# CHILDRENS COURT OF QUEENSLAND

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| CITATION: | *WJS v Director of Child Protection Litigation & Anor* [2020] QChC 3 |
| PARTIES: | **WJS**<br>(Appellant)<br>**v**<br>**DIRECTOR, CHILD PROTECTION LITIGATION**<br>(First Respondent)<br>and<br>**SARAH CLEELAND, SEPARATE REPRESENTATIVE**<br>(Second Respondent) |
| FILE NO/S: | CCQ 2697/19 |
| DIVISION: | Childrens Court of Queensland |
| PROCEEDING: | Appeal under section 117 *Child Protection Act* 1999 |
| ORIGINATING COURT: | Magistrates Court at Brisbane |
| DELIVERED ON: | 6 March 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 November 2019 |
| JUDGE: | Loury QC DCJ |
| ORDER: | **1. The appeal is dismissed.** |
| CATCHWORDS: | CHILDRENS COURT – CHILD PROTECTION ORDER – APPEAL – where a Child Protection Order, granting short term custody of a child, was made according to section 59 of the *Child Protection Act* – where the appellant appealed against the decision, alleging multiple errors – whether the learned Magistrate ought to have been satisfied the child was in need of protection.<br><br>*Jennifer Glover, Separate Representative v Director, Child Protection Litigation & Ors* [2016] QChC 16<br><br>*Child Protection Act 1999* sections 5B, 9, 10, 59, 61, 104, 117, 120, 143 |
| COUNSEL: | Self-represented for the Appellant<br>L. Stewart for the First Respondent<br>D. Firth for the Second Respondent |

SOLICITORS: Self-represented for the Appellant
Director of Public Prosecution (Queensland) for the First Respondent
Sarah Cleeland as the Second Respondent

[1] On 12 July 2019 a Child Protection Order, granting short term custody of S to the chief executive was made pursuant to section 59 of the *Child Protection Act 1999* by a Childrens Court Magistrate.

[2] The appellant, who was represented at that hearing, appeals against the decision of the Magistrate pursuant to section 117 of the *Child Protection Act 1999*. Section 120(2) of that Act states that such an appeal must be decided on the evidence and proceedings before the Childrens Court Magistrate. Section 120(3) provides for the appellate court to order that the appeal be heard afresh, in whole or in part. That discretion tends to indicate that the appeal should be conducted as a rehearing. In *Jennifer Glover, Separate Representative v Director, Child Protection Litigation & Ors,*[1] Bowskill DCJ (as she then was) said:

> *"In my view, the proper construction of s 120(2), having regard to s 120(3), is that an appeal governed by s 120(2) is an appeal by way of rehearing, with the court having a discretion, if an application is made in this regard, to order that some or all of the evidence be heard afresh, or for further evidence to be relied on. The very presence of that discretion is one of the indicia that the appellate court is given a rehearing function.*
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> *The sense in which "rehearing" is used here is that the appellate court rehears the matter, as at the date of the appeal, not in the sense of a completely fresh hearing, but on the basis of the record of the evidence before the court below, subject to the discretion conferred by s 120(3). The appellate court is obliged to give the judgment which in its opinion ought to have been given at first instance, observing the natural limitations that exist in the case of any appellate court proceeding wholly or substantially on the record. Within those constraints, the appellate Court is required to conduct a real review of the evidence and proceedings below, and the Childrens Court Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due respect and weight to the Magistrate's conclusions. The powers of the appellate court are, however, exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error." (footnotes omitted)*

**Background**

[3] S was born on 29 October 2015. He is the child of MW (mother) and the appellant. An investigation by the Department of Communities, Child Safety and Disability Services ("the department") regarding S commenced on 6 September 2017. S was taken into care on 9 November 2017 and eventually placed with two carers (a same-sex couple) on 8 December 2017. The concerns of the department were with

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1 [2016] QChC 16 at [76] and [77].

respect to MW's alcohol misuse, the domestic violence to which S was exposed and the appellant's mental health issues.

[4] At the hearing of this matter MW did not oppose the making of the Child Protection Order. The only concern of the department with respect to MW as at the time of the hearing, was her alcohol misuse. The appellant opposed the making of the Child Protection Order.

[5] At the hearing before the Magistrate the following persons gave evidence:
1. Ms Aylene Grant, a Child Safety Officer.
2. Ms Julie Fox, a Child Safety Officer.
3. The appellant.
4. The appellant's mother, Mrs W.
5. The appellant's father, Mr W.
6. Mr Gary Shepherd, a social worker and solicitor (and author of a social assessment report).

**Reasons for the Magistrate's decision**

[6] Pursuant to section 59 of the *Child Protection Act 1999* the Magistrate had to be satisfied of the following before he could make a child protection order:
1. that S was in need of protection and that the order was appropriate and desirable for his protection;
2. that there was a case plan for S that was appropriate for meeting his protection and care needs;
3. S's wishes or views, if able to be ascertained, had been made known to the court; and
4. the protection sought to be achieved by the order was unlikely to be achieved on less intrusive terms.

[7] Section 104 of the *Child Protection Act 1999* provides that the Childrens Court is not bound by the rules of evidence and may inform itself in any way it thinks appropriate. Further, the standard of proof in relation to a matter of which the court needs to be satisfied is on the balance of probabilities.

[8] The learned Magistrate said that the child protection concerns related to the applicant were his mental health and domestic violence. The appellant had disclosed to departmental officers that he had been diagnosed with bipolar disorder. Despite such disclosure the appellant produced no medical evidence to the department or the Childrens Court attesting to that diagnosis.

[9] The evidence before the Magistrate included that the appellant had been prescribed Epilim, which was, according to the appellant's father, for the treatment of his bipolar disorder. The Magistrate referred to the appellant's own evidence that he had been diagnosed with bipolar disorder, *"the less severe form."* The Magistrate referred to the appellant's evidence that he was prescribed medication for his condition but took that medication in lesser amounts, depending on his lifestyle. He referred to the evidence establishing that no scripts had been filled by the appellant between August 2017 and January 2019. He referred to the appellant's mother's evidence that the appellant took a dietary supplement.

[10] The Magistrate considered the appellant's own opinion that his mental health condition and its impact on his functioning did not need to be assessed. The learned

Magistrate took into account evidence of the appellant's behaviour towards others involved in the care of his son. He said that the body of evidence *"shows a man who can be unreasonable. This has manifested itself at times by aggression and threatening behaviour, intolerance, impulsivity, self-centredness and fixation on certain topics."* He was described by the learned Magistrate as having no insight into his own behaviour and how it affects S's well-being.

[11] The Magistrate referred to the appellant's distress at the placement of his son with a same-sex couple. He referred to his having multiple domestic violence and family protection applications made against him and convictions for breaching the domestic violence order. The Magistrate described the appellant when giving evidence as *"evasive when answering questions, made speeches, contradicted himself, justified his poor conduct and painted himself as a victim of the Department of Child Safety."*

[12] The learned Magistrate found that S was a child in need of protection as he had suffered emotional harm and was at an unacceptable risk of suffering significant harm. That harm he found, was neglect likely to be suffered by S because of the unassessed mental health of the appellant. He determined that the appellant's mental health was not appropriately managed and that he prioritised his own interests and needs over those of S. He considered that the appellant was neither willing nor able to protect S from that harm.

[13] The learned Magistrate considered whether there was sufficient evidence before him to determine whether S could be placed with the appellant's mother. He did not consider that so. He described the appellant's mother as *"vague on all of the child protection concerns."* He described her as having minimal insight into the appellant's behaviour. She could not see fault with the appellant and minimised the seriousness of his behaviour.

[14] The learned Magistrate considered the case plan that had been filed and considered it suitable in addressing S's care and protection needs. In light of S's age, being 3 years and 8 months, he was too young to have his views considered.

[15] The Magistrate considered the principles underpinning the *Child Protection Act 1999*, that being the safety, well-being and best interests of the child. He considered that given the appellant's refusal to work with the department and that reunification with MW, the mother, was the goal of the department, that no other order on less intrusive terms could be imposed.

**Ground 2 – domestic violence**

[16] The appellant argues that the learned Magistrate took into account unproven allegations of domestic violence in reaching his decision.

[17] Ms Grant (a Child Safety Officer) swore an affidavit dated 22 January 2018 to which she annexed a report titled *'SCAN team additional information'*. It sets out the purported history of domestic violence between MW and the appellant. It references the following incidents:

1. an incident on 5 May 2016 where the appellant was the aggrieved. Police had been called to an address where the appellant and MW had a verbal argument. The appellant had left the address prior to police arrival and attended at the Boondall Police station. MW was intoxicated upon police

arrival. Witnesses advised police they had not witnessed any actual acts of domestic violence that afternoon however the day prior they had seen MW physically attack the appellant as he left the address with S.

2. On 25 May 2016 police were called by neighbours who had overheard the appellant and MW having a verbal argument. The appellant admitted to police having a verbal argument with MW.
3. On 24 August 2016 a 000 call was made where the operator could hear the sounds of a loud and abusive argument. Police attended and ascertained that the appellant had taken exception to MW drinking alcohol with a neighbour. A heated argument took place between the appellant and the neighbour. The appellant telephoned MW whilst police were in attendance and told her she was breaching a Domestic Violence Order by yelling at him and that she would lose S.
4. On 29 August 2016 police were called by MW who said the appellant attended at her address and told her to drop some charges in relation to a domestic violence application being heard the following day. He called her derogatory names.
5. On 16 September 2016 MW and S met with the appellant for a family picnic. MW was running late. Upon arrival the appellant called her derogatory names whilst taking S from her.
6. On 2 October 2016 the appellant, MW and S attended a public pool. MW had consumed a significant quantity of alcohol during the day. The appellant intended to drop MW home however she asked that he stop at a bottle shop. She attempted to leave the vehicle at a set of lights. The appellant grabbed her arm stopping her from getting out. She got out of the car and they continued a verbal argument whilst S remained inside the car.
7. On 9 November 2016 the appellant telephoned and messaged MW a large number of times in breach of a Temporary Protection Order which prohibited him from contacting her.
8. On 30 January 2017 the appellant attended MW's address and removed S from his bed. He left the address with S but returned 45 minutes later where he returned S to his bed. The appellant then commenced verbally abusing visitors at the house. He grabbed MW and threw her to the floor. MW then punched him in the face.

[18] Further evidence before the Magistrate included an affidavit filed by MW in which she acknowledged that S had been exposed to arguments between herself and the appellant which had affected him emotionally.

[19] The appellant gave evidence before the Magistrate. He was cross-examined by counsel for the Director of Child Protection Litigation ("DCPL") He accepted that there was a final domestic violence order naming MW as the respondent and the appellant as the aggrieved between 2016 and 2018. He said that he had not reported MW's breaches of that order to police. He also accepted that there was a final domestic violence order naming himself as the respondent and MW as the aggrieved between 2015 and 2016. The appellant accepted he had been charged with a contravention of a domestic violence order on two occasions. He said that they did not involve violence on his part. The appellant accepted he got *"physical"* with MW when he was putting S in the car. The appellant said that he might have harassed MW on occasions but he was doing so because he wanted to see his son. He accepted that at times police had attended their residence when S was present because of arguments between the two of them.

[20] The appellant's criminal history which was before the Magistrate and which the appellant accepts, demonstrates that on 20 May 2015 the appellant was fined for breaching a domestic violence order on 6 May 2015, and on 12 January 2017 he was fined for breaching a domestic violence order on 7 November 2016.

[21] The appellant's argument is that the Magistrate found that the appellant committed three breaches of a domestic violence order which would amount to an error. The learned Magistrate did not make such a finding. His finding was restricted to a statement that the appellant had multiple domestic violence orders made against him and he had convictions for breaching domestic violence orders. Both those statements are correct. There is no error in the finding.

[22] There is no merit in this ground of appeal.

**Grounds 3 and 4 – urine test results**

[23] The appellant argues that the learned Magistrate ought to have given weight to a drug test undertaken by him of his own volition on 3 April 2019.

[24] In his ruling the Magistrate said that the tests of the appellant's urine samples for drug use were of little evidential value as the results indicated dilution of the samples. He said that he placed no weight on the results as a consequence.

[25] On 27 December 2017 the appellant underwent a drug test. The analysis certificate which was exhibited to an affidavit of his father, Mr W, indicates that no drugs were detected in the urine sample provided. The certificate also states *"[t]he urine was very dilute. This suggests a large water intake prior to passage of the urine or perhaps adulteration of the sample with water after collection. This may be used to dilute out any drug metabolites to concentrations below detection limits."*

[26] The appellant was cross-examined by counsel for the DCPL about this drug test. He said that he was never asked by the department to undertake another drug test after this one so he did not consider it necessary to undertake one. On 3 April 2019 (after having been cross-examined about this drug test) the appellant voluntarily underwent another drug test. The certificate[2] indicates that no drugs were present. The certificate states *"This creatinine concentration may indicate dilution in some individuals but does not necessarily represent a deliberate attempt at dilution. Repeat testing on a more concentrated recollection is recommended."*

[27] The utility of these results was very limited given the diluted nature of the samples. They were of little weight in determining whether the appellant was using illicit drugs. He had a previous conviction for possession of dangerous drug.

[28] The appellant further argues that the Magistrate erred in drawing an inference that the drug test undertaken on 3 April 2019 indicated dilution. The certificate quite clearly stated that the *"creatinine concentration may indicate dilution."* There is no error in the Magistrate having placed no weight on the drug tests in light of the diluted nature of the samples.

[29] There is no merit in these two grounds of appeal.

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2 Marked exhibit 4.

**Ground 5 – hair follicle test**

[30] The appellant argues the Magistrate erred in finding that the appellant refused to undergo a hair follicle test. The learned Magistrate did, in his reasons, state that the defendant refused a hair follicle test. The respondents both concede that this was an error. Whilst there was a recommendation made by the Social Assessment Report writer, Mr Shepherd, that the appellant and MW undertake hair follicle tests to determine illicit drug use, there was no evidence before the Magistrate that the appellant had been requested to undertake such a test.

[31] Whilst this amounts to an error in the Magistrate's findings, it is not an error which impacts upon the critical finding that S was a child in need of protection. That is so because the finding of the Magistrate as to why the appellant was not a parent willing and able to protect his son related to his mental illness. That finding was not impacted by this error for the reasons which follow later in this judgement.

**Ground 6 – Lithium Orotate**

[32] The appellant disclosed to the Department of Child Safety that he had been diagnosed with bi-polar disorder. In his evidence before the Magistrate the appellant said that his bipolar disorder has been well managed for a long time with medications. Prior to January 2019 the appellant had not attended upon his doctor for close to a year. He said *"to be honest, at times, I have taken less dosages of – of the medication because, at times, the medication can actually make you feel depressed. There are –there are- different types of medication that are given to a person with bipolar. Most people aren't very educated in regards to the type of medications that are given to someone with bipolar. There is basically medications which deal with the depressive side of the illness. Those medications basically bring you up out of a low mood state, so to speak, into, say a high mood state and then other medications are used to actually bring you down from that higher state into a somewhat lower state."*[3]

[33] The appellant said that from his understanding he had the less severe form of the illness. He said he did not suffer with any delusions. He was not incapacitated to such a point that he was not able to take care of his son. He admitted that when S was removed from MW's care he became a *"little bit manic."*

[34] Evidence before the Magistrate demonstrated that the appellant had last filled a script for his medication for bipolar disorder on 9 August 2017. The appellant's own evidence was that he was not compliant with his medication; he took lower than the recommended dosage of his medication at times because it could make him feel depressed. He also said he took lower dosages depending upon his lifestyle.

[35] The defendant's mother, Mrs W gave evidence before the Magistrate. She said that the appellant's symptoms were very well managed, that he was on medication and that she had observed him taking Epilim daily over a 12 – 18 month period. She also said that the appellant took lithium orotate capsules which are a dietary supplement. Mrs W said that lithium orotate was a mood stabiliser and that the appellant reduced his dosage of Epilim when he commenced taking lithium orotate. Mrs W said she considered that this dietary supplement had a significant impact on the appellant's health and well-being. He wasn't experiencing severe manic highs

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3 Transcript 1-61 line 5.

or really low depressions. Despite Mrs W's evidence in this regard no medical evidence was placed before the learned Magistrate attesting to the impact that this dietary supplement had upon the appellant's mental illness or social functioning.

[36] The learned Magistrate referred to the lack of any medical evidence confirming the appellant's diagnosis and to the evidence of prescriptions for Epilim having been filled by the appellant. He referred to there being no evidence that the appellant had filled a prescription for his medication between August 2017 and January 2019 and the appellant's own evidence that he took less than the prescribed dosage. The learned Magistrate referred to the appellant's mother's evidence as to the appellant taking a supplement. The Magistrate said *"there is no evidence of this substance being a prescription medication or having been prescribed by a medical practitioner."*

[37] The appellant's argument misunderstands the import of what the learned Magistrate said. The appellant's argument is that lithium orotate does not require a prescription and the magistrate has erred in finding that it did.

[38] The learned Magistrate did not say that lithium orotate required a prescription. The concern expressed by the Magistrate was that there was no medical evidence before him that such a dietary supplement had been recommended by the appellant's medical practitioner as assisting in the treatment of his bipolar disorder. The appellant's mother was neither a medical practitioner nor the appellant's treating doctor. Her opinion as to its impact on the appellant's mental illness was irrelevant.

[39] No error arises in the Magistrate's findings. There is no merit in this ground.

**Ground 7 – Christian beliefs**

[40] The appellant argues that the learned Magistrate erred in finding that premarital sex was against the appellant's Christian beliefs. The Magistrate said *"He has been a Christian for 15 years. Some of his Christian beliefs must be more important than others given he has a criminal history for drug use, has had a sexual relationship with the respondent mother outside of marriage and has fathered a child outside of marriage in that period."*

[41] This statement made by the learned Magistrate was intended to be an observation relevant to the credibility of the appellant. He was not attacking the appellant's Christian beliefs but rather pointing out what he considered to be an inconsistency between the appellant's attack on the *"homosexual lifestyle"* of S's carers based upon his Christian beliefs as against his own history of drugs use, his sexual relationship outside marriage and his fathering of a child outside marriage.

[42] In argument before me the appellant quoted Leviticus 18:22 *"You shall not lie with a male as with a woman; it is an abomination."* He holds strong views about homosexuality. The Magistrate's reference to premarital sex was perhaps to other passages in the bible which suggest that premarital sex is not permitted.[4]

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[4] See for example: Genesis 1:24; 1 Corinthians 7:2; Hebrews 13:4; Acts 15:19-20; 1 Corinthians 5:1; Galatians 5:19-21; 1 Thessalonians 4:3-5; 1 Corinthians 7:8-9; 8. Genesis 2:24-25; 1 Corinthians 6:18-20

[43] There are many Christians who believe that the condemnation in the bible is against adultery and sexual immorality rather than premarital sex. This appears consistent with the appellant's Christian beliefs.

[44] The Magistrate's comment was intended to be dismissive of the appellant's complaints about S's carers, the same-sex couple, a matter which was not relevant to whether S was a child in need of protection under the legislation. The Magistrate referred to the appellant's distress at S being placed with same-sex carers and to the litigation he had conducted in an attempt to have that placement ended.

[45] Whilst the statement of the Magistrate at least in respect of the appellant's Christian beliefs as to premarital sex was not correct, it is not a matter that is material to whether S was a child in need of protection.

[46] There is no merit in this ground.

**Ground 8 – The appellant's mother**

[47] The appellant's argument is that the learned Magistrate failed to give weight to a permanent care order granting custody and guardianship to the appellant's mother.

[48] A permanent care order grants long-term guardianship of a child to a suitable person.[5] It is a more intrusive order than the Child Protection Order made by the learned Magistrate granting short-term custody of S to the chief executive for a period of two years.

[49] The Magistrate was required to consider, in making a child protection order, whether the protection sought to be achieved was unlikely to be achieved on less intrusive terms. The application made by the chief executive was less intrusive than a permanent care order.

[50] The learned Magistrate considered the evidence given by Mrs W. The affidavit sworn by Mrs W reveals that she had previously held the position of Child Safety Officer and Clinician. She criticised the actions of the department for failing to comply with legislation requiring an invitation to be sent to her to participate in a *"Family Group Meeting"* and for breaching the Child Safety Practice Manual for failing to seek her views about the case planning options. Despite her criticisms she did not address in her affidavit a criticism made of her contained in the social assessment report authored by Mr Shepherd. That criticism was that in a visit with S and the appellant she appeared confused as to what the monetary currency of the day was. Mrs W explained that confusion in her evidence, as a joke she was having with Mr Shepherd.

[51] In evidence Mrs W indicated that if S was not reunified with either MW or the appellant, she wanted a permanent care order made, granting custody of S to herself. She accepted that she had made an application to be assessed as a kinship carer and that she had sought review of the decision refusing that application before QCAT.

[52] Mrs W's application as a kinship carer for S relied upon an assessment conducted by an external agency. That assessment was considered to be insufficient to properly consider whether the requirements of the *Child Protection Act 1999* and

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5 Section 61(g) of the *Child Protection Act 1999.*

regulations were able to be met by Mrs W. Another agency was engaged to complete the assessment however that agency was not able to make contact with Mrs W despite numerous attempts. She also did not engage with the department despite numerous attempts made, to explain why further information was sought. As the application was not completed in the specified time period it was deemed to be refused under the Act.[6]

[53] Mrs W accepted that if the court granted her custody of S she would have the responsibility to organise and facilitate contact between S and MW and S and the appellant. She agreed that she had expressed concerns to the department about facilitating contact between S and MW. It was apparent that prior to cross-examination Mrs W was not aware of her obligations if she were granted custody of S rather than being a kinship carer.

[54] Mrs S did not accept that there were child protection concerns in relation to the appellant. She said that the concerns in relation to the appellant's ability to parent S were unsubstantiated. She said that there had only been one breach of a domestic violence order which she excused as being the actions of a concerned father sending text messages to S's mother. She also said that the allegations of domestic violence arose because MW was intoxicated. When asked how she knew that MW was intoxicated she said *"because it's my understanding that [MW] is intoxicated 24 hours per day."* She denied that the appellant had told her that but rather she gained that understanding from a few documents she had read. She claimed that the appellant was *"highly respectful of all women"* and would not assault any woman.

[55] Mrs W had not read any of the affidavits filed in the proceedings other than one affidavit sworn by Ms Fox (a child safety officer) on 25 February 2019. Her understanding was that the DCPL was relying upon one breach of a domestic violence order in support of the application for a child protection order. When told that the appellant had been charged with two breaches of the domestic violence order, Mrs W answered *"well, they aren't correct."*

[56] Mrs W gave evidence that the appellant's mental health symptoms were very well managed, that he was on prescription medication which she had seen him take daily and he was taking a supplement (referred to earlier in these reasons). He had been diagnosed in May 2009 with bipolar disorder when a patient at the Prince Charles Hospital. Mrs W said that she did not think that the appellant needed a psychiatric assessment as he was functioning very well on a daily basis.

[57] Mrs W was asked if she knew the reason why S was asked to leave his day-care centre. She answered that the appellant, as a concerned father made no more than four or five calls a day to gain information on S's well-being. Later in her evidence she said that S had changed *"kindies"* because it was closer to his carers. The evidence before the Magistrate was that the child care centre ceased S's enrolment at the centre on 21 December 2018 due to the excessive calls made by the appellant (and MW) to the centre. On 13 November 2018 it was reported to the department that the appellant had called the centre on 10 occasions that day, after the department had advised the appellant of the centre's concerns, that the excessive calls were interrupting S's education and staff were being abused.[7]

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6 Section 143. See affidavit of Ms Fox affirmed 25 February 2019 at paragraphs [16] – [23].

7 See affidavit of Ms Fox affirmed on 15 January 2019.

[58] Further, Mrs W did not know of the appellant's excessive and abusive contact with S's general practitioner. Mrs W stated that any contact the appellant had with the medical centre would have been the actions of a concerned father. Subpoenaed material before the learned Magistrate demonstrated that the appellant sent excessive and abusive emails to the surgery in an attempt to gain access to S's medical records.

[59] Mrs W said that any instability that S suffered as a result of his being asked to leave his day care centre was the direct result of the decision of the management of the centre. She said that any action taken by the appellant was as a concerned father looking to protect S's best interests.

[60] Mrs W made excuses for the appellant not attending contact appointments with S despite his being on a disability pension and not having any obligations to an employer. When asked about the appellant's failure to attend contact appointments between December 2017 and February 2018, and his only having attended 21 out of 45 appointments available to him, she attributed that to a communication breakdown between the appellant and departmental officers.

[61] Mrs W also agreed that the only occasions she had seen S were when she attended the appointments with the appellant. She had not contacted the department to arrange separate visits for herself. She claimed that she was not aware that was an option, despite having worked as a child safety officer herself and despite knowing that the appellant's father attended separate appointments to see S.

[62] Importantly there was no application before the learned Magistrate for S to be placed into the care of Mrs W. The Magistrate's findings were that Mrs W had not read much of the material, had little knowledge of the child protection concerns, and had minimal insight into the appellant's behaviour. There is no error in any of those findings. Having considered her evidence, Mrs W did not appreciate the child protection concerns and continually made excuses for the appellant's poor behaviour towards others involved in the care of S.

[63] There is no merit in this ground.

**Ground 10 – false and misleading evidence of Ms Grant and Ms Fox**

[64] The appellant argues that Ms Grant gave false evidence that she asked the appellant on 14 December 2017 for his doctor's information and details. Ms Grant's evidence before the learned Magistrate was that the department had asked for the details of the appellant's doctor and that such information was not provided by him. She did not give evidence that the request was made on 14 December 2017. In her affidavit sworn on 17 January 2018 Ms Grant states that on 14 December 2017 she and another Child Safety Officer met with the appellant where he indicated that he was not compliant with his medication. He refused to undergo a drug screen test. The appellant's counsel cross-examined Ms Grant but did not challenge her evidence as contained in her affidavit.

[65] The appellant has not established that Ms Grant's evidence was false. The appellant seeks to leave to rely upon the closed circuit television footage taken from the offices of the department on 14 December 2017 to demonstrate no such conversation occurred. Leave to adduce this evidence is refused as the appellant has not established that the evidence before the Magistrate was false.

[66] The appellant also argues that Ms Fox gave false evidence that she had attended five contact visits with S and the appellant. The question Ms Fox was asked was how many contact visits between S and Mrs S and the appellant had she supervised. Her answer was *"a limited number…around five possibly."* There is no evidence that the appellant has relied upon other than his own statements from the bar table to demonstrate that this evidence is false.

[67] Neither witness was challenged in cross-examination by the appellant's counsel about these matters. There is no merit in this ground.

**Ground 11 – Family Contact Report**

[68] The appellant argues that a Family Contact Report exhibited to the affidavit of Ms Fox is false. The document exhibited is referred to in the affidavit of Ms Fox as a copy of the available case notes from contact visits for MW and the appellant. The report that he criticises relates to a contact visit on 23 November 2017. I give the appellant leave to rely upon closed circuit television footage of this visit. That footage is a visual recording and contains no audio. The report writer appears to be making contemporaneous notes of what is occurring. The report insofar as it describes the physical movements and actions of the appellant, MW and S during a contact visit, appears consistent with what can be seen in the footage. The closed circuit television footage does not demonstrate that the report is fabricated or false and misleading as submitted. In any event, it relates to only one family contact visit which occurred when S was 2 years of age.

[69] There is no merit in this ground.

**Ground 12 – the appellant's criminal history**

[70] The appellant argues that his criminal history was not obtained by the department or DCPL until after the filing of the application for a Child Protection Order on 19 December 2017. He argues that the department was in possession of his criminal history and should have filed it immediately rather than exhibiting copies of a SCAN report which contains allegations of breaches of a domestic violence order of which the appellant has not been convicted.

[71] The appellant's criminal history was before the learned Magistrate. The timing of its provision to the court does not impact in any way on what the Magistrate had to decide.

[72] There is no merit in this ground

**Grounds 1 and 9 – the Magistrate erred in finding that S was a child in need of protection and in making a Child Protection Order**

[73] The appellant has not pursued his argument that the Magistrate failed to provide reasons for his decision but rather has argued that the evidence did not support the findings that the learned Magistrate made.

[74] The learned Magistrate found that S was a child in need of protection as he had suffered emotional harm and was at risk of suffering significant further harm due to neglect because of the unassessed mental health of the appellant.

[75] Section 10 of the *Child Protection Act 1999* provides that a child in need of protection is a child who –

(a) has suffered significant harm, is suffering significant harm or is an unacceptable risk of suffering significant harm; and

(b) does not have a parent able and willing to protect the child from harm.

[76] Harm is defined in section 9 as any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing. It is immaterial how the harm is caused. It can be caused by physical, psychological or emotional abuse or neglect or sexual abuse or exploitation.

[77] The act requires the Childrens Court to have regard to the principles stated in it to the extent that they are relevant. The main principle in administering the Act is that the safety, well-being and best interests of the child are paramount.

[78] Other general principles applicable are contained in section 5B of the Act which states:

**5B Other general principles**

The following are general principles for ensuring the safety, wellbeing and best interests of a child—

(a) a child has a right to be protected from harm or risk of harm;

(b) a child's family has the primary responsibility for the child's upbringing, protection and development;

(c) the preferred way of ensuring a child's safety and wellbeing is through supporting the child's family;

(d) if a child does not have a parent who is able and willing to protect the child, the State is responsible for protecting the child;

(e) in protecting a child, the State should only take action that is warranted in the circumstances;

(f) if a child is removed from the child's family, support should be given to the child and the child's family for the purpose of allowing the child to return to the child's family if the return is in the child's best interests;

(g) if a child does not have a parent able and willing to give the child ongoing protection in the foreseeable future, the child should have long-term alternative care;

(h) if a child is removed from the child's family, consideration should be given to placing the child, as a first option, in the care of kin;

(i) if a child is removed from the child's family, the child should be placed with the child's siblings, to the extent that is possible;

(j) a child should only be placed in the care of a parent or other person who has the capacity and is willing to care for the child (including a parent or other person with capacity to care for the child with assistance or support);

(k) a child should be able to maintain relationships with the child's parents and kin, if it is appropriate for the child;

(l) a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values;

(m) a delay in making a decision in relation to a child should be avoided, unless appropriate for the child.

[79] The appellant gave evidence that he has been diagnosed with what is a serious mental illness. He further said that he has been prescribed medication for that condition for which he was not always compliant. On the appellant's own evidence that illness had the capacity to impact upon his daily functioning. He had told members of the department at times that he couldn't take on the primary care of S because of his mental health.[8] That fact that he made such comments was not disputed by the appellant.

[80] The appellant in his evidence said in answer to a question *"what are the symptoms of manic depression that you say preclude you from working in paid employment?"* that *"you feel manic and you feel depressed. It's called manic depression. Go look it up. It's on the internet."*[9] He claimed to have not said this in his argument before me however the transcript makes clear what his evidence was. Alternatively, he claims that he was talking about the effects on other people of this illness and not himself. I do not accept that argument. The question and answers that the appellant gave throughout his evidence as to the impact of his bipolar disorder on his functioning are clear. He suffers variously from mania,[10] overwhelming tiredness[11] and depression.[12]

[81] The potential consequences of the appellant's illness upon his ability to function and care for S were and are apparent. The evidence before the Magistrate was that such concerns were raised as early as 12 months prior to the trial.[13]

[82] The evidence before the Magistrate included that there were periods of significant time when the appellant had no contact with S.[14] Between December 2017 and February 2018 the appellant did not visit with S. Between 13 March 2018 and 28 August 2018 (five months) the appellant cancelled or failed to attend approximately 21 out of 43 scheduled visits. The appellant's absence from visits with S caused S to get upset during contact with his mother and when back in his carer's house.[15] The appellant initially claimed that this information was false however he accepted in argument that his absence at visits might have caused S to become upset, but that blame for S's upset shouldn't be sheeted home to him because he had other commitments and was otherwise dictated to by the department as to when he could see his son. The applicant informed the department on 14 February 2018 that his reason for not attending contact visits with S was because he refused to attend the offices of the Chermside Child Safety Service Centre. Two months had passed since he had last seen his son before he provided this information to the department.

[83] The lack of contact the appellant had with S when he was not in paid unemployment and the paucity of the reasons for having no or little contact does lead to a concern that his illness may have been impacting upon his social functioning during those

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8 Evidence of Ms Grant at transcript 1-7 line 5.
9 Transcript 1-115 line 5.
10 Transcript 1-42 line 27.
11 Transcript 1-73 line 37.
12 Transcript 1-115 line 5.
13 Affidavit of Ms Fox affirmed 6 April 2018 exhibit JF-01 case plan at page 7.
14 Affidavit of Ms Fox affirmed 26 February 2018 at paragraphs [21] and [22] and affidavit of Ms Fox affirmed 3 September 2018.
15 Affidavit of Ms Fox affirmed 15 January 2019 exhibit JF-04 at page 55.

periods. The appellant said in his evidence, for example that if he was deeply involved in writing a song (he is a musician) that he may choose to continue that creative process rather than spending time with his son.[16] That the appellant, who quite clearly loves his son, would choose to neglect him for significant periods of time for such scant reason does lead to a concern as to the possible impact of his illness upon his functioning.

[84] The appellant argues that he has been discriminated against because of his mental illness. I do not accept that argument. On his own evidence serious concerns arise as to the nature of his mental illness and its impact upon his ability to function and to parent a child. The request by the department for the appellant to undertake a psychiatric assessment was a reasonable one. That the appellant chose not to do so and chose not to place any medical evidence before the Magistrate as to his illness and its impact upon his functioning and ability to parent, necessarily meant that the only finding open is that S is at an unacceptable risk of suffering significant neglect because of the appellant's mental health. The order made is appropriate and desirable for his protection.

[85] The appellant said in his evidence that he told the separate representative *"I am not prepared to go ahead with all these assessments you wish to put me under whilst you've got my son running around with the two men and I'm a Christian."*[17] This provides no reasonable explanation for why the appellant would not have undertaken a psychiatric assessment but rather reveals what the true nature of the appellant's complaint is, that his son was placed with same-sex carers.

[86] The appellant's reasons for not attending contact visits with his son and his reasons for not undertaking the psychiatric assessment (that it is his own private business) quite clearly demonstrate that he prioritises his own interests over the needs of S as the learned Magistrate found. Accordingly, the appellant is not a parent either willing or able to protect S from harm.

[87] The error which the learned Magistrate made as to the hair follicle test has no impact upon the reasoning as to why a Child Protection Order was made.

[88] The learned Magistrate was required to consider the least invasive order. He was also required to consider whether Mrs W, the appellant's mother, had the capacity to care for S. On the evidence placed before the Magistrate, which was limited, she did not. She had little knowledge of any of the concerns of the department. She made excuses for the appellant's behaviour. She had not completed the kinship care application.

[89] The appellant's argument is that a Permanent Care Order in favour of his mother should have been made. A permanent care order grants long-term guardianship of a child to a suitable person.[18] It is a more intrusive order than the Child Protection Order made by the learned Magistrate granting short-term custody of S to the chief executive for a period of two year. Accordingly it could not have been made.

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16 Transcript page 1-111 line 10.
17 Transcript 1-116 line 19.
18 Section 61(g) of the *Child Protection Act 1999.*

[90] The other aspects of section 59 were satisfied. There was no contest that there was an appropriate case plan; that the necessary conferences had been held; and that S was too young to have his wishes made known.

[91] The evidence before the Magistrate clearly established that S was at an unacceptable risk of being neglected by the appellant if placed in his care because of his mental illness which had not been assessed by any medical practitioner and for which he was, on his own admission, not compliant with his prescribed medication.

[92] The appellant sought leave to adduce a series of videos of himself, S and MW recorded prior to S being taken into care. I have watched the videos. They have no bearing on the matters raised in the grounds of appeal and the considerations contained in section 59 of the Act, each of which I am satisfied.

[93] The appeal is dismissed.