



New South Wales  
Supreme Court

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**CITATION :** Re Georgia and Luke (No 2) [2008] NSWSC 1387

**HEARING DATE(S) :** 19 December 2008

**JUDGMENT DATE :** 19 December 2008

**JURISDICTION :** Equity Division

**JUDGMENT OF :** Palmer J

**EX TEMPORE  
JUDGMENT DATE :** 19 December 2008

**DECISION :** Order that Georgia and Luke be returned immediately to the care of their parents.

**CATCHWORDS :** FAMILY LAW AND CHILD WELFARE – PARENS PATRIAE JURISDICTION – INTERFERENCE WITH CHILDREN’S COURT PROCEEDINGS – Whether “extraordinary circumstances” exist – DOCS officers remove children for no justifiable reason – independent Court assessor strongly recommends immediate return of children – DOCS officers seek to delay return for further four months by further proceedings in Children’s Court – welfare of children at serious risk – abuse of power by DOCS officers. - HELD: Extraordinary circumstances warrant interference by Supreme Court in Children’s Court proceedings.

**LEGISLATION CITED :** Children and Young Persons (Care and Protection) Act 1998 (NSW) – s 43(1), s 53, Ch 5 pt 2

**CATEGORY :** Principal judgment

**CASES CITED :**

- Alan, Re [2008] NSWSC 379
- Director-General of the Department of Community Services v Priestley [2004] NSWSC 639
- Elizabeth, Re [2007] NSWSC 729
- Georgia and Luke, Re [2008] NSWSC 1277
- Liam Re [2005] NSWSC 75
- Victoria, Re [2002] NSWSC 647 ((2002) 29 Fam LR 157)

**PARTIES :**

Mr A (First Plaintiff)  
Ms B (Second Plaintiff)  
Department of Community Services (First Defendant)  
Director-General, Department of Community Services NSW (Second Defendant)

**FILE NUMBER(S) :** SC 6225/08

**COUNSEL :**

In person (Plaintiffs)  
P. Guterres (Sol) (Defendants)

**SOLICITORS :** I.V. Knight, Crown Solicitor (Defendants)

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## **6225/08 Re Georgia and Luke (No 2)**

### **JUDGMENT – Ex tempore**

**19 December, 2008**

#### **How this case comes to the Equity Division**

1 The children who are the subject of these proceedings have been given the pseudonyms “Georgia” and “Luke” in previous proceedings, and it is convenient to keep those pseudonyms for these proceedings.

2 On 12 September 2008, officers of the Department of Community Services (“DOCS”), with the assistance of two police officers, removed Georgia and Luke from their parents' home in exercise of the power of emergency removal under s 43(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (“the Act”).

3 The children's parents commenced proceedings in the Common Law Division of this Court against the Director-General of DOCS seeking the return of the children to their care. They invoked

the *parens patriae*, or wardship, jurisdiction of the Court in doing so.  
4 The Director-General filed a Notice of Motion seeking summary dismissal of the parents' proceedings on the ground that there were then current proceedings in the Children's Court for a care order in respect of the children under Ch 5 pt 2 of the Act. The Notice of Motion came before McCallum J on 28 November 2008.

5 As matters then stood, the proceedings in the Children's Court had been adjourned to 9 December 2008, by which time it was expected that an assessment report as to the children and as to the parents would be available. An assessment report had been ordered under s 53 of the Act and it was to be carried out by a clinician authorised by the Children's Court. In those circumstances, McCallum J acceded to the Director-General's Notice of Motion and summarily dismissed the parents' proceedings: *Re Georgia and Luke* [2008] NSWSC 1277.

6 In doing so, her Honour followed a well established line of authority in this Court, enunciated in *Re Victoria* [2002] NSWSC 647 ((2002) 29 Fam LR 157), that this Court will not, save in extraordinary circumstances, exercise its *parens patriae* jurisdiction in respect of the care and custody of children where there are currently proceedings relating to those children in the Children's Court, or where avenues of appeal from Children's Court proceedings are still open: see also *Re Liam* [2005] NSWSC 75 at [27] per McDougall J; *Director-General of the Department of Community Services v Priestley* [2004] NSWSC 639 at [5] per Young CJ in Eq; *Re Elizabeth* [2007] NSWSC 729 at [12]; *Re Alan* [2008] NSWSC 379 at [13] per Gzell J.

7 On 9 December 2008 a clinical psychologist, Dr Lizabeth Tong, provided an assessment report. The assessment report strongly recommended immediate restoration of both children to their parents' care.

8 On 16 December 2008, the matter was listed in the Children's Court. The parents applied for immediate restoration of the children. The officers in DOCS having conduct of the case filed a Care Plan which provided for the children to be restored to their parents' care after three months. The Magistrate stood the matter over for a hearing on 27 and 28 January 2009. The children remained in the custody of the Director-General.

9 On 17 December 2008, the parents appeared in person and obtained leave from me as Duty Judge in the Equity Division to serve on short notice a Summons seeking an order in the exercise of the Court's *parens patriae* jurisdiction for the immediate return of the children. The Summons was made returnable at 2pm that day, when Mr Guterres, solicitor, appeared for the Director-General. The Summons was adjourned until 18 December 2008 to enable Mr Guterres to obtain instructions.

10 On 18 December, the Director-General filed in court a Notice of Motion seeking dismissal of the parents' Summons on the ground that there were current proceedings in the Children's Court.

11 Having read the assessment report of Dr Tong and the Care

Plan proposed by the DOCS officers, I re-listed the matter for this afternoon and requested that the DOCS officer responsible for this matter provide an affidavit setting out all relevant facts and circumstances. That affidavit has been provided and this afternoon I have had the benefit of further oral evidence from the officer by audio link.

### **The Director-General's Motion for Summary Dismissal**

12 As in the proceedings before McCallum J, the Director-General relies upon the line of authority established in *Re Victoria*. Mr Guterres says that the Children's Court will determine, on 27 and 28 January 2009, whether the children should be restored immediately to their parents or whether the Director-General's Care Plan will be adopted. He says that the fact that a decision will be delayed until the end of January – another six weeks from now – does not constitute “*extraordinary circumstances*” as discussed in *Re Victoria*, and especially in *Re Alan*.

13 I agree that delay in the hearing of a care application in the Children's Court cannot, in itself, constitute extraordinary circumstances warranting this Court in exercising its *parens patriae* jurisdiction, even though delay in the hearing of the application causes acute distress to parents deprived of the care of their children, and even though such delay can cause emotional damage to the children. This Court cannot, for those reasons alone, take upon itself the burden of hearing cases properly before the Children's Court. The reasons are obvious. If the lists of this Court become clogged with cases invoking the *parens patriae* jurisdiction, those cases will not be heard any sooner than they are now heard in the Children's Court. If anything, they will be heard later because this Court has a much wider jurisdiction than does the Children's Court.

14 Further, the special experience and expertise of the Children's Court Magistrates should be given full weight and authority so that this Court should not lightly pre-empt decisions within the jurisdiction of the Children's Court.

15 For those reasons, I affirm the principle enunciated in *Re Victoria* and in the cases which have followed it.

16 If this Court is to refuse the Director-General's Notice of Motion and is to exercise jurisdiction in this case, it will do so only if there are extraordinary circumstances, not being mere delay in the hearing of a care application in the Children's Court. Those extraordinary circumstances, if they exist, must, in my opinion, have a direct bearing on the welfare and the best interests of the children. It is that consideration which lies at the heart of the Court's *parens patriae* jurisdiction.

### **Whether “extraordinary circumstances” exist**

17 It is necessary to state at once that, in this case, there is no

evidence whatsoever that the parents have ever abused Georgia and Luke physically or emotionally. There is no evidence that the children have been neglected or have failed to thrive. There is no suggestion that the mother, who has four children by a previous relationship, has ever abused those children in any way. The home in which the parents were bringing up the children was described by the DOCS officers as neat and tidy and the grounds well maintained. There is no evidence of alcohol abuse by the parents. There is evidence of some recreational cannabis use to which I shall come in a moment, but there is no evidence that the parents have an addiction to cannabis or are unable to care for themselves and their children because of over-use of cannabis. There is no evidence that the parents have abused other drugs, legal or illegal.

18 Neither parent has any relevant criminal history. The father pleaded guilty ten years ago in the Local Court to a charge of assault in a road rage incident and received a suspended sentence and a good behaviour bond. He has no other relevant criminal record. He is a licensed builder and a carpenter by trade. He has been in regular employment until recently but is now unemployed.

19 The mother has been self-employed on a part-time basis in doing craft work. She and her previous partner took out mutual Apprehended Violence Orders against each other some years ago when their relationship broke up, but no charges were ever laid and they are now on amicable terms and see each other fairly frequently.

20 Neither parent has any history of psychiatric or psychological illness. They do not have any physical disability. There is no suggestion that either of them has had a series of relationships such as would indicate emotional instability.

21 Both parents appeared in person before me and conducted their case calmly, intelligently, courteously and in all respects entirely appropriately, although at times they were understandably affected by emotion. They say, and I accept, that they have the usual ups and downs of a relationship which has endured for some three years, but they both emphatically deny any history of violent behaviour. They say that they have a close and loving relationship. Their conduct towards each other in Court supports that evidence.

22 Why, then, were the children of these parents removed forcibly by police officers from their home on 12 September 2008? Why have they been kept in DOCS' custody for the last thirteen weeks? Why will they be kept in DOCS' custody for another six weeks before their care application is heard in the Children's Court? Why do the DOCS officers seek a care plan which will keep these children in custody until May next year?

23 In my opinion, the answer to these questions is: a serious abuse by certain DOCS officers of the Department's power to take children into custody under the Act. It is difficult to resist the conclusion that those officers grossly overreacted to the parents' hostility to DOCS' unjustified insistence that the children were at risk of harm. This case has been generated and fed into the legal

system, with all its inherent delays, when it should never have been started in the first place.

24 The DOCS officers now seek to invoke this Court's policy of not interfering in Children's Court proceedings, so that they may keep in custody these two young children for another six weeks before their case is heard, and for another three months after that, if their Care Plan is accepted by the Children's Court Magistrate.

25 Why are the DOCS officers taking this attitude? I regret to say that I am driven to only one conclusion: an intransigent refusal to acknowledge a mistake, regardless of the consequences to the children.

26 I will now deal with the facts in more detail.

### **The parents' history with DOCS**

27 The mother has four children by a previous relationship. That relationship of thirteen years' duration broke down in 2005. The children were taken into DOCS' care for a short time before being placed with their father. The affidavit of the DOCS officer does not give any further details. It says that the Department "*received a risk of harm report*" and that she understands that the Queensland Department of Child Safety "*had child protection concerns*". What those concerns are has not been revealed. The mother has given evidence that she was, at that time, unable to look after the children properly because of stress and illness. She says that she sought the help of DOCS. There is no evidence to suggest otherwise. In any event, the children of the previous relationship now live with their father, close by the mother, and she sees them frequently during each week. There is no suggestion from DOCS that any of these children are at risk of harm from the mother or from anyone else in her household.

28 On 30 April 2007, the Department received a pre-natal risk of harm report consequent upon the mother receiving little ante-natal care. She had gone to hospital when she entered premature labour. However, she discharged herself. Much is apparently made of the fact that a cannula was still in her arm at the time. She was said to have behaved aggressively. All of this is hearsay at a remove which I cannot ascertain: there is no evidence of any particularity whatsoever.

29 Georgia was born in June 2007. She had a low birth weight; that can be, but is by no means necessarily, an indication that the mother abused drugs during pregnancy. In this case, as I have said, there is no history of drug abuse by the mother. There is a suggestion that the mother reported physical violence by the father. The mother denies this and there is no police report or any other evidence of what happened. In circumstances which the DOCS officer has left entirely unclear, Georgia was taken into the care of the Director-General on the day of her birth.

30 The Director-General commenced care proceedings in the Children's Court. On 7 August 2007 Georgia was placed by the

Department in her parents' care. One would have thought that that order would not have been made if there was any substantial reason to fear for Georgia's safety.

31 On 12 March 2008, the DOCS officers filed a Care Plan for Georgia in the Children's Court. The delay of some nine months in filing a Care Plan does not demonstrate any sense of urgency on DOCS' part. The Care Plan required the parents to attend counselling for anger management. Otherwise, it was in very general terms, requiring the parents to remain drug-free and to submit regular urinalyses. Bearing in mind that there was no suggestion of drug use, other than recreational cannabis use, and no suggestion that cannabis use was affecting Georgia's care and nurture, this requirement was questionable.

### **The parents' use of cannabis**

32 I pause here to note that, in answer to a question from me, both parents frankly said that they had used cannabis. They said that they did so on social occasions or to relax. They did not use cannabis daily or regularly every week. I accept their evidence: they were not cross examined on it and there was nothing otherwise in the evidence to suggest that it was untrue. In those circumstances, I would describe the parents' use of cannabis as recreational rather than addictive or dependent. The independent Children's Court clinician reached the same conclusion.

33 A question posed by this case is whether DOCS takes the view that any parent who uses cannabis, no matter how infrequently, is for that reason alone unfit to care for a child. I asked Mr Guterres, who appears for the Department, whether DOCS had any policy or guideline in that regard. Mr Guterres said that he did not know but suggested that the use of cannabis should not affect DOCS' assessment of parental responsibility unless it actually impaired the parent's ability to care properly for the child. If I may say so with respect, that seems to me to be an eminently reasonable attitude.

34 If the Department takes the view that any cannabis use, in itself, renders a parent unfit to care for a child, that view should be made public, so that there may be public debate about it.

35 What has happened in this case suggests that the particular DOCS officers took the view that they were entitled to require, as a condition of a Care Plan, that the parents refrain from any use whatsoever of cannabis, despite the fact that there was no evidence that their cannabis use in itself posed any direct risk of harm to the children. I repeat – if this is a view prevalent in the Department, it is important for the public to know about it. I do not pretend that the issues are simple.

### **The children are removed**

36 The parents provided regular urinalyses up to 30 June 2008.

They provided no further urinalyses.

37 On 1 September 2008, the Department commenced care proceedings in the Children's Court "*due to concerns about the parents failure to meet the minimum outcomes*" of the previous Care Plan – seemingly, failure to provide urinalyses. There is no evidence whatsoever that the Department had any concerns at this time as to the well-being of the children or as to their safety. As I have observed, the sole reason for the fresh proceedings seems to have been an insistence on a Care Plan requirement to continue supplying urinalyses without any regard to whether the use of cannabis by the parents may actually be having any impact upon the children's well-being and care.

38 On 2 September 2008, the matter was listed in the Children's Court. The parents attended with their solicitor. The DOCS officer says that the parents accepted the following conditions:

*i. that they participate in random supervised urine analysis;*

*ii. that they accept random home visits by Departmental officers;*

*iii. that they participate in counselling to address anger management and relationship issues;*

*iv. that [Georgia] attend a registered child care centre two days per week;*

*v. that the parents attend a case meeting with the Department within two weeks, and thereafter every two months, to discuss the case plan and minimum outcomes expected."*

39 In view of the fact that the major concern of the DOCS officers seems to have been cannabis use, this Care Plan was somewhat heavy handed. One wonders how parents who were taking good care of their children would react to this sort of Care Plan. A requirement to address "*anger management and relationship issues*" would, if anything, be a goad and an insult to such parents.

40 Nevertheless the parents are said to have agreed to the Care Plan proposed and on 2 September the Children's Court made a final order by consent placing Georgia under the responsibility of the Minister for six months in the care of her parents. That the parents consented to these heavy-handed terms indicates a willingness on their part to co-operate with the Department.

41 On 8 September 2008, a DOCS officer telephoned the home of the parents and left a message that she wished to arrange a meeting "*to discuss the minimum outcomes*" under the Care Plan.

42 On 9 September, after ringing and leaving another message, the officer sent a registered letter to the parents requiring them to attend DOCS' offices at 9.30am on 12 September. Later the same

day the DOCS officers received a fax from the father saying that the parents were available to meet the DOCS officers *“between 22 and 26 September 2008 at any time that suits you”*. The letter was courteous, appropriate and reasonable. The DOCS officers did not respond to this letter at all, as one would have expected they would have done.

43 On 12 September, when the parents did not attend DOCS' offices at 9.30am, and notwithstanding the DOCS officers' failure to respond to the father's fax of 9 September 2008, the DOCS officers took the view that immediate action was required. Three DOCS officers went to the parents' house. The affidavit of one of the officers recounts what happened. Having heard that officer give evidence, I am convinced that she endeavoured to describe what happened in terms which cast the most unfavourable light possible on the parents.

44 The substance of the conversation is recounted thus:

*“[The mother] was making a hot drink. She was dressed in her pyjamas. Her hair was messy and knotted. I observed that Ms B appeared to have lost a lot of weight in the period since I had last seen her. Her clothes were hanging off her and her bones were protruding. A conversation with words to the following effect took place.*

*[DOCS officer] said: ‘Hi [B], how are you?’*

*[The mother] mimicked: ‘Hi [B] how are you?’*

*[DOCS officer] said: ‘[B] you look like you have lost a lot of weight. Are you ok?’*

*[The mother] said: ‘You look like you’ve put on weight.’*

*[DOCS officer] said: ‘I have phoned you a couple of times and sent a letter to arrange a meeting with you this morning at 0930hrs.’*

*[The father] said: ‘Yes. You rang on Monday and Tuesday. We got the letter but it doesn’t suit us. I sent you a letter saying that we were available between the 22nd and the 26th.’*

*[DOCS officer] said: ‘At Court we agreed that the meeting would be within two weeks.’*

*[The father] said: ‘No we didn’t agree to this ...’*

*[DOCS officer] said: ‘We spoke to your solicitor*

*and it was very clear that there needed to be a meeting within two weeks of Court. The two weeks is up next Tuesday, so we need to arrange a meeting at the office either Monday or Tuesday.'*

*[The mother] yelled: 'Well we're very busy and that doesn't suit us. You can come here and meet with us between the 22nd and the 26th.'*

*[DOCS officer] said: 'The meeting needs to be sooner than this and it needs to be at the office.'*

...  
*[The mother] yelled: 'No. I won't be coming to the office. I don't even know why you're involved. You just make things up and you have no right to extend the order.'*

*[DOCS officer] said: '[B] have you done any of the minimum outcomes in the care plan.'*

*[The mother] mimicked: '[DOCS officer] have you done any minimum outcomes.'*

*[The mother] said: 'I won't be doing any of it. My children aren't at risk.'*

*[DOCS officer] said: 'It is important that you do the minimum outcomes this time. We don't want to end up in a situation where we have to remove your children because you haven't done them.'*

*[The father] said: 'Are you threatening my wife. How dare you threaten us.'"*

45 Although she now denies it, I am satisfied that the DOCS officer was angry at the reaction of the parents, particularly the reaction of the mother. I have no doubt that the mother was emotional and that she spoke rudely to the DOCS officer. There is no suggestion that the father spoke rudely. During the conversation he rang his solicitor for advice.

46 In my opinion, while it is regrettable that the mother spoke rudely, the parents, and the mother in particular, were entitled to be angry, bearing in mind their attempts to arrange a meeting with DOCS, in a letter to which they had had no response. The attendance en masse of the DOCS officers was an unwarranted and offensive intrusion into their home.

47 There was no physical violence in this episode, nor was there any threat of physical violence. The DOCS officers left. They say

that they were then seriously concerned for the safety of the children.

48 In her affidavit, the DOCS officer gives the following reasons for concern:

*“I was concerned for the children’s immediate safety during this incident based on the following factors:*

*i. Ms B’s apparent dramatic weight loss, her appearance and behaviour suggested to me that Ms B may have been substance affected;*

*ii. Ms B’s history of mental health issues and her behaviour raised concerns for me about the state of her mental health;*

*iii. the lack of reaction by the children, given their developmental stages, suggested to me that they may have been exposed to this behaviour on an ongoing basis;*

*iv. the history of domestic violence between Ms B and Mr A, as set out in the Departmental records and the possibility of ongoing domestic violence;*

*v. my impression that neither Ms B nor Mr A appeared to me to be concerned about the impact of their behaviour upon the children;*

*vi. the parent’s lack of compliance with the agreed case [sic] plan.”*

49 I make the following observations.

50 The officer had no rational basis for attributing weight loss to the mother’s drug use when there is no evidence of heroin addiction or other substance abuse by the mother.

51 The officer refers to a “history of mental health issues”. There is not the slightest evidence before this Court of a “history of mental health issues”, whatever that vague phrase is intended to mean.

Where the liberty of the subject is concerned, precise evidence justifying deprivation of liberty is required by the Court. The Court will not countenance the removal of a child from his or her parents on evidence of this type. If DOCS has information in its files which can properly be described as a “history of mental health issues”, that information must be presented to the Court with particularity. The Court will not condone the removal of a child from his or her parents on nothing more than DOCS’ assurance that it has good reason for doing so.

52 In the present case, the DOCS officers had access to skilled legal representation from the office of the Crown Solicitor. No

reason has been given for the lack of particularity in the Department's evidence.

53 The DOCS officer suggested that the children showed no great distress during the parents' confrontation with the DOCS officers. That may have been so because the parents' anger was not directed at the children and the children felt safe with their parents.

54 The officer refers to "the history of domestic violence" between the parents. Again, although this is a highly emotive phrase, there is no evidence of any particularity at all of any domestic violence. I repeat the remarks I have made above: children are not to be taken from their parents on the basis of vague and prejudicial "evidence" such as this.

55 The officer says that the parents did not appear concerned that their behaviour – i.e. the mother's verbal abuse of the DOCS officers – might affect the children. As I have observed, the parents had good reason to be upset with the DOCS officers. Unfortunately, parents sometimes lose their temper with each other and with other people in front of their children. If DOCS regards a parent's loss of temper, even if justified, as warranting the removal of a child, it would be as well for the community to be warned in advance.

56 The last concern expressed by the DOCS officer is non-compliance with the agreed Care Plan. As I have observed above, non-compliance in this case had no impact on the safety of the children.

57 I reject outright the DOCS officer's alleged concern for the safety of the children: it had no reasonable basis. Never in the history of dealings between DOCS and either of the parents had there been any evidence, or even any suggestion of, violence by the parents towards the children. There was no rational basis for the DOCS officers to have any apprehension of violence towards the children now, particularly as such anger as the parents demonstrated was directed to the DOCS officer, not to the children.

58 The DOCS officers returned shortly afterwards to the parents' home with two police officers to remove the children. The parents offered no violence on that occasion either. The children remain in custody.

### **The Children's Court Clinician's Report**

59 An assessment of the parents and of the children has been prepared by Dr Elizabeth Tong at the direction of the Children's Court. Dr Tong is Area Principal Clinical Psychologist, Sydney South West Area Health Service, NSW Department of Health. Her curriculum vitae shows an extensive and impressive experience in assessing children and parents. When I asked the DOCS officer concerned in this matter whether she had any reason to suspect Dr Tong of being biased or prejudiced in favour of the parents, she denied any such suggestion. I asked her whether she was of the opinion that Dr Tong had reached a conclusion that no competent

clinician could reasonably reach. She disavowed such opinion.

60 Dr Tong's Report is some twenty-seven pages in length. It is extremely detailed and careful. The Report has had regard to voluminous material provided by DOCS and by the parents. Dr Tong consulted not only all material provided by DOCS, she assessed directly both the parents and the children by observation on a number of occasions. Not only that, but she conducted psychometric assessments of the parents. Further, she spoke to other persons who had been concerned in the parents' medical and social history. It cannot be suggested that the Report of Dr Tong is anything other than thorough, detailed and conscientious.

61 Dr Tong made these observations about the mother:

*"Ms B's psychological state was reviewed on the **Mental Status Checklist for Adults** via structured clinical interview and behavioural observation. She presented as a deeply concerned parent. She was a tall, attractive, willowy woman, with a pallid complexion, who was neatly dressed, well-groomed and of stated age. She was verbally articulate and was clearly ambivalent about participating in the assessment. At the outset her demeanour appeared suspicious, defensive and overtly hostile until she was advised that the Children's Court Clinic was providing an independent assessment to the Children's Court."*

62 After reviewing the results of observation and extensive psychometric testing, Dr Tong concluded that there was no convincing evidence of mental illness, mental instability or mental disorder on the part of the mother.

63 Dr Tong made the following observations about the father:

*"Mr A's psychological state was reviewed on the **Mental Status Checklist for Adults** via structured clinical interview and behavioural observation. He presented as an energetic, well-spoken man of stated age who was neatly groomed and smartly dressed in business attire. He indicated he is in good physical health. He has played indoor cricket since the age of 14 He plays tennis, AFL Football and when he was in Sweden, he played the Swedish equivalent of AFL.*

*On mental state examination his demeanour was candid, forthright and engaging. He responded with alacrity to structured clinical interview questions. His responses appeared generally consistent with the available evidentiary material. He readily established eye*

*gaze and maintained direct eye contact. He was oriented in time and place and for current events. He appeared appropriately protective of his partner and their children. His affective responses were congruent with the conversation. His mood was appropriately reactive and there was no evidence of psychiatric disturbance, formal thought disorder or incipient psychotic process, as he did not express any imaginary voices (auditory hallucinations) or any false beliefs (delusions).*

*There was no indication of personality disorder or cognitive dysfunction or disability. He impressed as having an intellectual capacity within the good average range and a vocational history commensurate with his psycho-social background and educational level. There was no apparent impairment to his executive function. He demonstrated a good capacity for insight, practical reasoning and informed decision-making. His memory function appeared fully intact. There was no indication of thought disorder and an absence of symptoms suggestive of irrationality, agitation or psychomotor retardation. On clinical presentation there was no evidence of organic impairment occasioned by drug or alcohol misuse, abuse or dependency.”*

64 After reviewing the results of observation and extensive psychometric testing, Dr Tong concluded:

*“Mr A presents with no convincing clinical evidence of enduring mental illness, mental disorder, cognitive disability or personality disorder. His reported volatility is likely specific to the unresolved and entrenched antipathy with the Department of Community Services. Notwithstanding his alleged serial and inappropriate transgression of boundaries associated with contact arrangements and contact visits, his educational disadvantage and his inclination to provide favourable responses during the current assessment and his clinical presentation suggests an intelligent, high functioning, competent individual with a good capacity for insight and competent decision-making.”*

65 Dr Tong made the following observations about the bonding and attachment relationships between the children and the parents:

*“Both parents responded promptly and*

*appropriately to their children's needs. The mother assumed principal care of baby Luke, and interacted with him smoothly, consistently and sensitively. She gently cut his toenails and fingernails, held him securely on her lap. She murmured softly to him and enjoyed physical intimacy with him. She rocked him as would an experienced mother of six, Luke being her youngest child and her only son. The father assumed principal care of Georgia. He ran out to the car and within minutes was backing the room with Georgia's rocking horse and favourite toys. He carried her around the room and beamed at her with much pride. He lowered his voice tone, and appeared to be singing to her. Her mother called out softly, 'I love you Georgia', and Georgia beamed with pleasure. The father carried Georgia to the Court Registry and asked to use the microwave for heating the bottles of formula. A nascent attachment between Luke and his parents could not be ascertained given his infancy, although he was thoroughly at peace, emotionally comfortable and physically secure in their nurturing care."*

...

*"Both parents appeared emotionally available to both Georgia and Luke to whom they provided empathic attention and demonstrated responsive care-giving. Georgia was confident, and behaviourally contained in the context of the parent care observed during the assessment. Georgia's apparent emotional stability and security in the company of her parents is a likely precursor of her apparent psychological resilience. Georgia appears to be establishing a healthy sibling bond with her brother as she reached out to stroke him with obvious affection. She is currently at a critical period of attachment development and she demonstrated convincing evidence of psychologically healthy primary attachments to both parents. Given her anguished response and emotional distress at separation from her mother and her father and the consecutive, prolonged attachment disruptions occasioned by two sudden and traumatic removals from parental care within her short 14 month life, and intermittent, short, and shortened contact opportunities, she is highly vulnerable to*

*developing an Attachment Disorder which will have negative implications for her psychological development and well being into the future.”*

66 As to the parents' parenting ability, Dr Tong said:

*“Both parents are well able to provide for the safety, welfare and well being of their infant children. Notwithstanding concerns raised by the Department, the least detrimental option for the continuing health and psychological welfare of these children, in my clinical opinion, would be immediate restoration to parental care.”*

67 Dr Tong concluded with the following recommendations:

*“Immediate restoration of both children to parental care is strongly recommended as the least detrimental option for the psychological well being of the subject children.”*

68 Apparently, the DOCS officers do not accept Dr Tong's Report. They wish to “test” it by cross examination of Dr Tong in the Children's Court in support of an application to impose a Care Plan on the parents which detains the children in custody for a further three months.

69 When I wished to find out what bases the DOCS officers had for “testing” the Report of Dr Tong, I was informed by the DOCS officer concerned that she was concerned that Dr Tong had relied too much on self-reporting by the parents, particularly as to their drug use.

70 I do not accept this as a rational basis for criticising the Report. It is quite clear that Dr Tong relied upon many other sources of information besides self-reporting by the parents. She spoke to other people, she consulted records that were made available to her, and she conducted clinical analyses designed to detect any inconsistencies or inaccuracies in any self-reporting by the parents. Dr Tong, with the benefit of all of that information, found no reason to disbelieve the account given to her by the parents.

71 Mr Guterres submitted, on instructions, that DOCS was entitled as a matter of law to take the position that it wished to “test” the Report by cross examination and was entitled to keep the children in custody until the hearing in the Children's Court on 27 January 2009 to enable that cross examination to take place. Unless it is to be suggested that Dr Tong has acted with bias or has held a view which could not reasonably have been held by a professional person in her position – and both assertions have been disavowed by the DOCS officer concerned – I think that this insistence on a right to “test” by cross examination is mere cavilling, inspired by an intention on the parts of the DOCS officers concerned to justify their position rather than simply accepting the self-evident correctness of the opinion expressed by Dr Tong. It is another example of an intransigent refusal to acknowledge a

mistake, regardless of the consequences to the children.

## **Conclusion**

72 I infer that the action of the DOCS officers in seizing these children on 12 December 2008 was motivated by upset at the confrontation which they had had at the parents' home on that day. The parents were hostile but their experience with the DOCS officers gave them reason to be hostile. I find that the officers acted precipitately and irrationally in deciding that the situation satisfied the requirement that the children be seen to be placed in urgent need of emergency care by risk of violence.

73 I bear in mind that the reason given by the DOCS officer today for not acceding to the parents' suggestion that the interview take place between 22 and 26 September 2006 was that both she and the other officer concerned would be away from the office on leave during that period. In other words, it was a matter of the administrative convenience of those officers that they insisted that the interview take place on 12 September. That reason for requiring the interview with the parents on 12 September was not disclosed in the DOCS officer's affidavit.

74 The circumstances which I have recounted amount, in my opinion, to a gross abuse of power on the part of the DOCS officers concerned. The result has been to remove young children from the care of good and nurturing parents for the last twelve weeks. The insistence by the DOCS officers that the Children's Court proceedings continue on their course and the children remain in custody pending their conclusion aggravates the abuse of power already perpetrated.

75 I do not have regard simply to the question of whether or not the parents have been unjustly treated in this case. My principal concern is that young children who have been well cared for by their parents have been removed from their care for some three months and, if the DOCS officers have their way, will be kept out of their parents' care for another three months, for no good reason. The Report of Dr Tong makes it quite clear that Georgia is already suffering considerably from her removal from her parents. Luke is only months old. The best interests of the children have been, and continue to be, gravely imperilled.

76 All of these circumstances in my opinion amount to extraordinary circumstances within the line of authority of *Re Victoria* and the cases to which I have referred. They warrant this Court interfering with the process in the Children's Court in order to restore these children immediately to the custody and care of their parents. I will make orders accordingly.

77 I direct that this judgment be brought to the attention of the Director-General. I wish to emphasise that such criticisms as I have made are not criticisms of the Director-General or of the Department as a whole; rather, they are criticisms of individuals within the Department.

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