

CITATION: *Minister for Health & Community Services v TB* [2007] NTMC 025

PARTIES: MINISTER FOR HEALTH AND
COMMUNITY SERVICES

v

TB

TITLE OF COURT: Family Matters Court

JURISDICTION: Family Matters - Alice Springs

FILE NO(s): 9711099

DELIVERED ON: 22 May 2007

DELIVERED AT: Alice Springs (via video link from Darwin)

HEARING DATE(s): 17 April 2007

JUDGMENT OF: M Little

CATCHWORDS:

Community Welfare Act - Whether Family Matters Court has jurisdiction to conduct s.49 review – Home Order transferred pursuant to s62C of the Community Welfare Act

REPRESENTATION:

Counsel:

Minister: Jody Truman
Child: Mark Heitmann

Solicitors:

Minister: Povey Stirk
Child: Mark Heitmann

Judgment category classification:

Judgment ID number: [2007] NTMC 025

Number of paragraphs: 32

IN THE FAMILY MATTERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 9711099

BETWEEN:

**MINISTER FOR HEALTH AND
COMMUNITY SERVICES**

Applicant

AND:

TB

Child

REASONS FOR JUDGMENT

(Delivered 22 May 2007)

Ms M LITTLE SM:

1. On the 17th of April 2007 this matter came before the Family Matters Court in Alice Springs, by way of s.49 of the Community Welfare Act. The Minister objected to the Court hearing the matter and argued that the Court had no jurisdiction. Submissions were made on this jurisdictional question and I reserved my decision. This is now the decision on the jurisdictional question. The parties are not able to locate any cases directly relevant to the question before the Court.
2. Action number 9711099 relates to a child TB born on the 25th of January 1997. On the 12th of June 1997 Mr Donald SM made an order declaring the child to be in need of care and placing him in the sole guardianship of the Minister for 3 months. From that time until 2004, orders for sole guardianship in the Minister were continued for varying periods of time. It is not necessary to set out the various orders made.
3. On the 20th of October 2004 the Court made an order as follows:

1. The child be placed in the sole guardianship of the Minister for Health and Community Services until he reaches 18 years of age.
2. Review on the 18th of October 2006 at 9.30am.
4. The review date specified complies with section 49 of the Act in that it was within 2 years. Since the 18th of October 2006 there have been various adjournments of that review, where the jurisdictional issues the subject of this decision were touched upon.
5. The jurisdictional objection by the Minister with respect to the hearing of the review relates to administrative procedures undertaken by the Minister pursuant to s.62C of the Community Welfare Act transferring a child protection order (the home order) to Victoria. The representative for the child submitted that the Court did have jurisdiction to hear the review. The Minister submits that, as a consequence of a transfer of the home order by the Minister, that the review can not take place. The mother has been served but has never attended or been represented in the proceedings. The fathers' whereabouts are unknown.
6. On the 9th of March 2007 the following documents from Victoria were filed on the Court file:
 - Guardianship to Secretary order date 19th of September 2006
 - Children's Court of Victoria certified extract (Family Division) dated 19th of September 2006.
7. The Guardianship to Secretary order sets out that an order is made for the period from the 19th of September 2006 to the 18th of November 2008. The Children's Court of Victoria certified extract sets out that the application before the Court was a registration of an interstate child protection order. There has been no other documentation filed with the Court file with respect to the transfer of the matter to Victoria.
8. The following matters are agreed by the parties before the Court:

1. The declaration that the child is in need of care has not been revoked.
 2. The order made on the 20th of October 2004 that the child is in the sole guardianship of the Minister until he is 18 years of age has not been revoked.
 3. The case was adjourned for review to 18 October 2006, and that order has not been revoked.
 4. The proceedings are ongoing and have not been discontinued.
9. The order of 20th of October 2004 was made pursuant to s.43(5)(d) of the Community Welfare Act. Section 49 of the Community Welfare Act relates to orders made pursuant to this sub paragraph. Section 49(1) of the Community Welfare Act reads:

49. Review by Court

(1) The Court shall review the circumstances of a child in relation to whom an order under section 43(4) is made containing a direction referred to in section 43(5)(d) –

- (a) where the sole rights in relation to the custody of the child are vested in the Minister – at intervals not exceeding 2 years

...

and may make such further orders in relation to the child as it could have made on the original application.

10. Sub paragraph (b) is not relevant in these circumstances. The order made relating to the child TB contains a direction pursuant to s.43(5)(d) and therefore s.49 applies. The Act sets out that the Court shall review the circumstances of the child (my emphasis). There is a requirement for a review to take place at intervals not exceeding 2 years.

11. In the Court report before the Court on the 20th of October 2004 (which is dated the 12th of October 2004) the Minister sought an order that the Minister be the sole guardian of the child until he was 18 years of age with a review in 2 years. The report flags that the matter may be re-listed before the Court to allow the order to be transferred to Victoria once placement is agreed. That is, they flagged that they may well make an application pursuant to s.62H of the Community Welfare Act. As it transpired they did not apply to the Court for a transfer under this section and it would appear that an administrative transfer of a child protection order occurred under s.62C of the Community Welfare Act.
12. Part VIIA of the Community Welfare Act sets out the three ways a transfer of either an order or a proceeding from the N.T. can occur and reads as follows:

PART VIIA – INTERSTATE TRANSFER OF CHILD PROTECTION ORDERS AND CHILD PROTECTION PROCEEDINGS

Division 1 – Preliminary

62A. Definitions

In this Part, unless the contrary intention appears –

"child protection order" means an order (other than an interim transfer order) that –

- (a) is made under a child welfare law; and
- (b) gives a minister, government department, statutory authority or other organisation, or the chief executive officer or other officer of a government department, statutory authority or other organisation, responsibility in relation to the guardianship or custody (however described) of the child;

"child protection proceeding" means a proceeding commenced in a Court under a child welfare law for –

- (a) a finding that the child is in need of care or protection or any other finding that is, under the child welfare law, a prerequisite to the exercise by the Court of a power to make a child protection order; or
- (b) a child protection order or an interim transfer order, a variation or revocation of the child protection order or interim transfer order or an extension of the period for which a child protection order or an interim transfer order is in force;

"child welfare law" means –

- (a) the law of a State that substantially corresponds to Part VI; or
- (b) a law of a State prescribed under section 62B(a) to be a child welfare law;

"Court" means a court of a State with jurisdiction to hear and determine a child protection proceeding at first instance;

"home order" means an order made by the Family Matters Court under Part VI;

"home proceeding" means a proceeding commenced in the Family Matters Court under Part VI;

"interim transfer order" means –

- (a) an order made under section 62R;
- (b) an order made by the Supreme Court under section 62T that has the same effect as an order that may be made under section 62R; or
- (c) an order by a Court under an interstate law that has the same effect as an order that may be made under section 62R;

"interstate law" means –

- (a) the law of a State that substantially corresponds to this Part; or
- (b) a law of a State prescribed under section 62B(b) to be an interstate law;

"interstate officer" means –

- (a) the person holding, acting in or performing the duties of an office or position held or established by or under a child welfare law of a State that has principal responsibility for the supervision and protection of children in the State who are in need of care (however described); or
- (b) the person holding, acting in or performing the duties of an office or position prescribed under section 62B(c) to be an interstate office;

"interstate order" means –

- (a) a decision under an interstate law that substantially corresponds with Division 2, Subdivision 1 to transfer a child protection order to the Territory;

- (b) an order of a Court under an interstate law for the transfer of a child protection order or a child protection proceeding to the Territory; or
- (c) an interim transfer order made by a Court under an interstate law;

"parent", in relation to a child to whom a home order or home proceeding relates, means a parent, guardian or other person having the custody of the child but does not include a person who is the child's foster parent;

"receiving State" means a State in which an interstate law is in force to which the Minister transfers or proposes to transfer a home order or a home proceeding under this Part;

"sending State" means a State in which an interstate law is in force from which an interstate officer transfers or proposes to transfer a child protection order or child protection proceeding to the Territory under the interstate law;

"State" means a State or another Territory of the Commonwealth or New Zealand;

"working day" means a day on which the registry of the Supreme Court is open for business.

62B. Minister to prescribe child welfare laws, interstate laws and interstate officers

The Minister may, by notice in the *Gazette*, prescribe –

- (a) a law of a State to be a child welfare law;
- (b) a law of a State to be an interstate law; or
- (c) an office or position held or established under a child welfare law to be an interstate office.

Division 2 – Transfer of child protection orders

Subdivision 1 – Transfer by Minister

62C. Minister may transfer home order

(1) If a child to which a home order relates is residing or is about to reside in a State in which an interstate law is in force, the Minister may transfer the home order to the State.

- (2) The Minister must not transfer the home order –
 - (a) if the home order is subject to an appeal in the Supreme Court;

- (b) if an application has been made to the Family Matters Court for the transfer of the home order under Subdivision 2;
- (c) if the Minister is satisfied that the welfare of the child will be adversely affected by the transfer, taking into account the wishes of the child, each of the child's parents and any other person who has access to the child under the home order;
- (d) unless in the opinion of the Minister a child protection order that has the same or a similar effect as the home order may be made under the child welfare law of the receiving State and it is desirable that a child protection order that has the same or a similar effect as the home order be registered in that State;
- (e) unless the Minister considers that an interstate officer in the receiving State is or will be in a better position to exercise powers and functions under a child protection order relating to the child than he or she is or will be under the home order;
- (f) subject to section 62D, unless the Minister has proposed the terms of the child protection order that, on the transfer, will apply in the receiving State and the relevant interstate officer has consented in writing to the transfer and to the terms of the child protection order; and
- (g) unless each person whose consent to the transfer is required under section 62E has consented to the transfer.

62D. Terms of proposed child protection order to be transferred

(1) The Minister must determine and specify the period for which a proposed child protection order referred to in section 62C(2)(f) is to be in force.

- (2) The period is to be –
 - (a) if it is possible under the child welfare law of the receiving State for the proposed child protection order to be in force until the expiry of the period that the home order would, but for the transfer, be in force – the period that ends on the expiry of the home order; or
 - (b) if that is not possible – the period expiring as close as possible to, but not later than, the day that the period for which the home order would, but for the transfer, be in force expires.

(3) In determining the other terms of the proposed child protection order, the Minister may include any terms and conditions that may, under the child welfare law in force in the receiving State, be included in a child protection order having the same or similar effect as the home order to be transferred.

62E. Certain persons required to consent to transfer of order

(1) If the Minister proposes to transfer a home order that includes a direction referred to in section 43(5)(a) or (b), the Minister may not transfer the home

order unless each parent of the child to whom the home order relates consents to the transfer of the home order.

(2) If the Minister proposes to transfer a home order that includes a direction referred to in section 43(5)(c) or (d), the Minister may not transfer the home order unless each parent of the child to whom the home order relates and any other person who has access to the child under the home order consents to the transfer of the home order.

(3) The Minister must ensure that, before a parent or other person consents or refuses to consent to a proposed transfer of a home order, the parent or other person is informed of the effect of consenting to the transfer and of refusing or failing to consent to the transfer (including being informed about the Minister's right to apply to the Court for an order for the transfer of the home order, the right of review under section 62G and the right of appeal to the Supreme Court under section 62S).

(4) The Minister is not required to obtain the consent of a person referred to in this section to the transfer of a home order, or to inform such a person of the effect of consenting or refusing or failing to consent to the transfer of the home order, if the person cannot be found after reasonable inquiry.

62F. Notification to child and his or her parents

(1) If the Minister decides to transfer a home order to a State under section 62C, the Minister must give notice in writing of his or her decision to –

- (a) each parent of the child to whom the home order relates;
- (b) each person (other than a parent of the child) who has access to the child under the home order; and
- (c) if the child is 10 or more years of age – the child.

(2) The Minister must give the notice to the persons referred to in subsection (1), if any, within 3 days after making his or her decision.

(3) The notice is to include –

- (a) details of the child protection order that will apply in relation to the child in the receiving State;
- (b) sufficient details to inform each person to whom the notice is given about his or her right of review under section 62G and how to apply for review of the Minister's decision; and
- (c) sufficient details to inform each person to whom the notice is given about the right of appeal to the Supreme Court under section 62S.

(4) The Minister is not required to give notice to a person under this section if the person cannot be found after reasonable inquiry.

62G. Review of decision

(1) A person to whom the Minister gives notice under section 62F may, within 10 working days after the date of the notice, apply to the Family Matters Court for review of the Minister's decision to transfer the home order.

(2) The application for review may be for review of the decision on the merits or on particular grounds specified in the application.

(3) The operation of the Minister's decision is stayed until the review is concluded or is, for any reason, discontinued.

(4) In reviewing a decision under this section, the Family Matters Court may confirm, vary or reverse the decision.

Subdivision 2 – Transfers by Court

62H. Family Matters Court may hear application for order to transfer home order

(1) The Minister may apply to the Family Matters Court for an order for the transfer of the home order to the other State if –

- (a) a child to which a home order relates is residing or is about to reside in a State in which an interstate law is in force;
- (b) the home order is not subject to an appeal in the Supreme Court;
- (c) the Minister is satisfied that the welfare of the child will not be adversely affected by the transfer, taking into account the wishes of the child, each of the child's parents and any other person who has access to the child under the home order;
- (d) the Minister considers that an interstate officer in the receiving State is or will be in a better position to exercise powers and functions under a child protection order relating to the child than he or she is or will be under the home order;
- (e) the Minister has proposed the terms of the child protection order that, on the transfer, will apply in the receiving State and the relevant interstate officer has consented in writing to the transfer and to the terms of the child protection order; and
- (f) any one or more of the following apply:
 - (i) a person required under section 62E to consent to the transfer of the home order by the Minister has refused or failed to do so;
 - (ii) in the opinion of the Minister it is desirable that the child protection order that would, on the transfer, be registered in that State contains terms (being terms that may be made under the

child welfare law of the receiving State) that are not the same or do not have a similar effect as the terms of the home order;

- (iii) in the opinion of the Minister it is likely that, if he or she were to decide to transfer the home order to that State, the child (if entitled to seek review of the Minister's decision under section 62G) would seek review of the decision;
- (iv) other circumstances relating to the transfer of the home order cause the Minister to consider that it is appropriate that the Family Matters Court hears and determines whether the home order be transferred to that State.

(2) The Family Matters Court must not hear an application for an order for the transfer of a home order unless –

- (a) it is satisfied that the Minister is entitled to make the application under subsection (1); and
- (b) the Minister has prepared and given to the Court a report in relation to the application that includes –
 - (i) a history of the care of the child by the Minister;
 - (ii) details of any offences committed by the child and any sentence imposed on the child for committing those offences;
 - (iii) details of any offences the child has been charged with committing and any criminal proceedings pending against the child;
 - (iv) details of any sentencing order under this Act that is in force in respect of the child at the time of making the application;
 - (v) the recommendations of the Minister concerning the order for the transfer of the home order; and
 - (vi) the prescribed information, if any.

62J. Procedure

Sections 36(2), (3) and (4), 37, 38, 39(2) and (3), 40, 41, 44(1) and (4), 45, 46 and 47 apply, to the extent necessary and with the necessary changes, to and in relation to an application to the Family Matters Court under section 62H(1) for the transfer of a home order as if the application were an application to the Court that a child be found to be in need of care.

62K. Court to have regard to certain matters in determining application

(1) In determining whether to make an order for the transfer of a home order, the Family Matters Court must have regard to the following matters:

- (a) the place of residence or likely place of residence of the child, each parent of the child and any other person who is significant to the child;
- (b) whether the welfare and interests of the child will be promoted or adversely affected by the transfer of the home order;
- (c) whether it is desirable that a child protection order relating to the child be registered in the receiving State;
- (d) any wishes expressed by the child, each parent of the child and any other person who has access to the child under the home order;
- (e) whether the child protection order proposed by the Minister for transfer and registration in the receiving State may be made under a child welfare law of the other State;
- (f) the terms to be included in the child protection order that will be in force in the receiving State;
- (g) whether an interstate officer in the receiving State is or will be in a better position to exercise powers and functions in relation to the guardianship and custody of the child under a child protection order relating to the child than the Minister is or will be under the home order.

(2) The Family Matters Court must consider and have regard to the report from the Minister referred to in section 62H(2)(b).

62L. Order of Court

(1) On determining the application, the Family Matters Court may make an order –

- (a) for the transfer of the home order to the receiving State; or
- (b) dismissing the application.

(2) If the Court makes an order under subsection (1)(a), the order must specify the terms of the proposed child protection order, including the period that the order is to be in force in the receiving State.

(3) The period the proposed child protection order is to be in force in the receiving State is to be any period, commencing on the date of its registration in the receiving State and expiring not later than the date on which the home order would (but for the transfer) have expired, for which the order may be in force under the child welfare law of that State.

(4) In determining the other terms of the proposed child protection order, the Court may include any terms that –

- (a) may, under the child welfare law of the receiving State, be included in a child protection order relating to the child (whether or not having the same or similar effect as the home order to be transferred); and

- (b) the Court considers promote the welfare and interests of the child.

Division 3 – Transfer of child protection proceedings

62M. Family Matters Court may hear application for order to transfer child protection proceeding

(1) If a child to which a home proceeding relates is residing or is about to reside in a State in which an interstate law is in force, the Minister may apply to the Family Matters Court for an order for the transfer of the proceeding to the Court of the State.

(2) The Family Matters Court must not hear an application for the transfer of a home proceeding unless –

- (a) the relevant interstate officer in the receiving State has consented in writing to the transfer of the home proceeding; and
- (b) the Minister has prepared and given to the Court a report in relation to the application that includes –
 - (i) details of any offences committed by the child and any sentence imposed on the child for committing those offences;
 - (ii) details of any offences the child has been charged with committing and any criminal proceedings pending against the child;
 - (iii) details of any sentencing order under this Act that is in force in respect of the child at the time of making the application;
 - (iv) the recommendations of the Minister concerning the order for the transfer of the home proceeding; and
 - (v) the prescribed information, if any.

62N. Procedure

Sections 36(2), (3) and (4), 37, 38, 39(2) and (3), 40, 41, 44(1) and (4), 45, 46 and 47 apply, to the extent necessary and with the necessary changes, to and in relation to an application to the Family Matters Court for the transfer of a home proceeding as if the application were an application to the Court that a child be found to be in need of care.

62P. Court to have regard to certain matters in determining application

(1) In determining whether to make an order for the transfer of a home proceeding, the Family Matters Court must have regard to the following matters:

- (a) the place of residence or likely place of residence of the child, each parent of the child and any other person who is significant to the child;

- (b) whether the welfare and interests of the child will be promoted or adversely affected by the transfer of the home proceeding;
- (c) whether any other proceedings relating to the child have been commenced, are pending or have been heard and determined under this Act or the child welfare law of the receiving State;
- (d) whether it is desirable that a child protection order relating to the child be made under the child welfare law of the receiving State and registered in that State;
- (e) any wishes of the child and each parent of the child;
- (f) the place where any of the matters giving rise to the home proceeding arose;
- (g) whether the Minister or an interstate officer in the receiving State is or will be in the better position to exercise powers and functions in relation to the guardianship and custody of the child.

(2) The Court must consider and have regard to the report from the Minister referred to in section 62M(2)(b).

62Q. Order of Court

(1) On determining the application, the Family Matters Court may make an order –

- (a) for the transfer of the home proceeding to the receiving State; or
- (b) dismissing the application.

(2) If the Family Matters Court makes an order under subsection (1)(a), the proceeding commenced in the Family Matters Court is discontinued on the filing of a copy of the order in the Court of the receiving State for registration.

62R. Interim transfer order

(1) If the Family Matters Court makes an order under section 62Q(1)(a), the Court may also make an order –

- (a) releasing the child from or placing the child into the care of a person; and
- (b) giving the control and supervision of the care of the child to an interstate officer in the receiving State or another person in that State to whom responsibility for the control and supervision of the care of the child may be given under the child welfare law of that State.

(2) An order under subsection (1) –

- (a) remains in force for the period not exceeding 30 days specified in the order; and
- (b) may be subject to any conditions the Family Matters Court considers just and specifies in the order.

Division 4 – Appeals to Supreme Court

62S. Right of appeal

The following persons may appeal to the Supreme Court against the decision on a review under section 62G or an order of the Family Matters Court under section 62L, 62Q or 62R:

- (a) the Minister;
- (b) a parent of the child to whom the decision or order relates;
- (c) a person (other than a parent of the child to whom the decision or order relates) who has or, before the decision or order was made, had access to the child under the home order the subject of the decision or order;
- (d) if the child is 10 or more years of age – the child.

62T. Procedure

(1) An appeal under section 62S is to be filed in the Supreme Court within 10 working days after the date the decision or order to which the appeal relates is made.

(2) The operation of the decision or order is stayed until the appeal is concluded or is, for any reason, discontinued.

- (3) The Supreme Court –
 - (a) may not extend the time fixed for making the appeal;
 - (b) in determining the appeal has all the powers of the Family Matters Court; and
 - (c) may, in the manner it considers appropriate –
 - (i) affirm, vary or reverse the decision or order appealed against;
 - (ii) if the appeal is against an order of the Family Matters Court – remit the matter to the Family Matters Court for further hearing or re-hearing; and
 - (iii) make any other orders, including an interim transfer order and orders as to costs, that it considers just.

62U. Control of persons present at hearing and publications about appeal

(1) The Supreme Court must order a person who is not directly interested in an appeal under section 62S and who does not have sufficient reason why he or she should be present at the hearing of the appeal not to remain in or enter a room or place in which the appeal is being heard or not to remain within the hearing of the Court.

(2) A person must not remain in or enter a room or place, or remain within the hearing of the Court, in contravention of an order under subsection (1).

Penalty: 100 penalty units or imprisonment for 6 months.

(3) A person must not publish a report of an appeal under section 62S or the result of the appeal unless he or she does so –

(a) with the leave of the Supreme Court; or

(b) in good faith under or for the purposes of the administration of this Act.

Penalty: If the offender is a natural person – 100 penalty units or imprisonment for 6 months.

If the offender is a body corporate – 500 penalty units.

Division 5 – Registration etc. of orders and proceedings

Subdivision 1 – Orders and proceedings transferred to Territory

62W. Filing and registration of interstate orders

(1) If –

(a) an interstate order is made to transfer a child protection order or a child protection proceeding to the Territory;

(b) both the time for seeking review of the interstate order, if any, and the time for commencing an appeal against the interstate order under the interstate law have expired; and

(c) the decision by the interstate officer or the order of the Court to transfer the interstate order to the Territory is not subject to a review or appeal or otherwise stayed because of a review of or appeal,

the Minister must file a copy of the interstate order in the Family Matters Court for registration as soon as possible.

(2) The Clerk receiving the copy of the interstate order must register the interstate order in the Family Matters Court.

62X. Effect of registration of interstate orders

(1) On the registration in the Family Matters Court of an interstate order –

- (a) if the interstate order is for the transfer of a child protection order to the Territory – subject to subsection (2), the child protection order is taken for all purposes to be a home order of the same type made by the Family Matters Court on the day on which it is registered and it may be dealt with under this Act or any other law of the Territory as if it were a home order; or
- (b) if the interstate order is for the transfer of a child protection proceeding to the Territory – the child protection proceeding is taken to be a proceeding under Part VI that is commenced in the Family Matters Court on the day on which the order is registered.

(2) No proceedings may be brought under section 62G or 62S in respect of an interstate order referred to in subsection (1)(a).

62Y. Revocation of registration

(1) Any of the following persons may apply to the Family Matters Court for the revocation of the registration of an interstate order:

- (a) the Minister;
- (b) if the child to whom the interstate order relates is 10 or more years of age – the child;
- (c) a parent of the child;
- (d) any other party to the proceeding in the Court that resulted in the making of the interstate order.

(2) On the making of an application for revocation under subsection (1), a Clerk must send a copy of the application to the relevant interstate officer and each party referred to in that subsection (other than the applicant).

(3) The Family Matters Court may only revoke the registration of an interstate order if it is satisfied that at the time it was registered –

- (a) the time under the interstate law for seeking review or commencing an appeal against the interstate order had not expired; or
- (b) the interstate order was subject to review or appeal or was otherwise stayed because of a review or appeal.

(4) The revocation of the registration of an interstate order under this section does not prevent the registration of the order at a later time.

62Z. Duties of Clerk of Family Matters Court

(1) On the registration of an interstate order under section 62W, a Clerk must notify the Court in the sending State of the registration.

(2) On the revocation of the registration of an interstate order under section 62Y, a Clerk must –

- (a) notify the Court in the sending State of the revocation; and
- (b) return to that Court all documents filed in the Family Matters Court in relation to the registration of the interstate order.

Subdivision 2 – Orders and proceedings transferred from Territory

62ZA. Effect of registration and revocation of registration of home order in receiving State

(1) On the registration in the Court of the receiving State of a decision by the Minister under section 62C to transfer a home order, the home order ceases to have effect.

(2) On the registration in the Court of the receiving State of an order of the Family Matters Court under section 62G or 62L, or of the Supreme Court under section 62T, to transfer a home order, the home order ceases to have effect.

(3) If the registration in the Court of the receiving State of the order to transfer the home order is revoked under the interstate law of that State, the home order revives on that revocation.

(4) A home order revived under subsection (3) continues in force until the date it would, but for its registration under the interstate law, have expired under this Act.

62ZB. Effect of registration and revocation of registration of home proceeding in receiving State

(1) On the registration in the Court of the receiving State of an order of the Family Matters Court under section 62Q, or the Supreme Court under section 62T, to transfer a home proceeding, the home proceeding is discontinued.

(2) If the registration in the Court of the receiving State of the order to transfer the home proceeding is revoked under the interstate law of that State, on that revocation, the home proceeding continues before the Family Matters Court, and the Family Matters Court may hear the home proceeding and exercise its powers under Part VI in relation to the child the subject of the home proceeding, as if the order to transfer the home proceeding had not been made.

62ZC. Transfer of Court file

(1) On the transfer of a home order or home proceeding from the Territory, a Clerk must send all documents filed in or otherwise held by or at the Family Matters Court in connection with the home order or home proceeding to the Court of the receiving State.

- (2) The Clerk must not comply with subsection (1) –

- (a) unless the time for seeking review of, and commencing an appeal against, the transfer of the home order or home proceeding has expired; or
- (b) if the decision by the Minister to transfer the home order or the order of the Family Matters Court for the transfer of the home order or home proceeding is subject to a review or appeal or is otherwise stayed because of a review of or an appeal.

Division 6 – Miscellaneous

62ZD. Hearing and determination of transferred proceeding

In hearing and determining a child protection proceeding transferred to the Family Matters Court under an interstate law, the Family Matters Court –

- (a) is not bound by any finding of fact made in the proceeding in the Court of the sending State before the proceeding was transferred to the Territory; and
- (b) may have regard to the transcript of and any evidence adduced in the proceeding in the Court of the sending State before it was transferred.

62ZE. Disclosure of information

Despite sections 97 and 97A and any other contrary intention in this Act, the Minister may authorise a person to disclose to an interstate officer any information that has come to his or her notice in exercising his or her powers or performing his or her functions under this Act if the Minister considers that it is necessary to do so to enable the interstate officer to exercise powers or perform functions under a child welfare law or an interstate law.

62ZF. Minister may consent or refuse to consent to transfer to Territory

If there is a proposal to transfer a child protection order or a child protection proceeding from a State to the Territory, the Minister may –

- (a) where the proposal is to transfer a child protection order – consent or refuse to consent to the transfer and to the terms of the child protection order proposed to apply in the Territory; or
- (b) where the proposal is to transfer a child protection proceeding – consent or refuse to consent to the transfer of the proceeding.

62ZG. Interstate officer's decision not reviewable in Territory

No proceedings seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration or an injunction (whether on the ground of absence of jurisdiction or any other ground) may be commenced in a court of the Territory against an interstate officer in respect of consent given or the failure or refusal to consent to the transfer of an interstate order to the Territory.

13. Accordingly, there are two forms of a transfer of a child protection order (one through the Court and one administratively), as well as the ability to transfer the entire proceedings.
14. With respect to a transfer of a home order by the Minister (which I have referred to as an administrative transfer), section 62D of the Community Welfare Act sets out that the period of a proposed child protection order pursuant to s.62C(2)(f) is to be, if possible, in force until the expiry of the period that the home order would, but for the transfer, be in force so that the period of the order expires on the expiry of the home order or if that is not possible to a period expiring as close as possible to, but not later than, the day that the period for which the home order would but for the transfer be in force. The Minister cannot seek an order to be made in an interstate jurisdiction for a period longer than the order made in the home jurisdiction. In this case an order is made in the Northern Territory jurisdiction until the child is 18 years of age (the longest an order can be made under the Community Welfare Act.) When considering the submissions before the Court, whatever is decided must be capable of application no matter the length of the order. The order in the receiving state cannot extend beyond the order from the home state. That is, it does not have a life after the home order expires.
15. As stated Part VIIA of the Community Welfare Act has three separate types of procedures that can be carried out with respect to interstate transfers of child protection orders and child protection proceedings. The first two procedures relate to 'orders' and the third procedure relates to 'proceedings'. Procedures in Subdivision 1 of Division 2 relate to a transfer of the order by the Minister and is the relevant subdivision in this case. There is no order of the Court made to effect a transfer. Subdivision 2 is a transfer by the Court. The Minister can apply to have a home order transferred to another jurisdiction and the Court can make an order pursuant to s.62L of the Community Welfare Act, either transferring the home order to the receiving state or to dismiss the application. If an order for transfer is made the order must specify the terms of the proposed child protection order including the period that the order is to be in force in the receiving state. The Court may make other orders which may have been included in a child protection order in the receiving state and which the Court considers promotes the

welfare and interest of the child. A transfer pursuant to s.62L ensures that the order has been specifically tailored for the transfer. The application is heard before the Family Matters Court in the same or similar way to any application which is heard. Service and notice provisions are in accordance with the Act generally. It does not have an equivalent notification procedure pursuant to s.62F which relates to procedures when there is an administrative transfer by the Minister. Pursuant to s.62F if a child is under ten years of age the Minister does not have to give notice in writing to the child of the decision to administratively transfer a home order.

16. Division 3 relates to a transfer of child protection proceedings. The Family Matters Court can hear an application for the transfer of the entire proceeding to another jurisdiction. The procedures, notice and service provisions are akin to any application under the Community Welfare Act. The Court may make an order under s.62Q transferring the home proceeding to the receiving state or dismissing the application. If the Family Matters Court does make an order transferring the home proceeding, the proceeding commenced in the Family Matters Court in the Northern Territory is discontinued on the filing of a copy of the order in Court of the receiving state for registration (s.62Q(2) of the Community Welfare Act).
17. Section 62ZA of the Community Welfare Act sets out as follows:

62ZA. Effect of registration and revocation of registration of home order in receiving State

- (1) On the registration in the Court of the receiving State of a decision by the Minister under section 62C to transfer a home order, the home order ceases to have effect.
- (2) On the registration in the Court of the receiving State of an order of the Family Matters Court under section 62G or 62L, or of the Supreme Court under section 62T, to transfer a home order, the home order ceases to have effect.
- (3) If the registration in the Court of the receiving State of the order to transfer the home order is revoked under the interstate law of that State, the home order revives on that revocation.
- (4) A home order revived under subsection (3) continues in force until the date it would, but for its registration under the interstate law, have expired under this Act.

18. The Minister's submission is that s.62ZA(1) applies in this case and as a consequence the review can not proceed as the home order has ceased to have effect. There is nothing before the Court to suggest that a receiving state (in this case Victoria) has registered in its Court a decision of the Minister under s.62C of the Community Welfare Act to transfer a home order. Annexure MFH 9 of the affidavit of Mark Friend Heitmann dated the 20th of February 07 (part of exhibit C2) is a document entitled "Filing of order or decision to transfer an interstate child protection order to Victoria for registration". That document relates to the child TB.

19. Part of that form sets out as follows:

"Details of order/Decision to transfer the Interstate Child Protection Order

The Order to Transfer the Interstate Child Protection Order is attached.

Who made the order? Family Matters Court Alice Springs

Interstate Order was made 20.10.2004"

20. No interstate child protection order is attached to the copy of the order annexed in the affidavit.

21. The document then sets out the details of the Victorian child protection order namely that there is a Guardianship to Secretary order, commencing on the 19th of September 2006 with an expiry date of 18th of September 2008. In the notice to parents and child it sets out:

"The filing of this document means that the above named child is now the subject of the above named Child Protection Order in Victoria."

22. The orders made by the Family Matters Court on 20th October 2004 are set out in paragraph 3 of this decision. Despite what is stated in the document entitled "Filing of order or decision to transfer an interstate child protection order to Victoria for registration", there was no transfer of the order of the 20th of October 2004 made by the Family Matters Court in Alice Springs to Victoria either on 20 October 2004 or at any later date. If there was a decision by the Minister to transfer the proceedings that has not been produced to this Court. Whether a

decision in writing has been produced to the Victorian authorities has not been able to be ascertained. There is a “Notification to Interstate Officer of Registration of Protection Order” which is also part of the same exhibit in Mr Heitmann’s affidavit. Dated 19 September 2006 it is addressed to the “Appropriate Officer of the Alice Springs Family Matters Court”. To this date, this form has not reached the Court file. There is no evidence that a form 11B has been completed or been given to those persons that the Minister is required to notify pursuant to s.62F of the Community Welfare Act.

23. Subsection 3 of section 62ZA of the Community Welfare Act sets out that if the receiving state revokes the home order, the home order revives on that revocation. Accordingly, whilst the home order has ceased to have effect under subsection 1, it remains in place and is able to immediately revive its effect upon the revocation of an interstate transfer. The Act is silent on what would occur if the interstate order expired or lapsed and was not renewed. The Community Welfare Act is beneficial legislation. The preamble sets out that the Act is “to provide for the protection and care of children and the promotion of family welfare and for other purposes”. Looking at the Community Welfare Act in its entirety, if an interstate order expired or lapsed, it is my view that the home order would continue to have the same effect it had at the time it was made.
24. The Minister’s submissions to the Court does not allow the Court to have any supervisory roll of the orders it has made under the Community Welfare Act following an administrative transfer. Orders of the Family Matters Court relate to persons under 18 years of age. This submission allows no mechanism to take account of situations where, for example, an interstate order expires and is not renewed. In such a circumstance, the Minister in the Northern Territory would surely have resumed responsibility as the sole guardian of the child TB and yet the Court would not be required to be notified or in a position to know what was occurring with respect to the child. The Court would be required to review the case pursuant to s.49 of the Community Welfare Act, yet not be told that the child no longer had a Victorian Order. On the Minister’s submissions the safety net of the Court’s obligatory supervisory role pursuant to s.49 has been taken away.

25. Subsection 4 of section 62ZA of the Community Welfare Act sets out that the home order continues in force to the date it would have expired under the Act should it be revived pursuant to ss.3. While the Act is silent on the question, it is open to find that should an order lapse or expire in the receiving state and not be renewed, that the home order would revive until the time it would have ordinarily have expired under the Community Welfare Act. Any other finding would place children in a vulnerable position. This would be contrary to the objects of the Community Welfare Act.
26. On the material before the Court there is no evidence that there was a decision by the Minister under s.62C to transfer a home order. Nevertheless I have a document from Victoria which sets out that the child is now the subject of a child protection order in Victoria. Mr Heitmann has raised numerous matters that go to whether or not the transfer was carried out in accordance with the procedures under the Community Welfare Act. I am not undertaking a review of the decision or of the procedures carried out. I have made some observations in the case and should there be a challenge to the question of the transfer I have flagged to the parties I would not hear that application. I accept that the Family Matters Court does not have a general right to review administrative procedures. A review of a decision by the Minister to transfer an order pursuant to the Community Welfare Act can be carried out by the Family Matters Court pursuant to s.62G of the Community Welfare Act. I am not undertaking such a review.
27. I find that the child TB is presently the subject of a child protection order in Victoria which has come about due to a registration of the Northern Territory order made on the 20th of October 2004. The Victorian order expires on the 18th of September 2008. Registration of the Northern Territory order in Victoria has not had the effect of revoking the Northern Territory order made on 20 October 2004.
28. What do the words “the home order ceases to have effect” in section 62AZ(1) of the Community Welfare Act mean? As stated, it does not mean the home order is revoked. The order remains until TB is 18 years of age unless it is revoked.
29. The order of 20 October 2004 was not just an order in the form of a child protection order. There were 2 orders made on 20 October 2004 and they are set

out in paragraph three of this decision. Order one can be defined as a child protection order (see s.62A of the Community Welfare Act). That is the order which ceases to have effect upon a transfer, and which can be revived in certain circumstances. Order two adjourned the proceedings for a review. That is not a child protection order within the meaning of section 62A of the Community Welfare Act. That order was made to comply with s.49 of the Act and that order continues to have effect.

30. Section 49(1) of the Community Welfare Act sets out:

(1) The Court shall review the circumstances of a child in relation to whom an order under section 43(4) is made containing a direction referred to in section 43(5)(d). (my emphasis)

31. Section 49 review provisions place an obligation on the Court to review the circumstances of a child, in this case the child TB. The obligation is not to review the order made. It is to review “the circumstances of a child”. The circumstances of a child could include that there has been a transfer of the home order by the Minister. I find that when considering the Community Welfare Act in its entirety, the beneficial nature of the legislation and its purpose as set out in the preamble, and when looking specifically at s.49 and the obligatory nature of the section, that the Court is required to conduct a review into the circumstances of the child before the Court. If the Court does not review the circumstances of the child it will not be carrying out its statutory obligations under the Community Welfare Act.

32. Accordingly I find that the Court has jurisdiction to conduct a review pursuant to s.49 of the Community Welfare Act in the case of TB and I will hear the parties as to what reports are to be furnished to the Court to conduct the review. There will also need to be further notification to the parents pursuant to s.49(4) of the Community Welfare Act. As I will be sitting in Alice Springs on 14 and 15 June

2007, I will request that the matter be listed before me for review on either of those dates. Otherwise alternative arrangements will need to be made.

Dated this 22nd day of May 2007.

M Little
STIPENDIARY MAGISTRATE