect of an interim order made under section 32(2) of the Act and that in respect of a care order or supervision order made under section 25(2) of the Act. In the latter case, the Family Court may only make an order if it is satisfied that the child concerned is suffering or is likely to suffer significant harm; in the case of an interim order, the Family Court may act where it is satisfied that there are reasonable grounds for believing that the child concerned is suffering or is likely to suffer significant harm.

30. The Department's concerns were put before the Family Court by Ms. Peets-Cottie. There is nothing to suggest that her comments were made by way of sworn testimony, and I will return to that subject in a moment. It has to be

remembered that Ms. Peets-Cottie's evidence was given at the very early stages of this case, based in part upon the two original calls, in part upon the enquiries which the Department had been able to make in the short time since those calls had been made, including enquiries from the Police, the condition of the house, and most particularly the condition of the children. In relation to some matters, for instance the potential involvement of drugs, Ms. Peets-Cottie was necessarily relying upon what she had been told by others. In relation to other matters, such as domestic abuse, the Magistrate's notes say no more than "there is domestic abuse". In fact, in her affidavit, Ms. Peets-Cottie confirmed that the Appellant had readily admitted the extent of the domestic violence, so it may well have been the case that matters were put to the Family Court in this way. Given the totality of what was put before the Family Court (and leaving aside for a moment the evidential basis of what was said), I have no hesitation in holding that there were sufficient grounds for believing that the children were both suffering and/or likely to suffer significant harm, on the grounds which subsequently were put forward explicitly by the Department, in terms of the matters set out in section 3(e)(i)(k) and (p) of the Act.

31. The question nevertheless remains whether the information given to the Family Court should be by way of sworn evidence. In *D –v- Attorney General* [2004] Bda L.R. 45, Kawaley J. had referred to the Family Court receiving evidence "be it sworn or otherwise". The question is whether unsworn evidence is acceptable. In this regard, I should firstly say that it appears that at all times the evidence given to the Family Court was in fact unsworn. Mr. Harshaw indicated that that was the position in relation to the two Family Court hearings he attended, on 13 March and 3 April 2008. Further, the Wor. Wolffe's notes use the word "states" after the name of the witness; I am sure that if the witness had been sworn, his notes would have so indicated. The Wor. Chin's notes similarly use the word "said", and the same comment applies.

32. The issue was addressed in the House of Lords in the case of *Re H and others* [1996] 1 All E.R.1. In that case, Lord Nicholls addressed the standard of proof to be required in family proceedings, having regard to the expression "likely to suffer significant harm" which appears in the English act, as it does in the Act. Having referred to the fact that the power of the court to make a care or supervision order only arises if the court is 'satisfied' that the criteria stated in the section exists, Lord Nicholls carried on to say (page 16):

> "The expression 'if the court is satisfied', here and elsewhere in the Act, envisages that the court must be judicially satisfied on proper material. There is also inherent in the expression an indication of the need for the subject matter to be affirmatively proved. If the court is left in a state of indecision the matter has not been established to the level, or standard, needed for the court to be 'satisfied'."

33. To my mind, the use of the words "judicially satisfied on proper material" means satisfied on the basis of sworn evidence. It was urged upon me that the proceedings in the Family Court are necessarily more informal than in other courts, and I do accept that too great a level of formality may be inappropriate in cases where the court is striving for consensus in a non-contentious matter. But cases concerning the removal of children from their home will likely always be contentious, and in such cases the evidence given to the court should always be sworn evidence. As Lord Nicholls carried on to say in *Re H*:

> "Family proceedings remain essentially a form of civil proceedings. Family proceedings often raise very serious issues, but so do other forms of civil proceedings."

It does also seem to me that having witnesses give their evidence on oath, with an opportunity for cross-examination and re-examination would help to bring some

form of structure to the proceedings, which the notes, particularly those in respect of some of the later hearings, suggest has not been present.

Compliance with the Requirements of the Act

34. The last question to be addressed is the extent to which the proceedings comply with the provisions of the Act. This is largely academic in relation to an interim order, since the compliance requirements are far fewer, but not entirely so. Section 24 of the Act sets out a check list of those matters to which the Family Court should have regard in making an order under this part of the Act, and this includes interim orders. In my view it would be useful for the Family Court to refer to this section, if only to focus its collective mind on the various matters, and to demonstrate that it had indeed had regard to those matters which it is required by the Act to consider.

35. Then there is section 25, which sets the threshold test and requires the Family Court to consider the particular "significant harm" which the child concerned may be suffering or likely to suffer. I have referred in paragraph 29 above to the fact that the test for an interim order is different than that for a care or supervision order which is not interim. Next is section 26, which governs the timely disposal of applications, and requires the Family Court to draw up a timetable with a view to the matter being disposed of without delay, and for directions to be given for the purpose of ensuring that the timetable is adhered to. There does not seem to have been any timetable drawn up in this case. One accepts that that may have been impractical on 11 October 2007, but no doubt it would have been appropriate thereafter.

36. Section 31 concerns the plan of care for the child, and sets out the requirements before the Family Court makes a care order or a supervision order, i.e. an order under section 25 of the Act. Hence this section has no application to interim care orders, but is crucial in relation to care orders. I have referred already to the failure of the plans of care prepared by the Director to address all of the matters in

section 31(1), and the failure of the Family Court when making care orders, to have regard to the provisions of section 31(2)(b). It is obviously particularly important that no care order should be made without the Family Court giving a statement of the evidence on which it based its decision, and where the order has the effect of removing or keeping a child from the care or custody of the parent, a statement of the reasons why the child cannot be adequately protected while in the care or custody of the parent. But those requirements do not pertain in the case of an interim order such as was made on 11 October 2007.

Summary as to the 11 October 2007 Order

37. By way of summary, therefore, I am satisfied that the removal of the children from their home on 11 October 2007 was lawful, pursuant to section 41 of the Act. In relation to the evidence put before the Family Court, I have indicated that my view is that that should be sworn evidence, and in relation to the requirements of section 24 of the Act I would have preferred that the Family Court had indicated that it had regard to the matters set out in the section.

38. As I have indicated, the compliance requirements of the Act are much less rigid in the case of the making of interim care orders. However, Mr. Harshaw complained that the Department should have submitted a written report to the Family Court on 11 October 2007, on the basis that the Department had had some two days to investigate the reports of neglect. This argument pre-supposes that the social workers attending at the Appellant's home on 11 October 2007 had a prior intention to remove the children. I do not believe that this contention is made out, and I reject it. I am satisfied that there was no such prior intention, so that the preparation of a written report in the very short time available to the social workers seems to me to be quite unrealistic, and in any event was not required by the Act. Neither was a plan of care required for an interim order. Insofar as Mr. Harshaw made criticisms of the Family Court's failure to make findings of fact and give reasons for its order of 11 October 2007, this was the one occasion on which a ruling was delivered, and reasons were given. I therefore reject the

complaint that there was failure to comply with provisions of the Act in respect of this hearing.

39. In relation to the complaints as to this hearing, that leaves only the matter of sworn evidence, so that technically the order of 11 October 2007 is potentially liable to be set aside on the ground of errors of law. However, I am satisfied that there would be no substantial miscarriage of justice in consequence of the identified deficiency of no sworn evidence, so that I would, in relation to this hearing, apply the proviso to section 18 (1) of the Criminal Appeal Act 1952 ("the Appeal Act"), to which I will refer in more detail hereafter.

The Tainting of Subsequent Orders

40. The grounds of appeal allege that each order made by the Family Court was based on its predecessor, so that one defective order effectively taints all that follow. I do not agree that that is the case in relation to the care order made on 9 November 2007, which cannot be properly be said to have been based on the interim order made on 11 October 2007. On 9 November 2007, the Family Court had before it extensive fresh material, and was clearly considering the making of a full care order for the first time. So I do not regard the subsequent orders as having been in any way tainted by the one deficiency which I have found there to be in respect of the interim care order.

The 9 November 2007 and 19 February 2008 Orders

41. I will take these together because essentially the complaints overlap. These are:

    (i) the alleged failure to bring all relevant information to the attention of the Family Court and to correct inaccuracies from previous Reports.

    (ii) ordering respectively a mental health assessment and a psychological assessment for the Appellant, to be shared with the Department.

(iii) the alleged failure to make findings of fact and give reasons for its orders.

Inaccuracies in the Reports

42. The alleged failure to bring all relevant information to the attention of the Family Court and correct past errors is largely based on the fact that the Report of 8 November 2007 continued to refer to the parents squatting in a derelict building, with a reference to potential drug activity. This was despite the fact that the true position in relation to the occupation of the home by the parents was set out in detail, and it is to be noted that the same error was not repeated in the 18 February 2008 Report, although there was an earlier reference in that latter report to "squatted property". Given the poor condition of the home and the nature of its occupation, it seems to me that not too much should be made of these mis-descriptions, when the true position was set out in the earlier Report.

Disclosure of the Reports

43. However, I should at this point deal with the complaint which Mr. Harshaw made during the course of the hearing, which was not referred to in his "catalogue of failures" but appeared earlier in his submissions with reference to one particular matter raised in the Reports. This is the fact that the Reports of 8 November 2007 and 18 February 2008 were not made available to the Appellant until Mr. Harshaw himself became aware of their existence at the hearing of 13 March 2008, and requested and was given copies. Although Mr. Harshaw made complaint of the fact that the second Report referred to an incident which the writer of the Report had requested not be read in court, it seems to me that the Department's failure to provide to the Appellant copies of the Reports submitted to the Court represents a fundamental failure of the requirement of procedural fairness, or the duty to act fairly. This issue has been the subject of complaint before, and was dealt with by Kawaley J. in his judgment in the case of *S –v- S* (Appellate jurisdiction No 25 of 2004, Judgment dated 16 December 2004).

44. In that case, Kawaley J. dealt with the issue of non-disclosure of reports which had been prepared by the Department for the Family Court, in circumstances where the appellant had sought copies of a number of reports, which application had been refused without reasons being given. As here, the case was concerned with the removal of children from their parents' care, and counsel for the appellant contended that it would be contrary to the rules of natural justice and fair play to deprive a litigant of knowledge of allegations made against him.

45. Kawaley J. referred to the House of Lords case of *Re D & Another (minors)* [1995] 4 All E.R. 385 at 397, where the leading judgment was given by Lord Mustill. Lord Mustill referred to the conflation of the remedies under articles 6 and 8 of the European Convention on Human Rights, which he said:

> "shows that full disclosure will usually advance the interests both of a fair trial and of the parties to the parental relationship. On the other hand, there is nothing … to suggest that that disclosure can never be properly be withheld if the interests of the child so demand ..."

46. Kawaley J. then dealt with matters in the following terms:

> "30. In the Bermudian context, the right of litigants to a fair trial is the most important factor relevant to disclosure, because this right is protected by the Constitution, which takes precedence over ordinary legislation, and which is expressed in section 6(8) as an unqualified right. The Court must also take into account the parents' right to found a family under article 8 of the European Convention on Human Rights, and seek to apply Bermuda domestic law in a manner which does not conflict with international obligations assumed for Bermuda by Britain.
>
> 31. However, this does not mean that the rights of the parties need be looked at in isolation from the fair trial rights of the child, as advocated for by either a guardian *ad litem* or the Department. And in applying the

> Children Act 1998 in Bermuda, as in England, the predominant consideration is the welfare of the child. So, in my view the English authorities relied on by the Appellant's Counsel, together with the further cases to which I have referred above, are highly persuasive and should be followed by this Court in deciding what principles apply to disclosure of social inquiry reports in child care cases. As the essential elements of the legal regime in care cases in Bermuda and England are so similar, it is difficult to contemplate any cogent reasons why the approach to disclosure should not be the same.
>
> 32. In summary, social inquiry reports submitted to the Family Court should in all but exceptional cases be disclosed to the parties. The only exceptions will be cases where the Court can positively justify withholding disclosure, even if only on an interim basis, in the interests of the child."

47. I respectfully agree with Kawaley J.'s finding above. During the course of the hearing, Ms. Goodwin referred to the sensitive nature of the information frequently made available to social workers, and of course I recognise that there will be people who wish to draw matters to the attention of the Department's social workers, but who are not prepared to give evidence or be publicly identified. In such circumstances, the social workers drafting a report on behalf of the Department need to recognise that whatever is stated in the report which is to be laid before the Family Court must be made available to all the parties at interest in the case. And while there may be exceptional circumstances which would justify withholding disclosure of reports prepared by the Department, there were no such grounds put forward in this case. It follows that the Reports should have been made available to the Appellant when submitted to the Family Court, and without the need for a request to be made by her attorney. This is particularly the case when, as here, the Appellant was unrepresented at the 19 February 2008 hearing, and there was a question over her representation at the earlier hearing in November.

Medical and Psychiatric Assessments

48. I next turn to the question of the assessments which may be ordered by the Family Court. Mr. Harshaw submitted that the Family Court had no power to order such assessments. Ms. Goodwin relied upon the terms of section 32(5) of the Act, which of course governs the position where the court makes an interim care order, and gives the Family Court power to make directions as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child and parent. Mr. Harshaw maintained that the word "and" meant that such an examination could be ordered in respect of both child and parent, but not one or the other, and only in the prescribed circumstances of section 32 (governing an interim care order), and also submitted that such a report could not be provided to the Family Court.

49. It does not seem to me that the words of section 32(5) should be read as Mr. Harshaw submits, and I take the view that the power of the Family Court under this sub-section is to order an assessment of the child, the parent, or both. Neither does it seem to me to make any sense for the Family Court to have the power to order an assessment, but not be able to view the report produced in consequence of such order. Mr. Harshaw sought to rely on *D -v- Attorney General* in relation to his arguments on this point, but that case was concerned with an order purporting to compel a parent to undergo drug addiction treatment, a very different matter than a medical or psychiatric examination or assessment.

50. But there does remain the puzzling question as to why the power which is clearly given in respect of interim orders is not duplicated in relation to the Family Court's powers when making care or supervision orders. Ms. Goodwin sought to rely upon the terms of section 30(2)(b) of the Act. This section pertains where the Family Court, in considering whether to grant a care order, directs the Director to undertake an investigation of the child's circumstances. Such direction mandates

that the Director should, when undertaking the investigation, consider whether he should … "arrange for the delivery of services or assistance for the child and his family" (section 30(2)(b)). In terms of providing power to order medical examinations or assessments, Mr. Harshaw described this as "an impermissible stretch" and I agree. The sub-section applies to the Director, rather than the Family Court, and is nowhere near the equivalent of section 32(5). Nowhere else in this part of the Act is there given any power equivalent to the power in respect of interim orders, and this appears to be a deficiency which needs to be addressed by the Legislature. I cannot believe that there was an intention on the part of the Legislature to provide for the power to exist in interim orders only.

Compliance with the Requirements of the Act

51. I turn next to the failure of the Family Court to make findings of fact and give reasons for its decision. The requirement that the Family Court should give reasons for its decision is contained in section 31(2)(b) of the Act, and in the cases of the 9 November and 19 February orders, there was no question of any compliance by the Family Court with its obligations under this sub-section. The giving of reasons for its decision is mandated to include a statement of the evidence on which that decision is based, which effectively covers the "findings of fact" aspect of matters. Since the Family Court made no ruling at all on these two occasions, it is impossible to say that it gave reasons for its decisions. And as I have said, the second requirement in relation to reasons is that the Family Court should give a statement of the reasons why the child cannot be adequately protected while in the care or custody of the parent; in other words to indicate why the Family Court chose to make a care order as opposed to a supervision order. This requirement also mirrors the obligation imposed on the Director in relation to the plan of care under section 31(1)(d)(i), and Mr. Harshaw did criticise the deficiencies in the plan of care under this sub-section, although those criticisms were not duplicated in his conclusion. Nevertheless, I do find that the plan of care submitted by the Director/Department to the Family Court failed to include in terms the matters set out in the sub-section, of which, as I have already

indicated, the provisions of section 31(1)(d) seem to me to be of fundamental importance.

Summary as to the 9 November 2007 and 19 February 2008 Orders

52. By way of summary in relation to the November 2007 and February 2008 orders, my findings are: -

(i) the Reports prepared by the Department did not contain material inaccuracies.

(ii) the Reports prepared by the Department and submitted to the Family Court should have been shared with the Appellant on a contemporaneous basis, and the failure in that regard constituted a breach of the duty to act fairly.

(iii) the orders made by the Family Court on 9 November 2007 and 19 February 2008 that the Appellant should undergo respectively a comprehensive mental health assessment by a licenced psychiatrist and a psychological assessment by Stephanie Guthman of the Family Centre were not lawfully made, there being no such power in the Act in relation to care orders.

(iv) The requirements of the Act were not complied with, with particular reference to section 31(1) of the Act with reference to the obligations of the Director in regard to the plan of care, and section 31(2)(b) of the Act with reference to the requirement that the Family Court should give reasons for its decision.

It follows that Mr. Harshaw's complaints in relation to the 9 November 2007 and 19 February 2008 orders are made out, and those orders are potentially liable to be set aside on the grounds of errors of law, and I so find.

The Hearings of 13 March and 3 April 2008

53. These hearings were both review hearings, at a time when the care order made on 19 February 2008 remained in effect. The hearings were attended by both parents, by Mr. Harshaw for the Appellant, and by the social workers. No Report was produced, and it appears that these hearings operated only as review dates which led to no change in relation to the care order of 19 February 2008. The criticisms leveled against these two hearings are in identical terms; that the Family Court failed to make findings of fact and give reasons for its orders, and failed to consider and attach a plan of care. Those complaints would have had merit had the Family Court made care orders on the two dates in question. In my judgment they did not. I agree with Ms. Goodwin that these were not care orders, and as such did not require the application of the section 31 criteria. They did not purport to extend the terms of the 19 February 2008 order, and in reality the "confirmation" of that order was redundant.

The Effect of the Above Findings

54. This is of course an appeal under the terms of the Appeal Act, and in the case of *D -v- Attorney General*, Kawaley J. dealt with the appeal mechanism in respect of appeals from orders of the Family Court, and particularly the effect of the proviso to section 18(1) of the Appeal Act.

55. That sub-section is in the following terms:

> "18 (1) Subject as hereinafter provided, the Supreme Court in determining an appeal under section 3 by an appellant against his conviction, shall allow the appeal if it appears to the Court –
>
> (a) that the conviction should be set aside on the ground that, upon a weighing up of all the evidence, it ought not to be supported; or
> (b) that the conviction should be set aside on the ground of a wrong decision in law; or

(c) that on any ground there was a miscarriage of justice;

and in any other case shall dismiss the appeal:

Provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction."

56. It is no doubt helpful to set out how Kawaley J. viewed the application of section 18(1), since I respectfully agree with his approach. He said:

> "In my view section 18(1) clearly applies to appeals such as this. Section 18 of the Children Act confers, on a person dissatisfied with orders made under the 1998 Act, the same rights of appeal as a person convicted of an offence by the Magistrates' Court enjoys under the 1952 Act. References to "conviction" must read as "order" and references to "criminal proceedings" read as "civil proceeding", with references to "sentence" presumably ignored. So a decision of the Family Court can be reversed on the grounds of (a) it being against the weight of the evidence, (b) an error of law, or (c) any other miscarriage of justice. But the proviso entitles this Court to dismiss an appeal if satisfied that "no substantial miscarriage of justice occurred".

57. Kawaley J. carried on to consider the potential applicability of section 18(2) of the Appeal Act. In this case, as in the case before Kawaley J., the power to substitute a different order for that made by the Family Court does not arise.

58. Kawaley J. then carried on to consider how the court's discretion should be exercised in a child welfare case, given the wording of the proviso, and in

particular the reference to "no substantial miscarriage of justice". Kawaley J. took the view that regard must be had to the provisions of section 6 of the Act, and the requirement that in the administration and interpretation of the Act, the welfare of the child should be the paramount consideration. He carried on to say:

> "In the appellate context, therefore, it seems to me the circumstances will be rare where a decision which is not clearly inconsistent with the interests of the child and/or not fundamentally flawed will be interfered with by this Court."

and

> "Thus for this additional policy reason, in my view this Court should be slow to second-guess the Family Court on the merits of a child welfare decision, unless something is obviously materially wrong."

59. Mr. Harshaw submitted that the proviso had no application because it was apparent from the fact that the provisions of section 31 of the Act had been disregarded, and the principles of natural justice ignored, that a substantial miscarriage of justice had indeed occurred.

60. I think that this is an overly simplistic analysis. It seems to me that the appropriate approach for the Court to take is to consider what conclusion the Family Court would have reached, had it applied the principles of natural justice and the duty to act fairly, and if both the Family Court and the Department had complied with the requirements of section 31 of the Act, and dealt with matters as they should have been dealt with. In my view, the overwhelming probability is that the Family Court would in such circumstances have made the orders which it did make on 9 November 2007 and 18 February 2008. It seems to me that that is the basis on which the Court must consider whether a substantial miscarriage of justice has occurred, and it follows from that approach, given my view as to the conclusion which the Family Court would have reached had it dealt with matters properly, that I should apply the proviso to section 18(1) of the Appeal Act.

61. I do, therefore, find that the points which I have identified above would, but for the proviso, have led me to decide the appeal in favour of the Appellant. However, applying the proviso, I am of the view that no substantial miscarriage of justice in fact occurred, and that the right course is for me to dismiss the appeal, which I do.

Post Script

62. Towards the end of counsel's submissions, I did ask that they address the type of order which the Court might properly make in the event that it allowed the appeal. In the event, that issue is academic, but I think it is important to bear in mind two things. The first is that the social workers concerned have obviously put in a very considerable amount of work which has been directed at achieving the end identified by the Wor. Juan Wolffe at the 11 October 2007 hearing, that of re-uniting the Appellant with her children. In this regard, it also has to be acknowledged that the Appellant has not at all times helped herself. The Report of 8 November 2007 referred to the fact that the Appellant's parents had caused repeated difficulties with Departmental employees. On occasion, the Appellant exhibited similar behaviour. Further, the Appellant failed to act with the requisite level of urgency in terms of assisting the Department to secure appropriate accommodation for her, which could be shared with the children. An example of this was that efforts were made in mid-October both to find appropriate accommodation, and to secure financial assistance for the Appellant. The Appellant was eventually taken to the Financial Assistance office by a Departmental employee on 5 December 2007, and given the requisite check list for completion. At the time of the 18 February 2008 report this had not been completed and returned to Financial Assistance.

63. The second point to be made is that as of the date of hearing, the Appellant's living circumstances did not justify support from the Director/Department in terms of re-uniting the Appellant with any of her children. The Family Court orders of 13 March and 3 April 2008 had both referred to the need for the Department to be satisfied in relation to the Appellant's employment and accommodation. Although the Appellant had been working, she had had four different jobs since the Department began working with her. In relation to accommodation, the Appellant left the Ord Road property in February, and had since then been living with her mother and two sisters in her mother's one bedroom home. The family is now required to vacate that home since the owner wishes to sell, so that it seems that once again there is a major question mark in relation to accommodation. In these circumstances it is difficult to see how the Department could be expected to achieve its objective of re-uniting Mother and children in the short term. In this regard I should make it clear that I am satisfied that the Department, through its social workers, did indeed have such an objective.

64. Although I have dismissed the appeal, it has to be recognised that many of the complaints made on behalf of the Appellant, in particular with reference to the matters dealt with by the Director in the plan of care, and the failures on the part of Family Court to comply with the requirements of the Act, were made out. What is of particular concern is that in relation to the deficient process undertaken by the Family Court, these deficiencies had been identified in earlier cases, referred to in this judgment, but had not been corrected. The Family Court must ensure that the proceedings taking place before it are conducted fairly, with all that that involves, and must have regard to all of the material provisions of the Act.

Costs

65. It seems to me that this is a case where it is not appropriate to make any order as to costs, but I will of course hear counsel on the issue should either of them so wish.

Dated the of June 2008.

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Hon. Geoffrey R. Bell
Puisne Judge