

CHILDREN'S COURT OF VICTORIA

Applicant: TW, Department of Human Services

Children: JP [30/07/1993] TR [19/07/2007]
BP [06/09/1997] AR [16/07/2008]
CP [30/03/2000] KR [16/07/2008]
MF [25/08/2005]

<u>MAGISTRATE:</u>	Belinda Wallington
<u>WHERE HELD:</u>	Melbourne
<u>DATES OF HEARING:</u>	10, 11, 12 and 13/03/2009
<u>DATE OF DECISION:</u>	8 April 2009
<u>CASE MAY BE CITED AS:</u>	TW, DOHS and P, F & R children
<u>MEDIUM NEUTRAL CITATION:</u>	[2009] VChC 6

REASONS FOR DECISION

Child protection – Protection application – factual basis and proof of risk of sexual harm.

PARTY	COUNSEL
Department of Human Services	Ms Mendes da Costa
Ms (name removed) “the mother”	Mr Brown
Mr (name removed) “Mr P” (father of JP, BP and CP)	Ms Healey
Mr (name removed) “Mr R” (father of TR, AR and KR)	Ms Pollard
JP, BP and CP	Mr Leach
MF and TR, AR & KR	Unrepresented (too young to give instructions)

The mother has nine children, seven of whom are the subjects of these protection applications. Mr P is the father of the five eldest children: H, JP, J, CP and BP. Next is a daughter, MF, who has a different father whose identity is unknown to the Court. The three youngest, TR and newborn twin girls, AR and KR, are all the children of Mr R. Protection applications were not taken out in relation to H and J as they were living with their father at the time the Department became involved.

There are no criticisms of the mother's day to day care of the children. DHS say the children are in need of protection because her de facto, Mr R has sexually assaulted her eldest daughter, H and that the mother's failure to support and protect H creates a risk of future harm to her other children.

The Department alleges three grounds for protective concern. The relevant legislation is contained in section 162 of the *Children, Youth and Families Act 2005* of which sub-section (1)(c), (d) and (e) are invoked.

Section 162(1)

For the purposes of this Act a child is in need of protection if any of the following grounds exist:

- (c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
- (d) the child has suffered or is likely to suffer significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
- (e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or psychological development is, or is likely to be, significantly damaged and the child's parents have not protected or are unlikely to protect, the child from harm of that type.

The Department does not allege that any of the seven children in the mother's care have suffered significant harm. Their case is put on the basis that the children are likely in the future to suffer each of the three specified types of harm.

Ground (c) – Physical abuse

The initial notification to DHS on 3/03/2008 dealt mainly with H's disclosure of sexual abuse by her step-father, Mr R. Though the protection application and disposition report state "concerns were raised re Mr R physically harming the children", those concerns were not particularised in the notification.

Investigation by DHS revealed the following which the Department relied on in support of ground (c):

- Mr R had in 1995 assaulted his five year old son, M, causing serious facial bruising;
- A DHS case note indicated that Ms B, the mother of Mr R's son, B, had accused Mr R of assaulting B when he was four months old;
- Another case note stated "it was reported" that B had been assaulted by Mr R when he was taken to visit him in prison in 1994;
- H saw Mr R hit her brother, JP on the back of the head; and
- H alleged that Mr R had hit her brother, J on the back of the head.

The case notes in relation to B were made during DHS's investigation of Ms B's severe neglect and abuse of B some years after her relationship with Mr R had ended. The case note about the alleged assault at the prison did not identify the source of that information, nor can Ms B be regarded as a reliable source. Given the impossibility of testing this unreliable hearsay, these are not allegations which the Court can regard as factual.

H gave evidence to this Court. She said she had seen Mr R hit JP on the back of the head. JP on the other hand had explained to the protective worker that this had happened during a play fight and it was clear he did not regard it as an "assault".

H had not seen but had heard that Mr R had hit her brother J. She said she was aware that her sister CP had told their father, Mr P about it. Whether or not she heard it from CP directly, it was not something she had witnessed herself.

Mr R conceded that on 6/09/1996 at the (location removed) Magistrates' Court he had pleaded guilty to unlawfully assaulting his five year old son, M, on 20/09/1995. He was given a good behaviour bond but the assault was sufficiently serious that M was removed from Mr R's care.

A single summary assault occurring over 13 years ago, without more, is not a sufficient basis for concluding that there is a present likelihood of significant harm.

Ground (d) – Sexual abuse

1. H

H, now 17, gave evidence to the Court and was cross-examined about her step-father sexually assaulting her in 2006 when she was 14 years old.

On a Saturday night in 2006 when she was in year 9 and not long after JP's birthday (30/7) her mother stayed the night at her friend C's place. H was unwell and had fallen asleep on the couch. She woke up when she felt her breasts being touched. She saw Mr R leave the room and she moved back to her own room. In the morning, he woke her by smacking her on the bottom which he then rubbed.

Two weeks later, her mother again stayed overnight at C's place. This time H woke up during the night because someone was touching her vagina and rubbing the inside of her legs. Her breasts were also touched. When she opened her eyes, she saw her step-father leaving the room. Then, when she had fallen asleep again he returned. He moved his hands up her legs towards her thighs. When she moved, he left the room.

Over the next few months he entered her room and touched her about four times. On these occasions her mother was home but asleep.

The last incident she particularised happened in October 2006 whilst the family was packing up to move house to (location removed). H and her sisters CP and BP were sharing two mattresses on the floor. She was awoken by Mr R rubbing her thighs and vagina on the outside of her pyjama bottoms. He put his hands under her pyjama top and touched her breasts. When BP stirred and sat up, Mr R left the room. In the morning, when asked by H, BP said that she had seen someone in the room when she briefly awoke. H told her what had happened and BP said, "You must tell Mum or I will."

That morning she told her mother that Mr R had been touching her whilst she was sleeping and that it had started the night her mother first stayed overnight at C's place. Later that day the mother told H that she had spoken to Mr R and she should tell her if it ever happened again.

There were no further incidents of sexual abuse after H spoke to her mother, but Mr R became aggressive and ill-tempered towards her from that time. In March 2007, H moved out to live with her father, Mr P.

In March 2008, H confided in another person about the sexual abuse as she had started to worry about her sister CP who had become quiet and withdrawn. That person notified DHS who in turn notified SOCAU (the Police Sexual Offences and Child Abuse Unit) to whom H made a statement of 9/03/2008. BP and the mother also spoke to SOCAU.

The mother made a statement on 17/03/2008 in which she said, "I don't remember H telling me that Mr R had touched her sexually. I don't remember talking to Mr R about touching H sexually. I don't remember telling H that I had spoken to Mr R about him touching her sexually". She also said, "Mr R can yell at the kids sometimes but I don't believe that he molested H".

Contradictory evidence was given to the Court as to the contents of BP's police interview. Senior Constable B who is the informant in the matter said that BP's evidence did not further the investigation. The protective worker, Ms TW, was told by SOCAU (who did the interview with BP) that BP had confirmed seeing Mr R in the bedroom on the night of the October incident.

During the proceedings, there was a change in the mother's instructions. Her counsel advised that the mother no longer denied that H had complained to her about the abuse.

It was put to H on behalf of Mr R that on the two nights her mother had been away from home, she'd had a friend over for a sleepover. H denied this. It was put that the abuse did not happen which was also rejected. She was asked if she might have imagined it and replied that the very first time she thought she might have imagined it as she had been ill but then it happened again.

There was an inconsistency between H's statement and her evidence as to whether she had seen or just been told of Mr R hitting some of her siblings. Otherwise, H gave a credible and cohesive account of Mr R indecently assaulting her on several occasions. The evidence of recent complaint to her mother supports her credibility.

The evidence from H has persuaded me that Mr R did touch her in the way she described. I have taken into account the seriousness of the allegations in arriving at a sufficient certainty that Mr R sexually assaulted his stepdaughter on at least three separate occasions.

It is relevant to note the possibility that BP's evidence corroborates Mr R being in their room the night of the last assault in October 2006. Senior Constable B may need to review BP's VATE. He should give the mother the opportunity to make a second statement in accordance with her instructions to this Court.

2. *M*

The Department intended to call Mr R's son, M, to give evidence of childhood sexual abuse committed upon him by his father in 1995.

At the time DHS commenced their investigation, Mr R had been charged with offences of indecent assault, indecent acts on, and sexual penetration of M when he was five years old. Just prior to this hearing, he was acquitted of all charges in the (location removed) County Court. DHS were unable to make contact with M and sought to rely on the hand-up brief of evidence and his video-recorded evidence at trial.

Though the admission of the recording into evidence meant that Ms Pollard was unable to cross-examine on behalf of Mr R, the recording included cross-examination by two counsel – Mr Gray for Mr R and Mr Chadwick for his then de facto, Ms JC, who had also been charged. This was because, though Mr R and Ms JC were facing separate trials, cross-examination on their behalf was conducted at the one special hearing due to M's cognitive impairment (he is a registered client of Intellectual Disability Services).

The hand-up brief was also tendered as an exhibit though the only part of the brief that is properly admissible is Mr R's record of interview.

M lived with his father for a period of seven months in 1995 when he was five years old. He was removed from his father's care on 20/09/1995 when he went to school with a badly bruised face caused by his father assaulting him.

Ten years later during a therapy session in November 2005, he told his therapist that during the seven months he had lived with his father he had been sexually assaulted by him. He made a statement to police by way of VATE tape on 28/02/2006 in which he alleged that his father had touched his penis; and forced him to touch his father's penis; and that he had been made to watch his father and Ms JC having sex, during which was forced to touch Ms JC's breasts and digitally penetrate her vagina.

He said the abuse began two or three weeks after he went to live with his father and that it happened a couple of times a week or two weeks, he wasn't sure.

The special hearing took place in the County Court over the 6th and 7th August 2008. In examination-in-chief, M said he was forced to watch his father and Ms JC have sex for the last two or three weeks he was in his father's care.

When cross-examined he said:

- he could not recall the events of 20/09/1995 when he was removed from his father's care;
- he could not recall attending school at all during the time he spent with his father;
- he was removed from his father's care because of sexual abuse not physical abuse;
- each time he tried to leave the room where Ms JC and his father were having sex he would be struck and he often went to school with a bruised face;
- when asked if that meant for the whole seven months he had a red mark on his face he said no, after a while it turned into a bruise;
- he was spoken to by police and DHS in April 2001 and at that time had denied that his father had inappropriately touched him. He had said to them that if someone did touch him he would tell an adult;
- he had said to his therapist in November 2005 that his father did not threaten to hurt him if he told anyone about the abuse;
- he had not remembered when he did his VATE statement that on 20/09/1995 his father had threatened to kill him if he told anyone about the abuse, it had popped into his head for the first time in July 2008.

The description given of the alleged abuse was very vague and there was no differentiation between incidents. It seems implausible that a five year old boy would continually try to defy his abuser when the inevitable result was that he would be badly assaulted. This is also at odds with the school immediately contacting the authorities when M arrived there with a bruised face on 20/09/1995. The outline of cross-examination above reveals a number of troubling inconsistencies in his evidence.

There is a real possibility that sexual abuse did occur but due to his intellectual disability and very young age at the time, M's memory has distorted what occurred. However, the evidence does not allow me to make a positive finding that Mr R did sexually abuse his son.

3. The rape conviction

Mr R's criminal history was admitted into evidence.

On 9/08/1990 Mr R, then known as Mr O-J, was sentenced to 7 ½ years imprisonment with a 5 ½ year minimum for charges of aggravated rape, rape x 2, abduction, indecent assault x 3 and intentionally/recklessly cause injury.

Detective Senior Constable C gave a summary of those charges based on the police brief. Mr R followed a young woman in his van as she walked home from work and dragged her into a schoolyard where he anally and vaginally raped her and forced her to perform oral sex on him.

Detective C understood that there was a second incident involving an attempted abduction. Mr R contested this and the details are unclear though Detective C was able to confirm there were two different victims named on the presentment.

If this matter had stood alone, though that sexual attack was extremely vicious, it could not have provided a basis for concluding Mr R posed a sexual risk to children. In combination with H's allegations however, a propensity for sexual offending emerges.

4. CP

It was not part of the Department's case but I was invited by Mr P's counsel to infer, on the basis that CP had wet her pants over a three week period and had been observed to be withdrawn, that she had been sexually abused by Mr R. This type of speculation has no basis in law.

Ground (e) – Emotional abuse

As I understand it, this was put on the basis that if any of the children were to be sexually abused then this would cause them significant emotional harm.

Though that may well be the case, it could be only a matter of mere possibility at this stage and there is no evidence that the harm would be of “such a kind that the child’s emotional or psychological development is likely to be damaged”.

I am of the view that there should be evidence before the court specifically as to the likelihood of emotional harm before this ground could be made out.

The case law

In *Re B (Children) (Fc)* [2009] 1 AC 11 Lord Hoffman re-stated that:

“The effect of the decision of the House in *Re H (Minors) Sexual Abuse: Standard of Proof* [1996] AC 563 is that section 31(2)(a) of the *Children Act* 1989 requires any facts used as the basis of a prediction that a child is “likely to suffer significant harm” to be proved to have happened.”

Similarly, Baroness Hale of Richmond who gave the leading judgment in that case:

“Conclusion as to future risk [has] to be based on facts”.

Baroness Hale quoted Lord Nicholls from *Re H* with approval:

“A decision by a court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom.”

The language of section 31(2) is different [from those sections dealing with interim orders]: the court must be “satisfied” ... that the child is suffering, or

is likely to suffer, significant harm: ...” “This is the language of proof [my underlining], not suspicion, however reasonably based”.

The relevance of this English case is that section 162 of our *Children, Youth and Families Act 2005* exists in the same framework of child protection and is similarly worded.

Before the Court can begin to look at the likelihood of future risk, it must be satisfied, on the balance of probabilities, of the existence of the facts which are alleged to form the basis for a likelihood of risk. Once those facts are proved to the Court’s reasonable satisfaction it can turn its mind to the likelihood of future risk.

As to the assessment of risk Baroness Hale said, in part quoting Lord Nicholls in *Re H*:

The words “is likely to suffer significant harm” did not mean that such harm had to be more likely than not in the future: It was enough if its happening was a real possibility, a “possibility that cannot be sensibly ignored having regard to the nature and gravity of the feared harm in the particular case”.

The likelihood of significant harm

There are no proven facts which would permit a finding of proof that the children are in need of protection on grounds (c) or (e) of section 162(1).

Having been satisfied that Mr R sexually assaulted H on several occasions whilst she was in his care, and also taking into account his prior conviction for aggravated rape, I am persuaded that the children are at risk of significant harm from sexual abuse from Mr R.

The mother’s failure to support H after her disclosure and her desire to reconcile with him (until very recently) indicate that she would fail to protect her children from such risk.

Ms TW, the protective worker, conceded in cross-examination that the allegation of sexual assault upon M was a central plank of their case under ground (c). This was because it showed that Mr R's sexual offending was across genders and included both his biological and non-biological children.

In my view those distinctions are not necessary to make in assessing the likelihood of sexual abuse in the future. It may be the case that JP, as the only boy, and the twins as newborns, are at a lesser risk of being sexually assaulted, but there is no basis upon which I could find that there was no risk of significant sexual harm. Given the gravity of the harm caused by sexual assault, even a lesser risk constitutes "a possibility that cannot be sensibly ignored having regard to the nature and gravity of the feared harm in the particular case¹".

During the hearing, the mother's counsel advised the Court that the mother no longer opposed proof of the protection application on the grounds of likelihood of sexual abuse.

The children have remained in the mother's care since DHS became involved in March 2008 on an Interim Accommodation Order that includes a condition that Mr R not attend her home. That condition was relaxed slightly after the premature birth of the twins, KR and AR. Mr R's access with the children since then has been supervised in the home.

In May 2008, CP went to live with her father and she has remained there.

The Department recommends a Supervision Order of 24 months in order to allow them to continue to supervise Mr R's access and to support the mother in her resolution to end her relationship with him.

Mr P understandably does not want his children, JP and BP, to have any contact with Mr R. This has meant that when Mr R has gone to the mother's house for access with

¹ I note that the House of Lords in *Re H* did not distinguish between biological and non-biological children in assessing risk. Though strictly speaking their decision did not require their Lordships to consider this issue, no party sought to argue that such a distinction should be made.

his children, JP and BP have been encouraged to stay with friends during access though this has not always been possible.

JP, through his counsel, has indicated he is happy to see Mr R whilst BP has begun to express a preference not to see him.

It is necessary to formulate an access regime that will address each child's needs. Mr Leach has asked for a condition as to sibling access though I note that the mother and Mr P have so far been able to arrange this between themselves.

Decision

The children are in need of protection from the likelihood of suffering significant harm as a result of sexual abuse and the application by DHS is therefore proved on ground (d) of section 162 (1) of the *Children, Youth and Families Act 2005*.

CP has not seen Mr R for some time and has expressed her ambivalence about contact. CP is placed on a Supervision Order for a period of 12 months, in the care of her father, Mr P, with the following conditions:

1. Mother must accept visits from and co-operate with DHS.
2. Father must accept visits from and co-operate with DHS.
3. Mother must accept support services as agreed with DHS.
4. Father must accept support services as agreed with DHS.
5. Mr R must have no contact with the child.
6. Mother may have access with the child every second weekend from Friday after school to Sunday evening to coincide with the weekend when CP's siblings are in the mother's care and at times and places as otherwise agreed between DHS, the mother and the father .
7. Child must reside with her father.

In relation to the six children residing with the mother, I am satisfied that risk of possible sexual abuse will be a long-term issue which gives rise to special circumstances which warrant the making of an order for longer than 12 months.

MF, TR, KR and AR are placed on Supervision Orders in the care of their mother for a period of 24 months with the following conditions:

1. Mother must accept visits from and co-operate with DHS.
2. Father must accept visits from and co-operate with DHS.
3. Mother must accept support services as agreed with DHS.
4. Father must accept support services as agreed with DHS.
5. Mother must immediately contact police and DHS if Mr R attends the family home other than for arranged access.
6. Mother must take the child to the Maternal and Child Health Centre nurse as often as the nurse recommends.
7. Father may have access with the child at times and places as agreed between the parties. DHS or its nominee will supervise access. Access will not proceed if the father is alcohol affected.
8. Mother must continue to engage with a family support worker and allow reports to be given to DHS.
9. Father to be assessed at Vic Psych as agreed between the father and DHS.
10. Child must reside with the mother.

BP and JP are placed on Supervision Orders for a period of 24 months to reside in the care of their mother. I have given consideration as to whether there should be any contact with Mr R and have concluded that such risk as there is can be managed by the contact being supervised. The following conditions will attach to the Supervision Orders:

1. Mother must accept visits from and co-operate with DHS.
2. Father must accept visits from and co-operate with DHS.
3. Mr R must co-operate with and accept visits from DHS.
4. Mother must accept support services as agreed with DHS.
5. Father must accept support services as agreed with DHS.
6. Mr R must accept support services as agreed with DHS.
7. Mr R must not live with or have contact with the child other than during access.
8. Mother must contact police and DHS if Mr R attends the family home other than for access.

9. Mr R may have access with the child, subject to the child's agreement, at times and places agreed between the parties. DHS or its nominee will supervise access. Access will not proceed if the step-father is alcohol affected.
10. Father may have access with the child every second weekend from Friday after school to Sunday evening and at times and places as otherwise agreed between DHS, mother and father.
11. Mother must continue to engage with a family support program and allow reports to be given to DHS.
12. Mr R is to be assessed at Vic Psych as agreed between him and DHS.
13. Child must reside with the mother

B. Wallington
Magistrate

8 April 2009