New South Wales
Supreme Court

CITATION :	**Wilson v Department of Human Services – re Anna [2010] NSWSC 1489**
HEARING DATE(S) :	13 to 16 December 2010
JUDGMENT DATE :	17 December 2010
JURISDICTION :	Equity Division Protective List
JUDGMENT OF :	Palmer J
DECISION :	Interim order for return of child to care of mother upon conditions.
CATCHWORDS :	FAMILY LAW AND CHILD WELFARE – Parens patriae jurisdiction of Supreme Court – final order by Children's Court that child be placed in care of Minister – whether Minister should be directed to return the child to care of mother – whether "unacceptable risk" of harm to child. - PRACTICE AND PROCEDURE – Practice by some advocates of addressing Judges and witnesses with inappropriate familiarity – perceptions of prejudice to fair trial – practice to be discouraged.
LEGISLATION CITED :	Children and Young Persons (Care and Protection) Act 1998 (NSW) – s 71, s 79(1), s 83, s 91, s 248 Mental Health Act 2007 (NSW) - s 34
CATEGORY :	Principal judgment
CASES CITED :	Alan, Re (2008) 71 NSWLR 573 Elizabeth, Re [2007] NSWSC 729 M v M (1988) 166 CLR 69 Saunders v Department of Community Services DC5589/2007. Victoria, Re (2002) 29 Fam LR 157
PARTIES :	Ms Wilson (First Plaintiff) Mrs Wilson (Second Plaintiff) Department of Human Services (Defendant) Anna (Child)
FILE NUMBER(S) :	**SC** A72/2010
COUNSEL :	In person (Plaintiffs) G.W. Moore (Defendant)

SOLICITORS :	D.J. Chapman (Sol) (Child) In person (Plaintiffs) Crown Solicitor (Defendant) D.J. Chapman (Child)

A72/2010 Wilson v Department of Human Services – re Anna

JUDGMENT

17 December, 2010

Introduction

1 On 27 April 2009, Ms Wilson gave birth to a daughter, Anna. A few hours later officers of the Department of Human Services came to the hospital and took Anna into the care of the Department. Two days later, the Children's Court made an interim order under the *Children and Young Persons (Care and Protection) Act* 1998 (NSW) ("the *Care Act*") giving parental responsibility for Anna to the Minister. On 11 October 2010 the interim order was made final and the Department began implementing the process of long term foster care for Anna with a view to her adoption. On 12 October 2010, Ms Wilson applied to this Court in its parens patriae jurisdiction for return of Anna to her.

2 Ms Wilson's application has succeeded – but at the cost of immense anguish within her own family and within the Department itself. The case is a tragic history of misunderstanding and distrust: on one side, officers of the Department who were acting, in good faith but on limited information, in what they believed to be the best interests of Anna and, on the other side, an intelligent and resourceful mother who believed that the Department had acted maliciously in taking her child without cause.

3 If there had been more understanding and co-operation between the Department and Ms Wilson at the very beginning, I think it highly probable that this tragedy would never have happened. However, despite the initial, repeated endeavours of the Department to engage co-operatively with Ms Wilson, such was her shock, grief and anger at the taking of Anna that she believed every action of the Department to be part of a design to thwart Anna's return to her.

4 There are some aspects of the conduct of the case in the Children's Court and in this Court which are disturbing and call for comment. I will make some observations in this regard at the conclusion of these reasons for judgment.

5 In accordance with the practice of the Protective List of the Court, the parties in these proceedings have been given pseudonyms to protect their privacy. I will refer to the mother as Ms Wilson, to her mother and father as Mr and Mrs Wilson, to the child as Anna, and to the officer of the Department responsible for managing the case as Ms Jones.

The history of the proceedings

6 The Department applied to the Children's Court on 28 April 2009 for an interim order

under s 79(1) *Care Act* allocating parental responsibility for Anna to the Minister. I have read the transcript. The application came before the Court on 29 April. Present were Ms Wilson, who had given birth only two days before, the Department's solicitor and Mr Chapman, solicitor, who represented the interests of Anna. How Mr Chapman came to be appointed as Anna's separate representative was not explained to Ms Wilson.

7 Ms Wilson said that she would like an adjournment to enable her to instruct a solicitor. After some discussion with the Department's solicitor and Mr Chapman, the Magistrate made an interim care order and stood the proceedings over 11 May. Unfortunately, Ms Wilson was not even asked by the Magistrate what was her attitude to the making of an interim care order. The transcript shows that the discussion seemed to be confined to the Magistrate, the solicitor for the Department and Mr Chapman, and it appears that Ms Wilson was entirely overlooked. One can imagine that Ms Wilson, without the benefit of legal representation and in a state of some shock at having her new-born baby taken from her two days previously, was in a vulnerable and confused state at this hearing. The fact that she was not even consulted as to the Magistrate's proposed course of action and that its consequences were not explained to her by the Magistrate could well have given her an impression that her rights were being disregarded entirely.

8 During May, the case came before the Children's Court for directions on three occasions, with a view to an early hearing. On 1 June 2009, the Children's Court made a further interim order for parental responsibility in favour of the Minister. That order was made upon a jurisdictional basis established under s 71(1)(b) *Care Act* in rather curious circumstances. The transcript reads:

> *"His Honour: Yes in relation to the establishment issue?*
>
> *Grant [Ms Wilson's solicitor]: Yes your Honour. In relation to the establishment issue without admissions Section 71(1)(b) only. We would say some difficulty your Honour.*
>
> *His Honour: Mr Chapman what do you say on the establishment issue?*
>
> *Chapman: Your Honour my position is that the matter ought to be established under Section 71(1)(b) without admissions as Mr Grant has indicated.*
>
> *His Honour: Yes without admissions proceedings will be established pursuant to Section 71(1)(b), child in need of care."*

9 Section 71(1)(b) *Care Act* relevantly provides that the Children's Court may make a care order if satisfied that the child is in need of care because *"the parents acknowledge that they have serious difficulties in caring for the child"*.

10 It is difficult to understand how the Children's Court could have acted upon *"an acknowledgement"* by Ms Wilson that she was *"in serious difficulty"* in caring for Anna if Ms Wilson's consent to the order was *"on a no admissions basis"* and if all that her solicitor had conceded was *"some difficulty"*. Doubtless, however, the parties agreed on 1 June that a further interim order should be made so that the matter could progress to a final hearing. However, I think it quite clear that neither Ms Wilson nor her solicitor – nor indeed the learned Magistrate – intended that there be any binding and conclusive admission on Ms Wilson's part that there was, in fact, any need for such an order. In my view, it is clear that Ms Wilson wished to reserve her right to assert, at a final hearing, that there had never been any proper basis for taking Anna into care.

11 Unfortunately, however, at the final hearing of matter in the Children's Court, Ms Wilson was precluded from asserting that Anna had been taken into care without justification. Counsel for Ms Wilson advised the Court that that issue would be contested. In fairness, it must be noted that the Magistrate who heard the case was not the same Magistrate who had dealt with it on 1 June 2009. His Honour said:

> *"Well there has already been a complaint established for the purposes of granting the jurisdiction of the Court. The question now the second part of the legislation is to permanency planning. We are really at the point where the complaint is established, the child was found to be in need of care, so we are really at the point of can the child be returned to the mother is that a realistic possibility of restoration or is there not a realistic possibility of restoration."*

12 Ms Wilson's Counsel then informed the Court that he wished to adduce evidence that Ms Wilson had never understood that she was completely foreclosed from contesting at a final hearing whether there had been any basis to take Anna into care. The Magistrate responded:

> *"HIS HONOUR: There was a consent to the establishment of the matter back on 1 June and at that stage your client had legal representation.*
>
> *McQUILLAN: That's correct.*
>
> *HIS HONOUR: Why aren't I entitled to assume it was on the basis of that, that she was legally represented that it was a knowledgeable consent with the benefit of legal representation. And it would appear from a practitioner that is very familiar in this jurisdiction.*
>
> *McQUILLAN: Yes.*
>
> *HIS HONOUR: It would appear that he had represented her immediately prior to that, at least in the month prior to that. That may be a matter for her to take up somewhere else. I think the reality is that we are here with the hearing on the question of placement and I think whilst your client may have a view now as to the consent she gave, well that may be something I think we are past that point now."*

13 It does not appear that the learned Magistrate's attention was directed to the precise terms upon which the previous Magistrate had proceeded on 1 June 2009 – i.e., that an interim order could be made by consent *"on a no admissions basis"*. Accordingly, in my view, in ruling that the issue whether Anna's assumption into care was warranted was now foreclosed to Ms Wilson and that the only issue was whether Anna could be returned to her care, the Magistrate fell into error. His ruling produced a substantial miscarriage of justice because the Court was now proceeding upon the basis that it had been conclusively established that, at the time of Anna's birth, Ms Wilson had acknowledged that she had had *"serous difficulties in caring for [Anna]"*. In fact, the very opposite was the truth. Doubtless, that miscarriage of justice confirmed Ms Wilson in her distrust of the Department and of the Children's Court.

14 On 25 May 2010, while the matter in the Children's Court was still in progress, Ms

Wilson filed a Summons in this Court seeking the removal of the proceedings into this Court and the return of Anna to her. The Summons was listed before me on 24 June. Ms Wilson did not appear. Bearing in mind that Ms Wilson had filed a Summons in almost identical terms on 22 February 2010 and that the Summons had been dismissed by Bergin CJ in Eq on 14 April 2010 – inevitably so, in my respectful opinion – I directed that Ms Wilson's Summons be removed from the List and not re-listed without prior leave of the Court.

15 The matter proceeded in the Children's Court. It was heard piece-meal – on 25, 26 and 27 May, 28 and 29 June, 5 and 13 July, 16 August, 6 September and 23 September. On 11 October 2010, the learned Magistrate gave judgment.

16 His Honour found that the complaint that Anna was in need of care had been established by consent on 1 June 2009. His Honour said:

> *"At the commencement of the hearing the mother was represented by Mr McQuillan of counsel. He indicated he wished to challenge the making of the complaint. I indicated that having regard to the age of the matter, the lack of notice and the fact the complaint had been established by consent many months ago when the mother was represented that I did not propose to have the hearing delayed with an argument on whether leave should be granted.*
>
> *The hearing then proceeded in respect of what orders the Court should make. The first consideration for the Court is whether there's a realistic possibility of restoration of the child [Anna] to the mother, pursuant to s 83."*

As I have already said, in my opinion, this ruling of the Magistrate was erroneous and occasioned a miscarriage of justice.

17 In determining whether there was a realistic possibility of restoration of Anna to Ms Wilson, his Honour said that the issues were:

> – does Ms Wilson have obsessive compulsive disorder;
>
> – if not, does she suffer from any other mental health issue which affects her capacity to parent Anna;
>
> – what significance is to be placed on reports of domestic violence between Ms Wilson and her mother and do those reports *"constitute material that places [Anna] at risk either independently or in combination with a resolution of the issue concerning mental health"*.

18 His Honour made findings, or observations, about these issues. However, I must emphasise that Ms Wilson's application to this Court is not by way of appeal from his Honour's decision in the Children's Court. It is an application to this Court in its inherent wardship jurisdiction. In order to make orders in favour of Ms Wilson, I do not need to find that the Children's Court erred in fact-finding or in law in making the orders which it did. Even if this had been an appeal from the order of the Children's Court to the District Court under s 91 *Care Act*, that Court would have heard the appeal by way of a new hearing and fresh evidence could have been adduced: s 91(2) *Care Act*.

19 In this application I have read the material tendered in the Children's Court and I have been taken to parts of the transcript of the proceedings in that Court – all of which are in evidence. I have also had, over a period of three days, extensive evidence from

Departmental officers, two psychiatrists and Ms Wilson's general practitioner, as well as evidence from Ms Wilson and her parents. All of this evidence is directed to the single essential issue in the case in this Court: what is now, in all of the present circumstances, in the best interests of Anna: to restore her – perhaps gradually and under supervision – to the care of her mother, or to sever forever the parental bond in order to implement a care plan directed towards Anna's adoption.

Events up to Anna's birth

20 Ms Wilson is now thirty-four years of age. She is the only child of her parents, who separated before her birth. Mr and Mrs Wilson have always remained on very good terms. Mr Wilson says, and I accept, that he and Mrs Wilson are much better as friends than they ever were as a couple living together.

21 Ms Wilson has lived most of her life with her mother in the same home and her father lives close by. He is a frequent visitor in their home and is obviously very close to his daughter.

22 From my observation of Ms Wilson's conduct of this case in Court, I am able to say with some confidence that Ms Wilson is highly intelligent and articulate. However, she did not complete high school. She had a difficult time at school and seems to have been the victim of bullying on occasions. After leaving school she worked in a number of jobs.

23 By the age of eighteen years, Ms Wilson was manifesting symptoms of Obsessive Compulsive Disorder ("OCD"), such as prolonged showering and other repetitive behaviours. A diagnosis of OCD was made in that year and she was prescribed medication. Already by 1999, Ms Wilson's symptoms were causing severe friction between her and her mother.

24 By the end of 2000, Ms Wilson's symptoms had grown worse. She was repeatedly washing her hands and was unwilling to leave the house. She received treatment and counselling from a clinical psychologist.

25 In January 2001, Ms Wilson was diagnosed with chronic OCD, rendering her unable to work. In February she began receiving a disability support pension from Centrelink. She has been unable to work since that time and she is still receiving the support pension. She has been living with Mrs Wilson, who owns her own home, in a separate flat at the rear of the house. Mrs Wilson began receiving a carer's allowance in December 2005.

26 In May 2006, Mrs Wilson reported to Police that she had been assaulted by her daughter. However, when Police attended the home, Mrs Wilson denied the assault and no action was taken. It is clear from the records of the Area Health Service that by this time Mrs Wilson and her daughter were in a *"lethally enmeshed"* relationship, in the words of one report at that time. There were heated and loud arguments between them and Mrs Wilson reported feeling threatened by her daughter's violent mood swings.

27 The fraught relationship between Mrs Wilson and her daughter intensified throughout 2006, as evidenced by Mrs Wilson's reports to the Area Health Service. Ms Wilson was said to be refusing food and to be staying awake at night, carrying out repeated ritualised actions.

28 In July 2007, Mrs Wilson again reported to Police that she had been assaulted by Ms Wilson. Mrs Wilson was observed to have bruising to the left eye.

29 Throughout September, October and November 2007, Ms Wilson's condition and her relationship with her mother deteriorated further. Mrs Wilson made frequent reports to the Police and health authorities of abusive language and yelling and that she was frightened of her daughter. One doctor was of the opinion that Mrs Wilson and Ms Wilson were suffering from *"shared delusional disorder"*. Clearly, the worsening relationship was of great concern to the Area Mental Health Authorities.

30 By the beginning of February 2008 matters had reached a crisis point. On 3 February, at the suggestion of the Senior Health Area Psychiatrist, Dr Maclean, Ms Wilson was *"scheduled"* under s 34 *Mental Health Act* 2007 (NSW) and admitted to a psychiatric unit. She remained there until her discharge on 21 February 2008.
31 Remarkably, according to Dr Maclean, Ms Wilson was *"a model patient"*. After some initial settling down and treatment, Ms Wilson displayed no obsessive compulsive behaviour. She was eating normally and was pleasant, engaged and communicative with staff and other patients. She had visits from her parents and seemed to get on very well with them. There were one or two incidents of disagreement with Mrs Wilson but none of any great concern. It seemed that Ms Wilson had achieved a very significant improvement in her condition.
32 On Ms Wilson's discharge, both she and her mother were to be kept under the supervision of the local Mental Health Authority and regular counselling services were arranged for them. Unfortunately, both Mrs Wilson and Ms Wilson resisted continued supervision. Mrs Wilson gave evidence, which I accept, that the Area case worker pressed her continually to attend counselling services and, while she did not want to do so because she felt no need, she was reluctant to refuse outright. Mrs Wilson said that her indecision in this respect infuriated Ms Wilson, who urged her to have nothing further to do with the local Mental Health Service.
33 Matters came to a head on 11 March 2008. A violent argument took place. Ms Wilson admits that she slapped her mother hard in the face, causing her to fall to the ground and leaving bruising to the left eye and neck. The Police were called and Mrs Wilson was admitted to hospital.
34 Police urged Mrs Wilson to seek an Apprehended Violence Order against her daughter. She refused to do so and, indeed, she seemed very anxious to withdraw any complaint against Ms Wilson. Accordingly, the Police themselves obtained an Apprehended Violence Order. There was no subsequent breach of that order by Ms Wilson.
35 On 3 November 2008, Mrs Wilson reported to Police that her daughter had assaulted her. When Police arrived, however, Mrs Wilson refused to provide any details and no further action was taken. It is not at all clear that there was, in fact, any violence that day on the part of Ms Wilson. I will return to this incident shortly.
36 There are no further reports of arguments, violence or abuse between 3 November 2008 and the birth of Anna on 29 April 2009.

The taking of Anna

37 In about August 2008, Ms Wilson fell pregnant. She had been in a relationship which had lasted about five months before it broke down. Ms Wilson says, and she said in the Children's Court, that although she lived with Anna's father for some months she never learned his surname and she now does not know how to locate him. The learned Magistrate thought that Ms Wilson's evidence in this respect was improbable and he did not accept it. He attached some weight to this factor in his decision.
38 Like his Honour, I regard Ms Wilson's evidence as to the identity of Anna's father as improbable. However, in the light of all of the other circumstances to which I will come in a moment, I do not see Ms Wilson's attitude to the father as significantly contributing to a finding that there is an unacceptable degree of risk of harm to Anna if she is returned to Ms Wilson's parental care.
39 Ms Wilson's pregnancy was completely normal. She regularly consulted her local doctor, who had been her doctor for some four years. The doctor, who has given evidence in this case, says that he had no concerns whatsoever about Ms Wilson or the pregnancy:

Ms Wilson regularly attended for check-ups, had an ultrasound test and she followed medical advice. He observed no obsessive compulsive behaviours and was satisfied that Ms Wilson was eating normally and appropriately. He observed that Ms Wilson has always been of slight build and that he has never been concerned that she had an eating disorder.

40 Ms Wilson was safely delivered of Anna in the early hours of 27 April 2009 at her district hospital. The birth was without incident and Anna was found to be a healthy and normal infant.

41 It should be recorded that there has never the slightest suggestion in this case that Ms Wilson has abused drugs or alcohol. Nor has there been the slightest suggestion that she has displayed violence or used abusive or inappropriate language to any person other than her mother. She has no criminal record. There is no suggestion that she has ever been in trouble with the Police, apart from the reports of the incidents with her mother to which I have referred.

42 Further, apart from the incident on 3 November 2008 to which I have referred, there was no report to the Police or the Area Health Authorities of any incident between Ms Wilson and her mother from March 2008 onwards. Ms Wilson says, and I accept, that the incident in November occurred because she was then four months pregnant and was suffering stress from the recent break-down of her relationship with Anna's father.

43 The November 2008 incident generated a *"Risk of Harm Report"* to the Department by the local Mental Health Authorities because it had been noted that Ms Wilson was pregnant.

44 Ms Jones was the manager of case work in the local office of the Department. The Risk of Harm Report came to a pre-natal case worker under Ms Jones' supervision. Neither Ms Jones nor the case worker had previously had contact or dealings with Ms Wilson or her mother.

45 As is usual, the pre-natal case worker made enquiries under s 248 *Care Act* as to all information concerning Ms Wilson and her mother in the possession of the mental health authorities, the Police, Government Departments, agencies, schools and hospitals. The enquiries resulted in the production of files which revealed the history of Ms Wilson's OCD and its destructive effects on her relationship with her mother.

46 Ms Jones and her case worker then attempted to engage Ms Wilson and her mother in consultation and to persuade Ms Wilson to undergo mental health assessment. Both Ms Wilson and her mother refused to co-operate. Clearly, Ms Wilson believed that by early 2009 there was nothing wrong with her which required the intervention of the mental health authorities. She and her mother say that, apart from the stress-related incident in November 2008, there had been no violence or abuse since March 2008 and that Ms Wilson had displayed no OCD behaviour since her discharge from the psychiatric unit in February 2008.

47 Bearing in mind the frequency of reports by neighbours and by Mrs Wilson herself of incidents up to and including March 2008, I accept that the absence of such reports from March 2008 onwards supports the evidence of Ms Wilson and her mother.

48 Nevertheless, the evidence in the mental health and Police files of the violent relationship between Ms Wilson and her mother, coupled with the refusal of Ms Wilson and her mother to engage with Ms Jones and her case workers caused Ms Jones considerable concern that, if Anna went home from hospital with Ms Wilson and her mother, there would be no one to monitor and report if violent behaviour again broke out between Ms Wilson and her mother.

49 On the evidence which she then had and in the absence of co-operation from Ms Wilson and her mother, Ms Jones was, in my opinion, entirely justified in forming the

view that Ms Wilson's baby was at serious risk of harm and should be taken into care at birth on an interim basis until a proper assessment of the risks could be made.
50 Accordingly, while I understand Ms Wilson's shock and grief at the taking of Anna, I can find no fault in Ms Jones or in the Department in acting as they did. I have no doubt that Ms Jones genuinely believed that she was acting in the best interests of Ms Wilson's child.

The 24 September 2009 incident

51 There has been only one reported incident between Ms Wilson and her mother since Anna was born. On 24 September 2009, Police were called to Mrs Wilson's home. It was reported that a loud argument was in process. The Police Officer who attended gave a statement of evidence to the Department and he has given oral evidence at the hearing.
52 Taken on its own, the Officer's written statement of evidence is capable of giving an impression of what happened which is materially different from the impression which one gets from the whole of the Officer's evidence. This is no criticism of the Police Officer, who was doubtless merely recounting in his statement of evidence the gist of his necessarily brief report of the incident. The Officer was very frank and helpful in his oral evidence, from which emerged a fuller picture of what had happened.
53 When the Officer arrived at the house, he could hear a loud voice inside. He knocked and was freely admitted by Ms Wilson, who was talking on the telephone. No one else was present in the house. The Officer could not remember exactly what was being said in Ms Wilson's telephone conversation but he recalled that it was something to do with this case in the Children's Court.
54 The Officer said that Ms Wilson's tone of voice during the conversation was more panic-stricken than angry or abusive. Ms Wilson handed him the telephone. He could hear a woman's voice talking rapidly, in a highly agitated manner. It was impossible for the Officer to understand what she was saying. He handed the phone back to Ms Wilson and shortly afterwards left, satisfied that no one was at risk of violence. He said that Ms Wilson was co-operative and that her behaviour caused him no concern.
55 Both Ms Wilson and her mother say that this telephone call was between them, that there had been a disagreement earlier between them about the conduct of the case in the Children's Court, that Mrs Wilson had left the home for *"time out"* – a technique which they had recently learned in counselling in order to contain their anger. Both denied that there was any verbal abuse in the conversation or that there had been any physical violence in the incident. Both explained that Ms Wilson was talking loudly on the telephone because Mrs Wilson has severe hearing loss and finds it hard to hear what is said on the telephone. Mrs Wilson's hearing loss is well documented in the evidence and it was manifest when she gave evidence in this Court.
56 I am entirely satisfied that the 24 September incident did not involve violence, physical or emotional, and that it was merely a disagreement between Mrs Wilson and her daughter which they dealt with appropriately.

Counselling

57 Since Anna's birth, both Ms Wilson and her mother have regularly attended counselling sessions, often together, with a counsellor of their choice in whom they have confidence. The counsellor is not part of the Area Mental Health Services – a factor which engenders their trust in him.
58 Both Ms Wilson and her mother say that the counselling has assisted them greatly in better understanding each other and their respective positions. Mrs Wilson says that she understands that she must regain control of her own life and be more independent than

she has been since Ms Wilson's OCD symptoms developed. She says that she is now beginning to pursue her own interests more actively. Both Ms Wilson and her mother say that the counselling sessions have taught them to control their anger much better.

59 I accept that counselling has assisted both Ms Wilson and her mother to deal much better with their relationship. There have been no flare-ups of violence between them since Anna's birth. Both report that, despite the intense stress which this case has caused, there has been no recurrence of any of Ms Wilson's obsessive compulsive behaviours.

Ms Wilson's relationship with Anna

60 While this case has been progressing through the Children's Court, Ms Wilson and her mother had contact visits with Anna, usually three times per week for a number of hours at a time. A case worker from Wesley Dalmar, a welfare agency engaged by the Department, has been present throughout these visits and has, on each occasion, provided a written report of her observations.

61 It is no exaggeration to say that the case worker's reports as to Ms Wilson's relationship with Anna are glowing. There is not a single adverse comment nor is there any concern expressed about the interaction between Ms Wilson and her mother during these visits.

62 Ms Wilson appears in these reports as a devoted, loving mother and Mrs Wilson appears as a proud and solicitous grandmother. No obsessive compulsive behaviours of Ms Wilson are observed. No concern is expressed about her ability to take care of Anna and to express love and affection. The case worker often observes that Anna is very happy in the company of her mother and grandmother, greatly enjoys the visits and eagerly looks forward to them.

63 To her credit, Ms Jones frankly concedes that Ms Wilson obviously loves and cares for her daughter. Nevertheless, the Department opposes the return of Anna to Ms Wilson's care. Since the Magistrate's decision on 11 October 2010, the Department has steadily reduced Ms Wilson's visits with Anna in order to weaken the parental bonds between them so that Anna, in a relatively short time, can be adopted.

Can Anna be returned to Ms Wilson's parental care

64 There is no dispute about the principle upon which the Court acts in a case such as this. It is the child's best interests which are the paramount consideration, not vindication of a parent's right to custody or access. As a Full Bench of the High Court said in *M v M* (1988) 166 CLR 69, at 76:

> *"Proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression:* Reynolds v Reynolds *(1973) 47 ALJR 499;* McKee v McKee *[1951] AC 352 at 364-5. In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents: cf* J v Lieschke *(1987) 162 CLR 447."*

65 Accordingly, I start from the position that, prima facie, it is in Anna's best interests to maintain the mother/daughter relationship with Ms Wilson. What are the contrary indications?

66 Both Mr G.W. Moore of Counsel, who appears for the Department, and Mr Chapman submit that there is *"an unacceptable risk"* of harm to Anna if she is returned to the care of Ms Wilson. The phrase *"unacceptable risk"* comes from the judgment in *M v M* at p.78; the passage in which it occurs is worth repeating because it shows the difficulty of making decisions on the facts of each case:

> *"Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a* 'risk of serious harm' *(*A v A *[1976] VR 298 at 300),* 'an element of risk' *or* 'an appreciable risk' *(*In the Marriage of M *(1987) 11 Fam LR 765 at 770 and 771 respectively),* 'a real possibility' *(*B v B (Access) *[1986] FLC 91-758 at 75,545), a* 'real risk' *(*Leveque v Leveque *(1983) 54 BCLR 164 at 167), and an* 'unacceptable risk' *(*Re G (a minor) *[1987] 1 WLR 1461 at 1469). This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child … and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk …."*

67 In this case, Mr Moore, Mr Chapman and Ms Jones lay heavy emphasis on the violent nature of the relationship between Ms Wilson and her mother which, they say, continued at least until 24 September 2009.

68 They say that there is an unacceptable risk of harm to Anna if she is returned to Ms Wilson's care because:

> – Ms Wilson has OCD and will always have OCD;
>
> – it is, in itself, an indication of danger and risk that Ms Wilson will not recognise that she now has OCD and will always have OCD;
>
> – the Court should not be satisfied that Ms Wilson's OCD behaviours have abated and that the relationship with her mother is any different now from what it has been since 1999;
>
> – there is a risk that Ms Wilson will involve Anna in her obsessive behaviours, requiring Anna to perform obsessive rituals to perfection and, in the process, subjecting Anna to violence, both physical and emotional;
>
> – there is a risk of violence, physical and emotional, between Ms Wilson and her mother, observation of which would traumatise Anna;
>
> – because of the refusal of Ms Wilson and her mother to engage with the Mental Health Authorities and because of their social isolation, no one will report to the Department if there is a serious risk of harm to Anna.

69 In submitting that the order of the Children's Court should not be disturbed, Mr Chapman relies on the following further considerations. He says that there is *"no realistic*

possibility" of Anna ever being returned to Ms Wilson's care because she has not *"got any significant runs on the board"* in terms of demonstrating that she has commenced a process of improving her parenting. The phrase *"runs on the board"* comes from the judgment of Johnstone DCJ in *Saunders v Department of Community Services* DC5589/2007.

70 In that case, the parents sought restoration of children after it had been established beyond doubt that the children had been removed into care because of the *"pervasive environment of abuse"* in the parents' household to which the children had been subjected and which had caused them physical and emotional trauma: judgment para 18. The issue was whether a permanent foster plan should be prepared for the children because there was no realistic prospect of their return to the parents: cf *Care Act* s 83(1).

71 At paragraph 11 his Honour said:

> *"I was unable to discover any judicial pronunciation on the meaning of a 'realistic possibility' of restoration. I was directed to the following passage in the submissions of Senior Children's Magistrate Mitchell to the Special Commission of Enquiry into child protection services in NSW:*
>
> > 'The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant 'runs on the board'. The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.
> >
> > What is required can be likened to a prima facie case where absent some unforeseen and unexpected circumstance a safe and appropriate restoration will be possible in the near future.'*"*

72 Mr Chapman says that Ms Wilson has not *"got any significant runs on the board"* since Anna's birth because:

> – she has not undertaken a parenting course and refuses to do so;
>
> – she has not undertaken a domestic violence management course and refuses to do so;
>
> – she has not undertaken an anger management course and refuses to do;
>
> – she refuses to co-operate with the Department because of her distrust.

73 I will first discuss the factors jointly urged by Mr Moore, Mr Chapman and Ms Jones.

74 I accept that Ms Wilson has a diagnosis of OCD and that her symptoms were florid at the time of her admission to the psychiatric unit in February 2008. I accept that Ms Wilson's OCD resulted in violence, both physical and emotional, towards her mother.

75 I also accept that, after treatment in the psychiatric unit in February 2008, Ms Wilson's condition improved dramatically. I accept that there was a violent episode in March 2008,

but I am satisfied that there has been no repetition of that degree of violence since then. I accept also that in November 2008 there was an incident causing distress to Mrs Wilson, but I am not satisfied that that incident involved physical violence.
76 I am satisfied that since Ms Wilson's discharge in February 2008 there has been no recurrence of Ms Wilson's OCD behaviour. In making this finding I rely upon the psychiatric unit's records as to her progress in the psychiatric ward, Dr Maclean's description of her as a *"model patient"*, the assessment of another psychiatrist, Dr Yenson, a few months ago that he could not observe any OCD symptoms, similar observations of her general practitioner during Ms Wilson's pregnancy, and the absence of any health and Police reports of violence or other disturbances in the household.
77 I find that the 24 September 2009 incident did not involve physical or emotional violence, although both Ms Wilson and her mother were in considerable distress.
78 I find that, as a result of Ms Wilson's treatment and, probably, counselling, at the time of Anna's birth and at all times thereafter Ms Wilson has been able to control well any impulse towards OCD behaviour. I find also that, as a result of counselling, both Ms Wilson and her mother are better able to manage their relationship without violence or abuse.
79 There is no evidence to lead me to conclude that there is an imminent risk of recurrence of Ms Wilson's OCD behaviours. Dr Maclean said that stress is a major factor in triggering OCD behaviour and that the stress of this case on Ms Wilson must have been very considerable. However, according to the observations of Dr Yenson and of Ms Wilson's general practitioner, Ms Wilson has, throughout this case, been able to control her behaviour so as not to manifest any OCD symptoms.
80 In assessing risk to Anna, I take very much into account that, despite the stress of this case and the anguish of Anna's removal from her, Ms Wilson has, throughout her frequent contact visits with Anna, displayed nothing but love and appropriate parenting skills.
81 I turn now to Mr Chapman's additional submission that Ms Wilson has not, since Anna's birth, demonstrated a realistic possibility of restoration to her care because she has not, since that time, *"got any runs on the board"*.
82 The difficulty with that submission is that it assumes that, at the time of Anna's birth, Ms Wilson was, in fact, incapable of taking care of Anna properly so that some improvement in her parenting capacity should be demonstrated. As I have observed, it was never conceded by Ms Wilson that Anna was in need of the Department's care, even though Ms Wilson was wrongly precluded from contesting that issue in the Children's Court. As will have emerged from what I have said above, I am far from satisfied that, at the time of Anna's birth, Ms Wilson was in fact incapable of caring for her properly.
83 Ms Wilson refuses to undertake a parenting course or a domestic violence management course or an anger management course because she says that, at the time of Anna's birth and at all times thereafter, there was no demonstrated need for her to do so. I agree.

Decision

84 At the conclusion of submissions yesterday, I would have preferred to reserve my reasons for judgment, if only for a short time. However, in order to spare the parties further anguish, I gave a summary of the conclusions which I had reached and the orders which I propose. The following are the orders and directions which I make.
85 Anna will be restored to the care of Ms Wilson, on an interim basis in the first instance, with a view to her assuming, ultimately, the full parental responsibility for Anna.

86 As a condition of interim restoration, I require that Ms Wilson and her mother participate in an assessment by a senior clinical psychologist experienced in family matters as to their parenting capacities. The parties should agree upon one of the names provided by the President of the New South Wales College of Clinical Psychologists.
87 I order that, during the next three months, the Department increase the rate of contact between Anna and Ms Wilson and her family as a transition to full time care by Ms Wilson, such full time care to be effected at the expiry of three months.
88 If the report of the clinical psychologist suggests that there is no reason why contact and restoration of Anna to full time parental care with Ms Wilson should not be escalated, then the Court will order restoration to full time care earlier than three months from today. The Court will be guided by the content of the report as to how best to effect Anna's restoration to her family.
89 I require the psychologist's report to give a recommendation as to what degree of monitoring is advisable during and after transition to full time care of Anna by her family. I note that the Department says that all but one of the agencies which could provide independent monitoring are unwilling to do so, and that it is difficult for the remaining agency, that is, Wesley Dalmar, to provide such monitoring.
90 If the clinical psychologist reports that there is no real need for monitoring, the Court will take that into account. If the clinical psychologist advises that it would be helpful and would tend to reduce any risk for such monitoring to occur, then the Court will not be prevented from ensuring restoration to full time care simply because the Department's usual agencies are unable to provide that service. A practical solution will be found, noting that it is a fact which must be taken into account that Ms Wilson and her family are intractably antagonistic towards the Department.
91 The Court will keep this matter under supervision until a final order as to Anna's care is made. I will stand the proceedings over for a period of three months to enable these directions to be implemented. Any party will have liberty to apply on such notice as is practicable in the circumstances.

Why this case was heard in the Supreme Court

92 As I have mentioned, the day following the decision of the Children's Court to make a final parental responsibility order in favour of the Minister, Ms Wilson appeared ex parte in this Court seeking to prosecute the Summons which she had filed on 24 May 2010 and which I had directed to be removed from the Court's List and not restored without leave.

93 Ms Wilson informed me of the final order of the Children's Court. I referred her to this Court's refusal to entertain appeals from decisions of the Children's Court in the guise of applications to this Court's inherent wardship jurisdiction, save in exceptional circumstances: see *Re Victoria* (2002) 29 Fam LR 157; *Re Elizabeth* [2007] NSWSC 729; *Re Alan* (2008) 71 NSWLR 573. Ms Wilson explained to me a little of the circumstances of the case. I then determined to review the documentary material which she provided and to read the decision of the Magistrate.
94 I observed from the material provided that the case in the Children's Court had taken from April 2009 to October 2010 to reach a conclusion, during which time Anna had been separated from her mother. If Ms Wilson appealed to the District Court from the Magistrate's decision, a further substantial period would necessarily elapse before the appeal could be heard and determined, Anna in the meantime remaining in the care of the Department with the bonds between mother and child being progressively weakened in preparation for an adoption.

95 As has been said on many occasions, delay in Court lists in hearing an appeal in the District Court cannot itself constitute exceptional circumstances warranting direct intervention by this Court in its parens patriae jurisdiction. If it were otherwise, appeals would be made directly to this Court as a matter of course and the appellate scheme of the *Care Act* would be subverted.
96 Exceptional circumstances warranting this Court's intervention must involve the imminent risk of harm to the child. It would be very difficult to conceive of circumstances arising during the course of proceedings in the Children's Court which would warrant this Court intervening. If something occurs in the course of Children's Court proceedings which presents a serious and immediate threat of harm to the child, the Children's Court is equipped to deal with the problem and its jurisdiction in that regard should not be usurped.
97 When Children's Court proceedings are concluded, this Court can more easily see where the matter stands, whether something appears to have gone wrong in the Children's Court proceedings and what harm the child may suffer as a consequence if that wrong cannot be corrected as quickly as possible.
98 In the present case, after having read a substantial amount of the material provided both by the Crown Solicitor and by Ms Williams, and having heard initial submissions by the Department, I came to the preliminary view that exceptional circumstances had been demonstrated warranting intervention by this Court and that the case should be fixed urgently for hearing. I said that if, having heard the evidence, I concluded that exceptional circumstances had not, in fact, been demonstrated then I would dismiss Ms Wilson's application to this Court, leaving her to pursue an appeal to the District Court under s 91 *Care Act* if she so wished.
99 My preliminary view that exceptional circumstances were demonstrated was founded upon a perception that the learned Magistrate may have erred in precluding Ms Wilson from contesting that there was an acknowledged need for a care order at the time of Anna's birth and that the Magistrate may have given insufficient weight to the exemplary care which Ms Wilson had devoted to Anna as evidenced by the contact visit reports. Harm to Anna if this Court did not intervene quickly appeared from the fact that a District Court appeal would inevitably take some time and that in the meantime the relationship between Anna and Ms Wilson might be irretrievably damaged by severance of the maternal bond.
100 For the reasons which I have given, I conclude that my preliminary views have now been confirmed.
101 I wish to emphasise that nothing I have said I this case should encourage applications to this Court to intervene, as a matter of course, in proceedings in the Children's Court nor should it encourage applications which are intended to by-pass the appellate procedure of s 91 *Care Act*. This case is a decision made entirely upon its own facts.

Some observations about the conduct of the case in Court

102 As I said at the beginning of this judgment, some aspects of the case call for comment.
103 The first is the way in which the first hearing in the Children's Court on 29 April 2009 was conducted. A reading of the transcript left me with the strong impression that what had occurred might well have contributed significantly to the hostility which Ms Wilson demonstrates to the Department and to her apparent lack of co-operation in a number of directions hearings in the Children's Court.
104 As I have recounted at paras 6-7 above, no one explained to Ms Wilson what was going on in Court or asked her if she had anything to say. As a result of what appeared to

be a rather quick and *"in club"* discussion between the Bench and Bar Table, an interim care order was made. The most important person in the courtroom at that time – the mother whose child had been taken from her at birth two days ago – was ignored.

105 Every judicial officer is familiar with the pressures of a busy list and looks for a means of getting through it efficiently. The Children's Court is a particularly fraught and stressful arena of conflict. A case such as the present shows how important it is in the administration of justice that judicial officers do their best to involve litigants meaningfully in the process by which justice is done.

106 The second matter calling for comment occurred in the conduct of the case in this Court but it is not peculiar to this case – it has been observed by a number of Judges in the Supreme Court and it is currently the subject of discussion between this Court, the Bar Association and the Law Society. I refer to the practice of advocates, which seems to have developed over recent years, of announcing their appearances to the Bench or beginning the examination of witnesses with the salutation *"Good morning, your Honour"* or *"Good afternoon, Mr Smith"*. I am informed that this is a practice which has developed in the Magistrates' Courts. The Supreme Court is of the view that it is a practice which should be abandoned in contentious litigation.

107 Lest it be thought that this view is the relic of a stilted and now-outdated judicial self-esteem, let me illustrate, by reference to what occurred in this case, how the practice can cause substantial misperceptions prejudicial to the conduct of a fair trial.

108 Mr Chapman, who is obviously a highly experienced and capable solicitor frequently conducting cases in the Children's Court, routinely greeted me with the salutation of *"Good morning, your Honour"* or *"Good afternoon, your Honour"* each time he announced his appearance at directions hearings and on each day of the trial. In accordance with the usual etiquette of this Court, Mr Moore of Counsel did not. Mr Chapman's apparent familiarity with the Judge could have caused a misapprehension in the mind of Ms Wilson, already distrustful of the judicial system, that Mr Chapman enjoyed a relationship with the Judge which was something more than merely professional. Such a suspicion should never be allowed to arise. A Judge should not feel compelled to allay such a suspicion by rebuking an advocate for misplaced courtesy.

109 More importantly, Mr Chapman routinely began his cross examination with the salutation *"Good morning, Ms Wilson (or Mrs Wilson)"*. He was met with a stony silence. How could Ms Wilson or Mrs Wilson greet politely the man who was avowedly intent on taking Anna away from them by destroying their evidence? A witness in their position would inevitably feel it to be the most odious hypocrisy to be compelled to return the salutation with a polite *"Good morning, Mr Chapman"*.

110 Mr Chapman, of course, noted the rebuff and, on occasion, directed a meaningful look at the Bench. I do not think he intended it, but the impression which could well have been conveyed to Ms Wilson and Mrs Wilson was that, even before Mr Chapman had begun his cross examination, he had already unfairly scored a point against them because he had put them in the position in which he could say – eloquently, by a look, not even a word – *"You see what rude and unpleasant people we are dealing with here, your Honour"*.

111 I wish to make it clear that, by these remarks, I intend no personal criticism of Mr Chapman. He conducted the case professionally and courteously, in what he saw to be the best interests of Anna. I am sure that, in using salutations as I have described, Mr Chapman was merely following a practice which is now routine in the Magistrates' Courts.

112 However, a witness should never be placed in the position of having to greet politely a cross examiner who is an avowed opponent. An advocate should never use this

technique to score against a witness. It is far better to avoid the perception that this technique of discrediting a witness is being used unfairly.

113 For these reasons, the practice of salutations by advocates should be completely abandoned in all Courts in all contentious litigation.

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Last Modified: 21/12/2010

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