03/11; [2011] VSC 61

SUPREME COURT OF VICTORIA

AB & ANOR v MAGISTRATES' COURT at HEIDELBERG & ORS

Mukhtar AsJ

8, 10, 15 February, 7 March 2011

ADMINISTRATIVE LAW – JUDICIAL REVIEW – *CERTIORARI* – JURISDICTIONAL ERROR – ALLEGED INTRA-FAMILY VIOLENCE AGAINST DAUGHTER AND FEAR OF RECURRENCE – QUESTION OF PERSONAL CONTACT WITH DAUGHTER'S BABY – INTERIM ORDERS – ADVERSE PARTIES WILLING TO CONSENT TO CONTACT ARRANGEMENTS – COURT'S REFUSAL TO MAKE CONSENT ORDERS – ORDER ON DIFFERENT TERMS EVENTUALLY MADE BY CONSENT – REVIEW OF MAGISTRATES' COURT DECISION – WHETHER CONSENT ORDER THE PRODUCT OF JURISDICTIONAL ERROR OR PROCEDURAL UNFAIRNESS – WHETHER ERROR ON THE RECORD: *FAMILY VIOLENCE PROTECTION ACT* 2008, PART 4.

NATURAL JUSTICE – ORDER SOUGHT BY CONSENT – WELFARE OF AN INFANT CHILD – ALLEGED FAMILY VIOLENCE – STATUTORY RIGHT FOR COURT TO REFUSE TO MAKE CONSENT ORDER AFFECTING CHILD – DUTY TO GIVE REASONS FOR REFUSAL: *FAMILY VIOLENCE PROTECTION ACT* 2008, S78(5).

NATURAL JUSTICE – COUNSEL APPEARING FOR THREE RESPONDENTS – NO CONFLICT OF INTEREST ASSERTED – WHETHER LATENT CONFLICT OF INTEREST WITH ONE RESPONDENT – WHETHER COURT BOUND TO INTERVENE – EFFECT ON COURT'S ORDERS.

At a mention hearing, a family violence intervention order was made by the Magistrates' Court in favour of a mother who has a two-year old daughter. The defendants were the mother's two brothers and her mother (grandmother). The Magistrate refused to make an order by consent which could have had the effect of exposing the child to the brothers and thereby affecting the child's well-being. After further discussion, the Magistrate made an order by consent against the grandmother – who was represented by counsel – which required her not to allow the child to be brought into contact with the two brothers. On the same day, the Magistrate extended on an interim basis – not by consent but without admissions – some pre-existing orders against them which had banned them from having any contact with the child. Upon appeal by the brothers—

HELD: Appeal dismissed.

1. A mention hearing is an occasion on which the parties inform the Court about the state of the contest. That is, whether the matter is still proceeding, or whether interim orders are to be extended or varied by consent, or whether final orders can be made by consent. In the event that the order is to become contested, the purpose of the mention hearing is to fix a date for the hearing of a contest. In the meantime the interim orders can continue, without admissions, akin to an interim injunction. If no agreement can be reached on interim orders, then the Court can hear evidence for interim purposes on a standard under the *Family Violence Protection Act* 2008 ('Act'). In that regard, the legislation does not require that any alleged family violence be proved before an interim order may be made. What matters is the safety or well-being of the child. Matters are mentioned, then stood down to enable parties to discuss their differences and try to agree on interim orders at least. The philosophy, naturally enough, is to let parties reach an acceptable position for themselves on an interim basis, rather than have an imposed legal intervention. It stands to reason that Magistrates will encourage continuation of interim orders consensually without admissions to minimise the inflammation of family conflict with interim contests, and defer the contest to a final hearing when evidence can be adduced and carefully considered.

2. Every step the Magistrate took was within power. The Act by its nature and its purpose contains many provisions which place positive obligations on the Magistrate to intervene in the proceeding in the sense that the Magistrate must be independently satisfied of certain matters before they proceed to make decisions concerning intervention orders in cases of family violence. Above all, there are positive obligations on the Magistrate to have regard to the welfare of children. Thus, it is not just up to the parties to decide what is in the welfare of the children. It is an issue for the Magistrate as well in exercising a protective jurisdiction especially where there are serious allegations of a history of domestic violence.

3. In the present case the Magistrate was certainly concerned to carry out that statutory dictate. By and large, the legislation looks to the Magistrate to undertake or allow a form of inquisitorial justice. A demonstration of that is s78(5) itself. Another example is s81 which permits the Court to include in a family violence intervention order "any conditions that appear to the Court necessary or desirable in the circumstances".

4. The Magistrate, in refusing to make a final order to which the parties consented, acted within power under s78(5). The exercise of the power is discretionary. Further, the refusal to allow the consent order was manifestly based on grounds under s78(5). The reasons for disallowing the consent order were obvious or apparent. The Magistrate believed that the consent order may pose a risk to the child, based upon the seriousness of the allegations made including the further particulars that day, and prevailing force of the pre-existing intervention orders. Those existing orders were based on a conclusion by the Court, presumably on the balance of probabilities under s53, that family violence had been committed by the two boys or that there was a risk that it might or in any event there was a risk to the child. In those circumstances, the brothers cannot mount an attack on the Magistrate for giving insufficient grounds for the belief that was formed. Whatever the expression "believes" means, the belief here was formed faithful to the purposes of the Act, and was justifiable.

5. The Magistrate was not bound to conduct a hearing into the particulars under s78(4). It was a matter of discretion. She was within jurisdiction without holding a hearing to form the view that the allegations were so serious that the exception being sought was unacceptable in the interests of the child. Moreover there were two subsequent occasions on which the Magistrate was ready to undertake the task of hearing the evidence that day from the mother so as to assess the strength of the allegations. On each occasion, no sooner had the prospect of evidence been instigated, counsel for the respondents spontaneously deterred the Court and gave consent.

6. The Magistrate did not commit jurisdictional error in suggesting or proposing a consent order that she would be prepared to make. To tell the parties that she would make a consent order if there were different terms was within power. To suggest what terms would be acceptable is part of the discourse that is necessary to understand the refusal of consent, and how to then advance the matter. Further, section 81(1) permits the Court to include any conditions that it regards as necessary or desirable in the circumstances. That, together with the inquisitorial features of the Act, unquestionably permits the Court to not only decline the consent order but to suggest or encourage orders that would be acceptable before the Court would give its consent. To sit there Sphinx-like, and simply refuse consent without suggesting alternatives adds to problems.

7. The Magistrate was doing no more than looking to direct the parties to a consent order on terms that she regarded protected the interests of the child. That is not jurisdictional error.

8. The inclusion of the condition that was eventually included in the consent order was within power. It was within power under section 81 and because by its nature requirement to keep the brothers away for the sake of the child fell squarely within the protective purposes of the Act.

9. Accordingly, the challenge to jurisdictional error must fail.

MUKHTAR AsJ:

1. The plaintiffs seek an order in the nature of *certiorari* to quash orders made on 27 August 2010 by the Magistrates' Court at Heidelberg constituted by Magistrate O'Reilly. On that day Her Honour made a family violence intervention order under the *Family Violence Protection Act* in three separate, but connected proceedings each brought by EF, the second defendant, against members of her family. The names of all family members have been anonymised in the interests of avoiding the identification of a child who has been made the subject of an order of the Children's Court under the *Children, Youth and Families Act.*

2. EF is 20 years old. She is the mother of a two year old daughter. The two plaintiffs are her brothers AB, who is 27 years of age, and CD who is 23. The third defendant, GH, is the mother of AB, CD, and EF and therefore the grandmother of the child. She is 47 years of age. The plaintiffs live with their mother in Thomastown. For ease of narration, I shall in this judgment mostly refer to the various family members as the mother, the child, the brothers, and the grandmother.

3. In circumstances that will require elaborate description below, the grandmother had supervised contact with the child on alternate weekends. On 27 August 2010, the Magistrate made an order against the grandmother — with her consent — that required her not to allow the child to be brought into contact with the brothers or to allow them to be at the same premises as

the child. The grandmother was represented by counsel, who also appeared for the brothers.[1] That order was final; that is, not interim. It is to expire on 27 August 2011. As for the brothers, the Magistrate extended on an interim basis, not by consent but without admissions, some pre-existing orders against them which on their face (and there lies a controversy agitated here) had banned them from any contact with the child.

4. This application for *certiorari* is by the brothers only. The grandmother is a defendant and separately represented. The grounds for judicial review are that the decision was infected with jurisdictional error, a breach of procedural fairness and there was error on the face of the record. The problem for the plaintiffs is that the order about which they are truly aggrieved was made against the grandmother with her consent.

5. The plaintiff's counsel, Mr Perkins, described what happened in the Magistrates' Court as a muddle. But this was really a root-and-branch attack on the judicial integrity on the conduct of the case. He contends the interim orders against the brothers did not ban them from contact with child, and the real harm lay in the order made (by consent) against the grandmother which in effect did. He says the brothers had bonded with the child and the Magistrate's orders "smashed" the family relationship on nothing more than the Magistrate's concern for the child based on the mother's untested allegations, and without disclosing any reasoning process or evaluation of the strength or credibility of the mother's allegations against them.

6. He also says that the Magistrate's conduct of the case put counsel for the brothers and the grandmother in such an invidious position that, in the end, the Magistrate's will was overbearing to the point that the grandmother had no choice but to consent to final orders.

7. And, it is contended, the Magistrate was so apparently preoccupied with despatch of the cases in a busy Court list, and so resolved on taking a set course, that her Honour disregarded the requirements of the statute and disembarked from her judicial task and the jurisdiction conferred upon her. That is, it was a constructive failure to exercise jurisdiction.[2]

8. The originating motion was filed one day later than the 60 day time limit under rule 56.02. The Court cannot extend time except in special circumstances. By an earlier order I deferred the application for an extension of time until the trial. After that, the mother who would not consent to an extension, filed a summons seeking a summary dismissal on the ground that the application was bound to fail. Mr Perkins contended that a time limit on the availability of the Supreme Court's supervisory jurisdiction was beyond power and invalid. In a ruling made on the first day of argument I extended time for reasons deferred until now.

9. I need not concern myself with the invalidity point. The delay here was slight. The explanation is shaky, but it appears the brothers were left to pursue some materials, but out of disorganisation or ignorance or a lack of guidance, did not do so. There is no apparent prejudice to the other parties by the delay. Moreover there is a question of human welfare here which I think must prevail. In my view, the just course, as I ruled, was to deal with the merits of the substantive case, and by necessity, the mother's summons.

10. The *Family Violence Protection Act* 2008 is recent legislation. Applications and orders under the Act are not uncommon. The elements of this case, and the widespread nature of the attack on the decision below, make it necessary to expose in detail what actually occurred in the proceedings below, alongside an examination of provisions of the Act. This Court was also required to consider contextual facts including pre-existing orders. The account is therefore unavoidably lengthy.

11. Before doing that, I ought to state in summary fashion only some legal principles that govern the exercise of this Court's supervisory jurisdiction, and which hover above the exposition of the facts. For when the facts are analysed in accordance with those principles, I think this application ought be dismissed on all grounds. And that is my decision.

Some essential principles

12. First, what is required by procedural fairness is a fair hearing, not a fair outcome, and therefore it is not to the point to ask whether the decision below was correct: see *Szbel v Minister for Immigration*[3]. The relevant question for judicial review is about the processes, not the actual decision.

13. Secondly, the statutory framework will be of crucial importance in determining what procedural fairness required. A court purporting to exercise an authority conferred by statute must act within the limits and in a manner which the statute prescribes and it is the duty of the supervising Court, so far as it can, to enforce the statutory prescription: see *Ainsworth v Criminal Justice Commission.*[4] That is because

> [T]he broad purpose of judicial review is to ensure that statutory authority, which carries with it the weight of State-approved action and the supremacy of the law, is not claimed for or attributed to decisions or acts that lie outside the statute.[5]

14. Thirdly, although procedure is usually a matter for the presiding judicial officer as affected by the common law, the legislation may state what is required of the procedure, including evidentiary standards. The task given to the Court under a statute may be more or less adjudicative, adversarial or partly inquisitorial, and may give the decision-maker the discretion to come to a view on certain matters. The fundamental point is that procedural fairness is determined in its statutory context: see generally Aronson and others, *Judicial Review of Administrative Action.*[6]

15. Fourthly, there is a difference between jurisdictional error, and error in the exercise of jurisdiction (the so called jurisdiction to go wrong). The difference is sometimes difficult to discern. But having regard to what was said by the High Court in *Craig v South Australia*[7] and more recently in *Kirk v IRC*[8] it is sufficient for present purposes to say that there is jurisdictional error if the decision-maker makes a decision outside the limits of the functions and powers conferred, or does something for which there is no power to do. Again, that necessitates close examination of the applicable statute.

16. What can be stated from *Craig* and *Kirk* is that jurisdictional error can occur if the Court mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers. There will a jurisdictional error if a court disregards a matter that the relevant statute requires to be taken into account as a condition of jurisdiction.

The facts: the prior intervention of the Children's Court

17. The child was born on 30 November 2008. According to the grandmother, when the child was approximately two months old, she came into the grandmother's care as the mother was having trouble with the child's father. The grandmother says that the child came to live with her in Thomastown where her partner and the plaintiffs lived with her. After about two months, the Department of Human Services ("the DHS") became involved. The DHS later commenced proceedings in the Children's Court of Victoria as a result of which, according to the grandmother, the child was placed into her care with her partner and the brothers. But I see no order putting the child in the care of the grandmother's partner and the brothers as well as hers.

18. She says the child remained in her care until the case returned to the Children's Court on 25 June 2010. On that day the Court made a finding that the child was in need of protection. Under s63 of the *Children and Young Persons Act* 1989, a child is in need of protection if amongst other things the child has suffered or is likely to suffer significant harm as a result of physical injury, sexual abuse, emotional or psychological harm and the child's parents have not protected or are unlikely to protect the child from harm of that type.

19. With that finding, the Children's Court made a supervision order to remain in force for six months until 24 December 2010. The order required the child to be placed in the day to day care of the mother. It gave the grandmother access. There were nine conditions to the order, three of which are relevant:

> 7. Mother must ensure that the child attends day care as agreed between the parties.
> 8. Maternal grandmother may have overnight access from Saturday to Sunday on a fortnightly basis.
> 9. Paternal family may have overnight access from Thursday evening to Sunday evening on alternate fortnights to the paternal grandmother. Access will occur at the paternal grandparents' homes unless otherwise agreed between DoHS and father.

20. Those orders say nothing about the brothers. Indeed paragraph 8 is circumscribed to say "maternal grandmother "whereas paragraph 9 says "paternal family".

The filing of the application for intervention orders

21. On 27 July 2010, the mother filed in the Magistrates' Court an application and summons for an intervention order under the *Family Violence Protection Act* against each of her brothers and the grandmother. The Act states its purpose is to, amongst other things, "maximise safety for children and adults who have experienced family violence" and to "prevent and reduce family violence to the greatest extent possible".[9] That purpose is to be achieved, the statute says, by "providing an effective and accessible system of family violence intervention orders and family violence safety notices"

22. Under the Act, family violence is defined to mean behaviour by a person towards a family member if that behaviour is amongst other things emotionally or psychologically abusive, threatening, or in any other way controls or dominates a family member and causes that family to feel fear for the safety or wellbeing of that family member or another person. Behaviour may constitute family violence even if the behaviour would not constitute a criminal offence. Emotional or psychological abuse means behaviour towards another person that torments, intimidates, harasses or is offensive to the other person.

23. In the application form against each of the brothers, this is what the applicant stated (the reference to "AFM" means affected family member):

> THE RESP IS THE AFM'S BROTHER. THE RESP RESIDES WITH THE AFM'S MOTHER, WHO IS ALSO THE SUBJECT OF AN APPLICATION BY THE AFM. THE RESP HAS A HISTORY OF PHYSICAL AND VERBAL ABUSE AGAINST THE AFM, INCLUDING A PHYSICAL ASSAULT DURING THE AFM'S PREGNANCY WITH HER CHILD, [THE CHILD]. THE AFM IS FEARFUL THAT THE RESP'S BEHAVIOUR WILL ESCALATE NOW THAT ORDERS ARE IN PLACE GRANTING THE AFM FULL CARE OF HER CHILD. THE AFM BELIEVES THAT THE RESP WILL TAKE HIS MOTHER'S SIDE, WHO IS ALSO SEEKING CARE OF THE CHILD, AND AS SUCH THE RISK OF PHYSICAL VIOLENCE INCREASES.

24. The application against the grandmother stated:

> THE RESP IS THE AFM'S MOTHER. THE AFM AND RESP HAVE HAD A LENGTHY ONGOING CONFLICTUAL RELATIONSHIP, RESULTING IN THE AFM BEING EXCLUDED FROM THE HOUSE ON A NUMBER OF OCCASIONS. THERE HAS ALSO BEEN AN ONGOING HISTORY OF PHYSICAL AND VERBAL ABUSE SUFFERED BY THE AFM AT HER MOTHER'S HANDS. THE AFM GAVE BIRTH TO [THE CHILD] IN 2008 AND HAD BEEN LIVING AT HER MOTHER'S ADDRESS UNTIL EARLY 2010, WHEN ONCE AGAIN SHE WAS KICKED OUT. THE AFM WAS FORCED TO LEAVE HER CHILD IN THE RESP'S CARE AS SHE DIDN'T WANT THE CHILD SLEEPING ON THE STREETS. IN THIS PERIOD, THE RESP WOULD OFTEN NOT ALLOW THE AFM TO SEE HER DAUGHTER. ON 25/7 THE CHILDREN'S COURT GRANTED FULLTIME CARE OF [THE CHILD] TO THE AFM. SINCE THIS ORDER, THE RESP'S BEHAVIOUR HAS ESCALATED. ON THE WEEKEND ON 10/7 AND 11/7, THE RESP ATTENDED AT THE AFM'S ADDRESS FOR HER OVERNIGHT ACCESS TO [THE CHILD]. THE RESP BECAME ABUSIVE AND AGGRESSIVE IN RELATION TO BRACELETS AND TO NECKLACES THE CHILD WAS WEARING. THE RESP ALSO THREATENED TO HAVE THE AFM BASHED, CALLING HER A DOG AND A SLUT. SINCE THIS INCIDENT, THE AFM HAS ASKED DHS IF ACCESS HANDOVERS CAN NOW OCCUR AT RESERVOIR POLICE STATION. THE AFM IS CONCERNED THAT THE RESP WILL DO ANYTHING SHE CAN IN ORDER FOR THE CHILD TO BE RETURNED TO HER CARE INCLUDING PHYSICALLY ASSAULTING THE AFM.

25. Under s53, the Court is empowered to make an interim intervention order if "the Court is satisfied, on the balance of probabilities," that such an order is necessary pending the final hearing to ensure the safety of the affected family member. For that purpose, section 55 says that the Court must not make an interim order (unless it is by consent or it is not opposed) unless the application is supported by oral evidence or an affidavit. Under section 54, the interim order may be made whether or not the respondent has been served with a copy of the application, and whether or not the respondent is present. Under section 53(1)(b) the Court may also make an interim order where the respondent is present and the parties consent to such an order or does not oppose the making of an interim order. In practice, interim orders are made without opposition on the basis of "no admissions" being made to the allegations. If an interim order is made the Court must then ensure the hearing is listed for a decision about the final order as soon as practicable – see s59. Under s60, an interim order ends if, amongst other things, the Court makes a final order.

26. Section 61 concerns the mention date procedure. This took on a significance here. That section says the Court must not proceed to hear a contested application for final orders on a

mention date unless: the parties have had an opportunity to seek legal advice and representation; the parties consent to the hearing of a contest on the mention date; and it is fair and just to hear the application on the mention date. Otherwise, the mention date is really a case management or scheduling date. Unless there is consent to a final order, or the application is withdrawn, the Court looks to schedule a hearing date for a contest. In the meantime the interim order may be continued without admissions. If a respondent will not agree to the continuation of a pre-existing interim intervention order, the Court acts under section 53 by deciding if such an order is necessary pending the final hearing to ensure the safety of the affected family member.

27. The statute contains evidentiary provisions. Under s65(1) "the Court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary." It is qualified by s65(3) which permits the Court to refuse to admit evidence if the Court is satisfied that "the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing." As for the mode of evidence, s66 permits the Court to admit evidence by affidavit or sworn statement.

The first interim intervention orders

28. The mother attended the Magistrates' Court at Heidelberg on 27 July 2010 to proceed with her application. Under s63(1) any number of applications for family violence intervention orders may be heard together if the Court thinks fit. Her three applications were heard together and granted *ex parte*. There is no evidence before me about precisely how the proceeding was conducted on that day because no-one challenges those decisions in this application.

29. The precise contents of the orders made that day are important. Each of the orders said that the affected family members were the mother and the child. Disregarding certain immaterial words or notes, the Court made separate orders against each brother and the grandmother that they must not:

> 1. commit family violence against the protected persons.
> 2. follow the protected persons or keep them under surveillance.
> 3. contact or communicate with a protected person by any means.
> 4. go to or remain within 200 metres of [the mother's address] or any other place where a protected person lives, works or attends child care.
> 5. get another person to do anything he/she must not do under this order.
> 6. Approach or remain within five metres of a protected person.
> 7. THE COURT ALSO ORDERS: until further order, any firearms authority held by the respondent is suspended. The respondent must hand any firearms in his/her possession to police immediately. …
> 9. further order that first named protected person gave sworn evidence that there are guns at Respondent's residence. Copy application and orders must be provided to DHS.
> This order will last until further order.

30. The disquieting contents of paragraph 9 establishes there was sworn evidence in some form on that day from the mother.

31. In the case of the grandmother, the interim orders were in the same form but there was an important and necessary exception in paragraph 8 which said "…she will not contravene this order by: (a) doing anything that is permitted by…a child protection order…" Thus by law the grandmother could still have the child every alternate Saturday and Sunday as allowed by the Children's Court under the protection order. But that protection order did not, in terms, include the brothers.

The mention day on 6 August 2010

32. On about 1 August 2010 the brothers and the grandmother were served with the application and the interim order. The application was returnable at the Heidelberg Magistrates' Court on 6 August 2010. That was a mention date. On that day, the Magistrates' Court continued the interim intervention order against the two brothers and the grandmother (who were legally represented) in exactly the same terms as had been made previously, expressed to last until further order. Those orders are in evidence here.

33. The orders on 6 August 2010 are not the subject of any challenge. But it was used here, by all, as a contextual fact. Mr Perkins who described the decision as part of a continuum pointedly

criticised the Magistrates' Court (the first defendant) in this application for not producing a recording of proceedings that day or on the first hearing, if it existed. He submitted this Court should take action, in the form of questioning of counsel. In a ruling given on the third day of argument, I declined to do so on the grounds that it was not for this Court to compel unilaterally any party to produce any evidence, but in any event, it was irrelevant as there was no application for judicial review of the decision on 6 August and the orders spoke for themselves.

34. In that situation, it was said the only additional evidence of what occurred on that day was in paragraph 14 of AB's affidavit which said (with my added emphasis):

> There was a court hearing on 6 August 2010. We spoke to Mr Dunlop, who appeared for each of my mother, me, and my brother [CD]. After a hearing which took approximately half an hour, or thereabouts, the matter was adjourned for three weeks. The order [which was made by a Magistrate whose name I do not know] permitted my mother to see [the child] *and did not place any restraint on me or my brother seeing [the child].*

35. That piece of evidence does not say what is meant by a "hearing". Mr Perkins asserted this evidence was uncontradicted. Therefore he said I should accept that the hearing on 6 August 2010 was before a magistrate who was not the same magistrate as presided at the hearing subsequently on 27 August 2010; and I should accept the effect of the order as AB asserts it to be. This was integral to the attack on the decision later on 27 August 2010, that her Honour saw fit to significantly alter the previous order of another magistrate.

36. But the order of 6 August says no such thing as asserted in AB's affidavit. The interim intervention orders so far as they concerned the grandmother, expressly did not prevent her from having contact every second weekend under the Children's Court protection order. If that is all there was to it, then, true it is, if the brothers were living with the grandmother there was practically nothing stopping them from having contact with the child when she was there with the grandmother on those alternate weekends.

37. But the interim intervention orders on 27 July 2010 as later continued on 6 August 2010 stated explicitly that the brothers must not "contact or communicate with" the baby. Debate occurred here about the meaning of those words. But cases of this nature are no place for word play or a clever construction exercise. If there is a prohibition on contacting someone then *a fortiori* in this context it means that you cannot be in their presence in any way. Otherwise the order is being defeated.

38. Further, condition 4 of the order said the brothers must not go to their sister's house or within 200 metres of it, or any other place where the child "lives" or attends childcare. It was said that "lives" has to be construed narrowly to mean something akin to the usual place of residence which is with the child's mother, but not with the grandmother. I cannot accept that. Given the purpose for which these orders are made and the protective jurisdiction that is being exercised, "lives" must mean wherever the child might be living and I think that includes a weekend visit.

39. Further, condition 6 prevented the brothers from approaching or remaining within five metres of the child. One construction (ignoring the other orders) is that the brothers could be in the vicinity of the child on alternate weekends with the grandmother but no closer than 5 metres and even then in silence or without communication. That was conceded by the grandmother's counsel as unworkable. I would describe it as ludicrous.

40. Mr Holt, counsel for the mother, acknowledged there is supererogation amongst those three orders but contended that together they stated clearly that the brothers could not have contact, and had to stay away from the child. In my view, that is so.

41. Despite that, Mr Perkins submitted that I should prefer the statement or understanding of AB in his affidavit about the effect of the orders made on 6 August. He sought to rely upon a decision of Hansen J in *Tudman v Flower*.[10] I reject that submission. There is nothing in that case to support the submission as made. As I apprehend it, counsel seeks to distil from that case a general rule that a court order is simply an administrative act. But the order is the order. It takes effect according to its terms.

42. The outcome is that I have no regard to AB's subjective understanding, fallacious as I think it was, about the effect of the order. Under the two interim orders the brothers were prohibited from having contact with the child. There was no exception for them under the Children's Court protection order to give them contact on alternate weekends. All those orders were all in force when the three matters came before the Magistrates Court on 27 August 2010.

The proceedings on 27 August 2010

43. There is before the Court a transcript of the recording of proceedings that took place that day. There is no need to refer copiously to its contents. It is important to keep in mind this was a mention hearing. It is an occasion on which the parties inform the Court about the state of the contest. That is, whether the matter is still proceeding, or whether interim orders are to be extended or varied by consent, or whether final orders can be made by consent. In the event that the order is to become contested, the purpose of the mention hearing is to fix a date for the hearing of a contest. In the meantime the interim orders can continue, without admissions, akin to an interim injunction. If no agreement can be reached on interim orders, then the Court can hear evidence for interim purposes on a standard under the statute to which I have already referred. In that regard, the legislation does not require that any alleged family violence be proved before an interim order may be made: see *Zion-Shalom v Magistrates Court.*[11] What matters is the safety or well being of the child.

44. It ought be accepted that a mention date is or can be a busy day. The Court must deal with many applications, maybe in a milieu of despatch depending on judicial resources. Matters are mentioned, then stood down to enable parties to discuss their differences and try to agree on interim orders at least. The philosophy, naturally enough, is to let parties reach an acceptable position for themselves on an interim basis, rather than have an imposed legal intervention. It stands to reason that Magistrates will encourage continuation of interim orders consensually without admissions to minimise the inflammation of family conflict with interim contests, and defer the contest to a final hearing when evidence can be adduced and carefully considered.

45. On this occasion, a lawyer (a duty lawyer, I think) appeared on behalf of the mother. Counsel appeared for the brothers and the grandmother. Counsel told her Honour that his clients were downstairs. Proceedings commenced by the Magistrate announcing that she might have heard the interim applications, to which Counsel for the respondents said, "That's correct". That casts doubt on AB's assertion that there was a different magistrate on the earlier occasion on 6 August, if that matters.

46. Counsel then requested further particulars concerning the mother's allegations of violence or threats from the brothers, which the Magistrate acknowledged. Her Honour said that time should be taken to produce the particulars that day, which did not have to be in court documented form as long as they identified the incidents, the date, the words used and the physical acts committed. Her Honour added that if there had been further incidents concerning violence or threats at the hands of the grandmother since July 2010, the question would be whether the interim orders should be varied to remove any child contact. A magistrate has that power under s173 of the Act which says a family violence intervention order applies despite any child protection order.

47. Accordingly, her Honour stood the matter down to enable further particulars to be prepared at Court. The plaintiffs do not challenge or cast aspersions on that step; nor could they.

48. The matter was later recalled in Court. Counsel for the respondents attended with his clients. By that time, the respondents had been given some handwritten particulars. They were also handed to the Magistrate. They take the form of notes of instructions taken by the mother's lawyer. They are in evidence here. The truth of the particulars is contested and I expect they will inflame relations each time they are repeated. But it will become apparent the Magistrate acted on these particulars in forming a view about the appropriate course to take.

49. The particulars commence "History of Violence". They say (I shall elide over various parts so as to reveal the gist of the allegations):

> When I was in primary school, I went to live with my auntie because my brothers were hitting me. One of my brothers raped me (x2) I went back to stay when I was about 13. I was often left alone with my brothers who were still very violent towards me. When I was about 15…one of my brothers

> tried to stab me ...I called the police... My brothers kicked in my bedroom door on several occasions... My brothers often grabbed me and bashed me...my brothers threatened me and my boyfriend with a chain saw when I was 7 months pregnant. My brothers often verbally abused and threatened me

50. The particulars allege the grandmother used to push her around and swear at her. They also refer to verbal and physical abuse in late 2009 in an incident between her and her mother while shopping.

51. The second part of the particulars is headed "Log of Claims" and refers to incidents on 6 and 7 August 2010. Two of the incidents concern a friend of the brothers named Harry who came to her house yelling out her name, and scared her, and told her that the grandmother wanted to bash her. Another incident concerns her brother CD who, as I interpret the notes, was stalking her on one occasion when she dropped off her daughter at the Reservoir Police Station.

52. On this occasion, after those particulars had been produced to the Court, counsel for the grandmother and the brothers announced that the matter had been resolved by way of consent without admissions for a 12 month period. He then said:

> Your Honour there may be one amendment which I believe is by consent that the orders regarding [the brothers] include an exception mirroring that of the mother's exception in terms of the child contact pursuant to child protection orders.

53. The mother's lawyer had no objection to that exception being made. It is apparent that the brothers realised, as they had to, that the existing interim orders did not permit them to see the child on alternate weekends as the mother was permitted to do under the protection order. What was sought by consent was an order that the brothers have the same contact as the grandmother on alternate weekends. It is clear that the parties were seeking to resolve the matter by a consent final order.

54. The Magistrate said "I wouldn't be building those [exceptions] into these orders not on the allegations I've seen." That could only be a reference to the additional particulars as augmenting the pre-existing allegations in the application on which interim orders had already been made. The respondents' counsel sought to overcome that attitude. He contended that the two brothers lived with the mother; and the child had lived with them for 20 months when the mother was unable to care for the child, and the DHS was not concerned about the brothers presence at the house.

55. The Magistrate said in essence that as there was a young child involved and as the grandmother was the person who has child contact then there was no need for an exception for the brothers to have child contact as well, and the DHS might not have known about the additional particulars. The Magistrate observed that the brothers had no right of child contact under the protection order, and as the grandmother chose to have the brothers living with her, they would have to make arrangements around child contact. Her Honour said she would refuse the consent order "because of my obligations under the Act to look at whether a child is possibly at risk and I can't do that".

56. Eventually, her Honour told counsel for the respondents that if it could not be resolved on that day, then the mother's contested allegations would be fixed for hearing on another day. In the meantime the interim intervention orders would remain in place and they prohibited the brothers from having any child contact. As for the grandmother, the Magistrate said attempts should be made to resolve the case against her that day. The matter was stood down to enable the parties to consider their positions, as they did.

57. The plaintiffs do not seek judicial review of the Magistrate's decision to refuse to make the parties' consent order. But that decision was attacked as being the progenitor of the eventual consent order against the grandmother about which the plaintiffs are aggrieved. They say that in disregarding the consensual wishes of all parties, her Honour acted improperly on nothing but a concern for the child on disputed allegations and without at least engaging in the judicial discipline of hearing and evaluating evidence, making of findings, and engaging in a course of reasoning in making a decision to not make a consent order.

58. But, the plain fact is that under s78(5) of the Act the Magistrate has the discretion to refuse to make a consent order. That section states:

> A court may refuse to make a final order to which the parties to the proceeding have consented if the court believes the order may pose a risk to the safety of one of the parties or a child of the protected person or respondent.

59. Section 78(4) says the Court may before making a final consent order or a final unopposed order, conduct a hearing in relation to the particulars of an application if, in the Court's opinion, it is in the interests of justice to do so. But that power is discretionary. Questions may arise as to what constitutes a hearing. It matters not because the fact is nobody sought a hearing here, and the Magistrate was not bound under the Act to conduct one. There is nothing in my view to stop a Court refusing to make a consent order under s78(5) without conducting a prior hearing into the particulars. For example, a Court may form a view that parts of a consent order are manifestly inappropriate or risky. Or a hearing may be called for to remove some apprehension or to satisfy the Court that the consent orders are not problematic in some way. It all depends on the case, the orders sought, and a judicial sense of prudence, or what is required. I think s78(5) has to be seen as part of the Court's overriding power to ensure, for itself, that orders are in place that adequately protects a child. One can well understand a Court being risk-aversive in making such a judgment.

60. The expression "if the Court believes" is something different, and less than an evidentiary standard such as being satisfied on the balance of probabilities. Not much argument was developed before me on the meaning of "believes" in the context of someone discharging judicial office. What informs the meaning is the purpose of the power, which in this case is to protect a child or some other protected person.

61. I think the statute is investing faith in the Magistrate to form a belief judicially, which is based not on caprice or convenience or personal value, but on some rational grounds. There is a natural inclination to say probative as well but there are bound to be cases where allegations may not be improbable but not manifestly so, and a Magistrate forms a belief conscientiously that "a risk may be posed" as s78(5) says. Perhaps it could be a real and sensible risk. However one poses the test, in my view, a belief can be formed about a risk on the basis of allegations that are yet to be proven, but have to be taken seriously (or not dismissed as frivolous) until they are eventually tested. An element of judgment has to be involved, especially as a child is involved, and so much will depend on the circumstances. To that end, regard must be had to the evidentiary requirements and the inquisitorial flavour of s65 which states that: "Subject to this Act, in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary."

62. As things stood at that juncture, the Court saw the allegations in the particulars. And there was the fact that orders were already in existence having been made on an evidentiary basis. They formed the grounds for a belief. The Magistrate explained her reasons for not allowing the consent order. Those reasons had as their foundation nothing but the avowed necessity, as dictated by the statute, to have regard to the interests of the child, not the interests of the brothers. Moreover, all the Magistrate was doing in applying a belief was preserving the status quo, for the protection order did not give the brothers access and the interim orders banned them from contact. Altering the status quo *ante*, by consent, posed a risk to the child which the Magistrate was not willing to countenance. The brothers could still test the allegations at a contest hearing. Where, practically speaking, is the procedural injustice or the jurisdictional error?

63. When the matter was recalled, the respondents' counsel announced that the parties had not been able to reach resolution and now wished to have a booking for a contested hearing. He said the brothers were not in the Court room because they were too upset. There was no suggestion they had left the precincts of the Court; just that they would not come into the Court. He said that the mother's allegations concerning both the brothers and the grandmother would be heavily disputed, and the brothers would call evidence from the mother anyway. As I see it, the grandmother was saying that if the brothers could not have contact with the child on alternate weekends with her, then she would not consent to a final order as against her even if that preserved her contact under the protection order.

64. Her Honour then stated she would then hear evidence from the mother about the interim order relating to the grandmother "and I'll be seeing whether she thinks there is any risk of the child having child contact with the brothers present". What was said next by counsel for the respondents is very important. Counsel said:

> I understand that the interims don't provide for any exceptions regarding the brothers and the brothers have accepted this too Your Honour, and they are happy to not have any contact with, well they're not happy Your Honour, but they have accepted that they won't have any contact with [the child] or the primary protected person in these proceedings until they are finally determined. So I believe that the interims can continue as they are, and there is no issue with that, the brothers will not be having contact with [the child] at all.

65. So, that meant as an interim measure, the status quo *ante* could be preserved as far as the brothers were concerned. But the brothers would not agree to final orders because they wished to contest the allegations made against them, as they were entitled to do. There followed some confusion in which it appears the Magistrate did not realise that the orders as first sought (and disallowed) were by consent. This does not matter. Either way, the Magistrate was not willing an exception to be made for the brothers. Counsel said that "his client" intended to pursue the matter separately with DHS to review the Children's Court orders with a view to having supervised contact only when the child is with other family members including the brothers.

66. So the strategy was clear: as the Magistrate would not give her consent, the grandmother and the brothers would pursue their plans in the Children's Court. This was all happening in the context of the brothers and the grandmother withdrawing their consent to anything, and looking for another date to contest the serious allegations.

67. One senses impatience visited, as the Magistrate might well have viewed the respondents position as erratic. The Magistrate said that she was "running out of time" and asked if the mother would take the witness box and give evidence. Her Honour was ready to start the case, saying she would hear evidence from the mother and then hear submissions afterwards. An order was made for a closed court.

68. If the mother gave evidence it might have been of a strength to give flesh to the allegations and fortify the Magistrate's apprehensions about the brothers having contact with the child, and maybe add apprehensions about the suitability of the grandmother to have contact. Counsel then said:

> Your Honour if I might, just quickly, I don't need to take any more time, but if there is a chance that the mother's time with the child is going to be impinged or stopped, in any event, I'm sure consent will be given to allow for that.

69. There was then some confusion about precisely what it was the grandmother was willing to consent to. The Magistrate who said she was getting alarmed about the respondents' changing position, said (in a remark now seized on) "I don't know about you but I actually have to go home" and then said she was looking for a safe position for the child if there was no consent. Counsel then announced that the grandmother did not want to jeopardise her relationship with the child and would take any step necessary to keep the relationship going. After speaking to the grandmother, counsel announced that the grandmother would consent to a final intervention order for 12 months, with an exclusion giving her contact under the child protection order.

70. When pressed whether she would be willing to also not allow the child to be brought into contact with her brothers, counsel again said that was a matter to be taken up with the Children's Court. The Magistrate would not accept this, and that she had a responsibility under the Act. Her Honour said if the grandmother's consent did not extend to disallowing the boys from seeing the child, then she would have to hear the current interim application and consider whether she, the grandmother, might be exposing the child to some possible danger by allowing the brothers to be present on contact.

71. It was then that counsel said unequivocally that "there is consent to that". That is, the grandmother would consent to a final order on the pre-existing terms together with another condition stopping the mother from allowing the brothers to have contact. That additional condition

was complementary to the existing order prohibiting the brothers from having contact. The finality was in the grandmother's interests because it meant her rights of access were preserved without the risk of adverse evidence that day from the mother. It was the brothers who were still missing out under the existing orders, and had to wait to challenge the allegations.

72. Thus, on 27 August 2010 the Court made interim intervention orders against the brothers in the same terms as were previously made expressed to last until further orders.[12] As against the grandmother, final orders by consent were made as before with an addition of condition 10 which stated that she must not "cause or allow the child … to be brought into contact with AB or CD or to allow them to be at the same premises as the child." The order was expressed to expire at midnight on 27 August 2011 unless extended or varied prior to that date.

73. Under the Act it was open for the respondents to appeal to the County Court by way of rehearing,[13] but the plaintiffs have sought judicial review instead.

What is the order under challenge?

74. The challenge on the originating motion appears to be directed at the consent order against the grandmother. But as argument developed it was not clear. I have had to press counsel to identify the relevant decision to be impeached, seeing as the grandmother is not an applicant here, and the order against her was by consent. The originating motion has been twice amended: first, at my direction before hearing to require a statement of the grounds with more precision; and secondly at the hearing after new arguments were advanced.

75. Mr Perkins contended he was, as a first alternative, seeking to quash the consent order against the grandmother and as against the brothers on the same day. As an alternative it was a challenge to the order against the grandmother. That raises a question of standing.

Jurisdictional error

76. The plaintiffs contend the Magistrate committed jurisdictional error "in that her Honour misapprehended and/or misconstrued her jurisdiction, as a consequence of which she failed to conduct a hearing into the application". The "application" is not identified with precision, but as I have shown in the exposition of facts, it can only be the application for an intervention order against the grandmother which was ultimately made by consent, so no hearing was necessary. The hearing can only refer to a hearing under s78(4) when the consent order was sought. Yet, there is no challenge to the decision to refuse consent. I have trouble seeing the sense in this.

77. The mother does not dispute that the brothers have standing to seek judicial review of the order made against the grandmother on the basis of jurisdictional error, error of law on the face of the record and denial of procedural fairness in relation to them. That is recognition of the principle as stated in *Ainsworth v Criminal Justice Commission*[14] that the order against the grandmother is one which may destroy, defeat or prejudice their rights, interests or legitimate expectations. But, it was submitted, and also conceded by the grandmother, that the brothers do not have standing to challenge a decision for which another person was denied procedural fairness. I accept that as correct. The denial of procedural fairness is personal to the grandmother. But she does not complain, and consented to the ultimate order.

78. The brothers submitted that the jurisdictional error occurred because –

> (a) Section 78 does not empower the Court to impose upon the parties its own conditions for the approval of the proposed consent order, and in so doing, the Magistrate stepped outside her jurisdiction;
> (b) the Magistrate ought to have conducted a hearing into the particulars of the application as soon as she had reservations about the appropriateness of the exception;
> (c) the Magistrate should not have "entered the fray" because an agreed outcome is better than one imposed by the Court;
> (d) the Magistrate did not give any hint as to how or why she considered the exception to be inappropriate, and a hearing should have been conducted into the particulars of the application;
> (e) in proceeding as her Honour did, this Court ought to infer that the Magistrate misconstrued or misapprehended her jurisdiction.

79. I reject all of those submissions. Jurisdictional error, as I said at the outset, comes down

to a consideration of the processes and procedures stipulated under the relevant Act. A challenge based upon jurisdictional error opens up the relevant evidence before this Court, and does not confine the evidence to what is on the record.

80. The first fact which creates an insuperable barrier for the plaintiffs is that the order against the grandmother was made by consent. She was represented by counsel. Had she been unrepresented then questions may have arisen for the Magistrate whether the requirements of procedural fairness required the Court to take extraordinary steps to ensure the grandmother properly understood what she was doing and recognised the additional burden on herself, which indirectly affected the brothers.

81. Even if one goes back to the provenance of the consent order, then in my view every step the Magistrate took was within power. As Mr Holt for the mother submitted, this Act by its nature and its purpose contains many provisions which place positive obligations on the Magistrate to intervene in the proceeding in the sense that the Magistrate must be independently satisfied of certain matters before they proceed to make decisions concerning intervention orders in cases of family violence. Above all, there are positive obligations on the Magistrate to have regard to the welfare of children. Thus, it is not just up to the parties to decide what is in the welfare of the children. It is an issue for the Magistrate as well in exercising a protective jurisdiction especially where there are serious allegations of a history of domestic violence.

82. It is apparent in all that occurred that the Magistrate was certainly concerned to carry out that statutory dictate. And I think it is right to say that by and large, the legislation looks to the Magistrate to undertake or allow a form of inquisitorial justice. A demonstration of that is s78(5) itself. Another example is s81 which permits the Court to include in a family violence intervention order "any conditions that appear to the Court necessary or desirable in the circumstances".

83. It is in that statutory context that one must approach s78. I would hold first, that the Magistrate, in refusing to make a final order to which the parties consented, acted within power under s78(5). The exercise of the power is discretionary. This Court, on judicial review, is not concerned with the merits of the decision.

84. Secondly, I would hold that the refusal to allow the consent order was manifestly based on grounds under s78(5). The reasons for disallowing the consent order were obvious or apparent. The Magistrate believed that the consent order may pose a risk to the child, based upon the seriousness of the allegations made including the further particulars that day, and prevailing force of the pre-existing intervention orders. Those existing orders were based on a conclusion by the Court, presumably on the balance of probabilities under s53, that family violence had been committed by the two boys or that there was a risk that it might or in any event there was a risk to the child. In those circumstances, I cannot see how the brothers can mount an attack on the Magistrate for giving insufficient grounds for the belief that was formed. Whatever the expression "believes" means, the belief here was formed faithful to the purposes of the Act, and was justifiable.

85. Thirdly, I would hold that the Magistrate was not bound to conduct a hearing into the particulars under s78(4). It was a matter of discretion. She was within jurisdiction without holding a hearing to form the view that the allegations were so serious that the exception being sought was unacceptable in the interests of the child. Moreover — and there is simply no escaping this — there were two subsequent occasions on which the Magistrate was ready to undertake the task of hearing the evidence that day from the mother so as to assess the strength of the allegations. On each occasion, no sooner had the prospect of evidence been instigated, counsel for the respondents spontaneously deterred the Court and gave consent.

86. Fourthly, in my view the Magistrate did not commit jurisdictional error in suggesting or proposing a consent order that she would be prepared to make. I reject the submission that the Magistrate entered the fray to the point where she, having stepped into jurisdiction, then stepped back out of it. To tell the parties that she would make a consent order if there were different terms was within power. To suggest what terms would be acceptable is part of the discourse that is necessary to understand the refusal of consent, and how to then advance the matter. Further, section 81(1) permits the Court to include any conditions that it regards as necessary or desirable in the circumstances. That, together with the inquisitorial features of the Act, unquestionably

permits the Court to not only decline the consent order but to suggest or encourage orders that would be acceptable before the Court would give its consent. To sit there Sphinx-like, and simply refuse consent without suggesting alternatives adds to problems. As Mr Holt said, are the parties to have their consent rejected and then leave the Court for further discussions to somehow magically discern why it was the Magistrate was concerned, and then to come back with some proposed additional order?

87. There may come a point where a Magistrate in this field, or any other, so conducts herself that to the informed bystander she is revealing a pre-judgment so as to attract the principles of apprehended bias. But no claim for bias was put in the court below or in this Court. Nor in my opinion would it have been open. The Magistrate was doing no more than looking to direct the parties to a consent order on terms that she regarded protected the interests of the child. That is not jurisdictional error.

88. Fifthly, I would hold that the inclusion of the condition that was eventually included in the consent order was within power. It was within power under section 81 and because by its nature requirement to keep the brothers away for the sake of the child falls squarely within the protective purposes of the Act.

89. For those reason the challenge to jurisdictional error must fail.

Procedural fairness

90. *Certiorari* of course is available for a denial of procedural fairness. There are three elements to the challenge on this ground. The first is that the plaintiffs were denied natural justice or procedural fairness in that the grandmother's will was "overborne by the Magistrate's conduct." This contention suffers from the defect that the brothers do not have standing for a breach of procedural fairness which is personal to a third party, the grandmother.

91. But, in any event, I would hold that the claim simply cannot be made out. The complete answer to this claim of course is that the grandmother was represented by counsel throughout the whole course of events that occurred on that day. As argument developed, it seemed to me the plaintiffs were really arguing that the grandmother was induced to make the consent order by imperious manner of the Magistrate, as they would see it. Relying on this Court's decision in *Taylor v Fratin*[15] it was submitted that the issues and the outcome was designated by the Magistrate herself, and justice was not manifestly and conspicuously seen to be done, with the result that all three orders were amenable to *certiorari*.

92. I reject that submission. I cannot accept the assertion that the grandmother's will, or anyone else's was overborne. Putting aside the presence of counsel, nothing was done to make her do something which she did not want to do. I detect the plaintiff's submission was that the Magistrate was acting high-handedly and forcing the plaintiffs and the grandmother into a corner especially considering the Magistrate's comment that she had to go home.

93. This Court is not here to judge the manner of magistrates or to make pronouncements about judicial etiquette. For one thing, the Magistrate cannot respond personally to the complaint or defend herself and maybe tell me what she was experiencing in Court. Magistrates are at the coal face and have to do practical justice in cases that are emotionally charged and troublesome. There is a growing expectation that Courts should take a more interventionist role than in the past and some may want to run a tight ship: see generally Thomas, *Judicial Ethics in Australia*.[16] Courts have to act with courtesy but above all with authority. Instances of sharp words, incredulity, sarcasm or urgings may be no more than a technique to try and ensure parties concentrate on the issues before the Court and act constructively. Litigation in the courts would simply be unworkable if relief was available by way of *certiorari* each time a judge in effect was telling parties to "get on with it" or each time a judge revealed what his or her preliminary thinking was so as to encourage the parties to reach agreement. That is especially so in cases under this Act.

94. Further, to say the conduct was overbearing also overlooks the fact that the grandmother through counsel chose to act in a way that shaped the eventual outcome. That is, the grandmother could have abstained from doing anything that day and simply allowed the continuation of the interim orders as against her and simply adjourned the matter to a contest date when she and

the brothers could have contested all the allegations put by the mother as affected all three of them. Her position would have been protected as she had access under the protection order. But she chose not to do that.

95. Mr Perkins submitted that another aspect of procedural unfairness was that the brothers were absent from the courtroom whilst the order concerning the grandmother was being made and in that sense they were denied procedural fairness. I reject that submission. They were represented by counsel at all times. Nobody forced them out of the courtroom. They chose to absent themselves from the courtroom when the matter was recalled and when the final orders were made.

96. This led Mr Perkins to make a new argument at the hearing. His submission was that the brothers were in effect without effective legal representation because there was a conflict of interest in counsel representing the brothers as well as the grandmother once the particulars had been disclosed, and once the Magistrate revealed her attitude to the consent orders. The argument was then broadened to say that the Court should have seen the counsel's conflict of interest and therefore came under some duty to intervene, and its failure to do so meant the grandmother's consent was not real or was somehow compromised.

97. Mr Holt submitted, and I accept, there is unknown in the law a duty, under the rubric of procedural fairness, on a judicial officer to effectively supervise counsel to be alert to the question of conflict, and then to proceed as if the Court had duties as if the brothers or the grandmother were unrepresented. If counsel perceives there to be a conflict of duty, it is a matter for counsel to act in accordance with ethical duties. Nothing of the sort was raised in Court. There is no duty on a judge to supervise the adequacy or quality of representation. A court is entitled to assume that counsel appearing for a party has authority to act for that party.

98. The closest one gets to the law's intervention where counsel's conduct of a case comes into question arises in the criminal law when the competence of counsel becomes a possible ground of appeal to show there was a possible miscarriage of justice. It is at best an analogical argument, and therefore to be approached with caution. A paradigm example, as arose in the barrister's immunity case of *D'Orta-Ekenaike v Victoria Legal Aid*[17] is where counsel is so intoxicated or in an altered state that it is clear that there is no legal representation at all.

99. The cardinal principle is that a person is bound by the way the trial is conducted by counsel. This was stated by Gleeson CJ in *R v Birks*[18] as follows:

> As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involved errors of judgment or even negligence.
>
> However there may arise cases where something has occurred in the running of a trial perhaps as the result of flagrant incompetence of counsel, or perhaps from some other cause, which will be recognised as involving or causing a miscarriage of justice.

100. But no question of counsel's competence arises here, and I see no miscarriage of justice.

101. The plaintiffs also submit there was a denial of procedural fairness in that the Magistrate made orders contrary to what the plaintiffs had agreed to, and in their absence. I reject that submission for reasons I have already given.

Error on the face of the record

102. By operation of s10 of the *Administrative Law Act*, reasons are incorporated as part of the record. A transcript may be incorporated into the record by reference at least to the extent that the transcript shows the Court's orders and the reasons for the decision.

103. Paragraphs 3(a) to (e) of the originating motion repeat the various grounds of attack that are made seeking *certiorari* for jurisdictional error or breach of procedural fairness. The plaintiffs' submissions also seem to weave in an attack on the reasonableness of the decision based on *Wednesbury* grounds[19]. For the reasons I have already given, I reject the submissions on all these

grounds. Further, in my view there is no possible basis for alleging *Wednesbury* unreasonableness. What the Magistrate did was within power. This is not a situation where the decision eventually made (which was, I emphasise, by consent) was in some way so manifestly bad or irrational that it bespeaks some sort of error in adjudication let alone jurisdictional error. To the contrary, the Magistrate was actuated by nothing more than a desire to protect the interests of the child. All endeavours to adduce evidence were repelled by the plaintiffs' counsel.

104. What this leaves under this ground of attack is an allegation that the Magistrate failed to provide any or any adequate reasons for her decision to include condition 10 in the consent orders. Of course that was a condition imposed by consent so the first answer to this submission is that reasons were not required if the orders were sought by consent. Of course, a failure to give reasons can amount to an error of law, but the plaintiffs have no authoritative basis for saying that reasons are required by a court before a consent order can be made. The plaintiffs, as in so much of this case, returned to the Magistrate's refusal to make the consent order. They contended reasons were not given for that refusal. Can the plaintiffs say they did not know why the consent order was refused?

105. The duty and extent of reasons is the subject of much legal discourse, and I need not dwell on it here. The statute here does not require the giving of reasons. Debate may take place about the true basis of or the true principled basis of obliging courts or tribunals to give reasons: see generally Aronson, *Judicial View of Administrative Action*,[20] It is very doubtful that a failure to discharge a duty to give reasons is susceptible to judicial review as constituting jurisdictional error. A duty to give reasons based on procedural fairness is regarded as having a broader and more flexible or pragmatic reach.

106. For present purposes, it is sufficient to refer to the Court of Appeal's decision in *Fletcher Construction Australia Pty Ltd v Lines Macfarlane and Marshall Pty Ltd*.[21] A judge has an obligation to provide reasons for judgment as a normal but not universal incident of the judicial process. That is especially so where the decision is in fact or in substance a final order. The duty is less clear when the decision is something less than final. In this context, McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*[22] stated that reasons need not be given for every decision made by a judicial tribunal. For example, in every day litigation rulings are made on evidence. The necessity or the extent of reasons all depends on the importance of the point involved and its likely effect on the outcome of the case.

107. The proceedings on 27 August 2010 were a mention date. The final order was given by consent. No reasons were called for. The reasons that the plaintiffs say were absent concern the very first step that occurred on the day which was the Magistrate's refusal to make a consent order. That was not a final decision in the proper legal sense. Nor did it require findings of fact or the evaluation of evidence because as I have said under s78(5), the Magistrate's entitlement to refuse consent was allowed if her Honour formed a belief based upon the needs of the child. If a duty to give reasons for that step could be construed as being required by the statute, then I would say it was adequately discharged. The Magistrate having been shown the additional particulars stated her reasons to be that the allegations were too serious to warrant the exception being given to the brothers. When counsel sought to persuade the Magistrate that consent should be given, making reference to the DHS and the Children's Court order, it is clear the Magistrate, faithful to her duty, regarded her obligations as independent from those of the Children's Court, and as requiring her to carry out the requirements of the statute and minimise a risk to the child. I think that this ground must also fail.

Conclusion

108. For those reasons, in my view this application for judicial review must fail. I would order that the proceedings be dismissed. I would also finish by saying that in my view, despite the attack made, I see no injustice in what has occurred. In the end, there has been a preservation of the brothers' rights to challenge the serious allegations made by their sister. That will soon be heard. If the brothers are successful in exposing those allegations as being unfounded or false, then presumably the Court will have no basis for extending the interim order in the way it has. There will then be an opportunity for the grandmother to seek a variation of the orders as made. Further the orders did no more than preserve the effect of pre-existing orders. That all means, if the grant of relief by way of *certiorari* came down to discretion, then relief would be declined on

the grounds of a lack of utility.

109. After the parties have digested these reasons, I will hear any submissions on costs.

---

[1] Not the same counsel as appeared on this application.
[2] See *Dranichnikov v Minister* (2003) 197 ALR 398 at [25] – [27].
[3] [2006] HCA 63; (2006) 228 CLR 152 at 160 [25]; (2006) 231 ALR 592; (2006) 81 ALJR 515; (2006) 93 ALD 300.
[4] [1992] HCA 10; (1991) 175 CLR 564 at 584; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255 per Brennan J.
[5] *Ainsworth* at 584-5.
[6] Fourth ed, [7.20]ff, and Ch 8.
[7] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[8] [2010] HCA 1; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[9] See s1.
[10] (1994) 73 A Crim R 321.
[11] [2009] VSC 477 at [12].
[12] On 10 September 2010 there was another mention date at which the orders as against the brothers were extended until further order, and a contest hearing was fixed for 18 February 2011. That fixture has been suspended by reason of these proceedings.
[13] See s114ff.
[14] [1992] HCA 10; (1991) 175 CLR 564; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255.
[15] 12 Fam LR 211.
[16] Third ed., at [4.7]ff
[17] [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784.
[18] (1990) 19 NSWLR 677 at 685.
[19] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.
[20] 4th ed at [8.500] ff.
[21] [2002] VSCA 189 at [99] ff.
[22] (1987) 10 NSWLR 247.

APPEARANCES: For the plaintiffs AB and CD: Mr D Perkins, counsel. Access Law. For the first defendant Magistrates' Court of Victoria: Ms R Orr, counsel. Victorian Government Solicitor. For the second defendant EF: Mr S Holt with Mr C Horn, counsel. Victoria Legal Aid. For the third defendant GH: Mr D Hancock, counsel. Chester Metcalfe and Co, solicitors.
